THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

MISC. LAND APPLICATION NO. 07 OF 2023

(Arising from Land Case No. 10 of 2022)

NKUMBI MALASHI HOLELA.....APPLICANT

VERSUS

MUSA CHRISTOPHER GINAWELE
@ MUSA BALALI .....1ST RESPONDENT

NASIBU CHAMANGA @ KINDAMPA .....2ND RESPONDENT

RAMADHANI KIHUKU @ MWARABU ..... 3RD RESPONDENT

JOEL KIMARO ..... 4TH RESPONDENT

ASHA SHOMARI..... 5TH RESPONDENT

FERDINAND NACHENGA ..... 6TH RESPONDENT

JAMES SIMON NJIKU @ JAMES BALALI ..... 7TH RESPONDENT

RULING

Hearing date: 07/02/2023
Ruling date: 10/02/2023

NGWEMBE, J:

This ruling is a result of preliminary objection raised by the respondents against the application made by the applicant seeking an order of this court to call upon the respondents to show cause as to why they should not be detained for disobedience of this court's order dated 13th December, 2022 in Land Case No. 10 of 2022.

The prayer to show cause is linked to the pending Land Case No. 10 of 2022 wherein this court issued an injunctive order for maintenance of *status quo* pending final determination of the main land case. The

order intended to put all disputants at equal playing field pending determination of their dispute. However, in the course, the applicant is in this court claiming that the respondents have defied such court order without any justifiable cause, thus filed this application to show cause as to why they should not be punished for disobedient to the court order. The applicant moved this court by way of a chamber summons supported by an affidavit. He cited section 124 of **The Penal Code**, section 95, Order XXXVII, Rule 2 (1) (2) and Order XLIII Rule 2 of the **Civil Procedure Code, Cap 33 R.E. 2019.**

Having so filed that application and served the adverse parties, in turn the respondents, rightly lodged counter affidavit sworn by advocate Martha Martin, together with notice of preliminary objection comprising one ground to wit; *this honourable court is improperly moved.* It is well developed legal procedure demanding no reference to any precedent, that once an application is encountered by an objection, the preliminary objection must first be determined prior to hearing the main application or suit. That being the case, this court invited disputants and their advocates to address the court on that ground of objection.

Rightly so, the learned counsel Ms. Martha Martin and Mr. Sikujua Funuki, for the respondents/objectors stood firm to argue in support of the preliminary objection, while Messrs. Abraham Hamza Senguji and Henry Kitambwa, learned advocates defended the application.

Arguing the preliminary objection, Ms. Martha Martin submitted broadly without confining to the point raised in the notice of preliminary objection. She pointed out that, save for the first respondent, the rest are strangers to the main case and the order issued in respect to that land dispute. Thus, the restraining order or maintenance of status quo

had nothing to do with the respondents save only to the first respondent who is a party to the main suit.

Proceeded to support her argument by referring this court to the case of **EWURA Vs. Jambo Petroleum Products Ltd and Managing Director, Civil Revision No. 04 of 2022** that a court order was not issued against a stranger to the main suit. Concluded in this point by arguing that the application is incompetent for it intends to affect strangers to the main suit.

Further proceeded to argue on the applicable sections of law capable of moving this court to determine this application. That citing section 124 of the **Penal Code,** which relates to criminal offence, while the main case is civil in nature is improper. Thus, mixing up Criminal law and Civil law in one application cannot move the court to determine such application. Submitted that contempt of court is provided for under **Criminal Procedure Act** section 9 and 10, as was so decided in the case of **Richard Joseph Kweyumba Rugarabamu Vs. Charles Kahatano, Misc. Civil Application No. 77 of 2022.** As such, the application is misconceived for improperly citing Criminal Laws and Civil Wrongs altogether.

Discreetly the learned advocate went yet to another point which was not part of the grounds of objection, that the applicant is part of 76 plaintiffs in the main case, filing this application individually without being granted a representative capacity is improper and the applicant lacks *locus standi*. Rested by a prayer that this application be blessed by a dismissal with costs.

To support the submission by advocate Martha Martin, advocate Sikujua Funuki added that offences under section 124 of the **Penal Code**, in accordance with sections 9 and 10 of the **Criminal**

Procedure Act, and section 5 of **the National Prosecutions Service Act**, requires only State Attorneys as opposed to individual as in this application. The applicant being not a State Attorney has no locus to prosecute this application. Supported his argument by referring this court to the case of **Kalembu Langaiseri and 9 others vs. Paulo Laparaja Narda, Misc. Land case No. 19 of 2019.**

Mr. Funuki went further to argue on Order XXXVII Rule 2(2) of CPC that the order deals with breach of contract, which is not the case at hand. Equally section 95 of the CPC is applicable only in certain circumstances where there is no specific section. Proceeded to reiterate on the issue of representative suit. Rested by a prayer to dismiss the application with costs.

In turn, the learned advocate Henry Kitambwa replied strongly that Order XXXVII Rule 2 of The CPC is the correct provision of the law in the circumstances of this matter. That the rule is not only limited to contract matters, even on this application is rightly applicable. Challenged the cited case of **EWURA** as totally distinguishable. Added that the injunction in the case of EWURA was not granted not for the reason that EWURA was a stranger to the case, rather because it was a government entity and the law does not permit issuance of injunction against the government and its entities.

In respect to section 124 of the Penal Code and 95 of the CPC argued that, those laws are intertwined and compliments each other. To him any person who disobeys court orders, regardless of whether or not he is a party to the case, must be dealt with. The applicant being part of the 76 plaintiffs in the main case, no law prohibits him from instituting an application individually. Rested by a prayer that the objection lacks

merits, same be dismissed with costs and the court may proceed to hear the application on its merits.

Mr. Senguji added that, the objection is misconceived. He pointed on sections 9 and 10 of the Criminal Procedure Act that do not apply to the current contempt of court. Going to another aspect he observed that, the application is on contempt of court and not a representative suit. Therefore, section 124 of the Penal Code is applicable. Rested by a prayer that the objection is incompetent because it calls for evidence and the referred cases by the respondents are not binding upon this court.

In brief rejoinder, Ms. Martha submitted that existence of the court order is not disputed, but the route taken by the applicant is improper. Mr. Funuki rejoined by convincing this court to find the objection as valid based on law as per the case of **Mukisa Biscuit**.

Having deeply considered the rival arguments of the trained legal brains, yet I find the main issue for determination in this objection is whether the objection has merits. The notice of objection comprised one ground, but in the course of hearing, the learned advocates added two other legal grounds which were also responded by the advocates for the applicant. As such I am determined to consider and decide all grounds raised and argued by learned counsels. I think, first I need to revisit the law and principles relevant to the legal contention between the parties. Mainly I find three valid legal questions calling for determination that: -

1) Whether it was proper for the applicant to file this application in his individual capacity without being granted a representative capacity;
2) Whether it is proper to join other persons who were not parties to the main case; and

3) Whether the applicant by citing section 124 of **The Penal Code**, section 95, Order XXXVII Rule 2(1), 2(2) and Order XLIII Rule 2 of the **Civil Procedure Code, Cap 33 RE 2019** properly moved this court for the reliefs sought.

To begin with, the first two questions, I think there is no dispute that the main case, Land Case No. 10 of 2022 pending before this court is between Nkumbi Malashi Holela and 75 others Vs. Musa Christopher Ginawele @ Musa Balali and Anna Muganda Balali. Those are the main disputants in the subject land. However, in this application, Nkumbi Malashi Holela appears as the sole applicant leaving behind all 75 others. In other words, the applicant without any representative character sues only Mussa Christopher Ginawale @ Musa Balali alone as per the main land case leaving behind Anna Muganda Balali. Above all the applicant has preferred to join in this application six other strangers to the main land case. I find this is the center of contention between the parties as above enumerated in detail.

The applicant's counsels are of the determined position that it is proper for the applicant to institute this application individually without involving his fellow plaintiffs in the main case and without seeking and being granted leave for representative capacity. The applicant's advocate suggested the reason for so doing is that he is the one who has suffered the misdeeds of the respondents. There being an order of this court, any person must obey it, notwithstanding he is a party or otherwise in the main case. Even those strangers were equally bound to obey the court's order for maintenance of *status quo*. Thus, eligible to be joined in the application for contempt of court. In the contrary, the respondents' learned advocates, Ms. Martha and Mr. Funuki, stood firm

that all the above were legal impropriety which should not be entertained by this house of justice.

I understand that, despite these questions being not so common, same are not foreign in our jurisdiction. It has happened in a number of cases where one of several plaintiffs can be aggrieved against the decision or relief granted against the adverse party while his fellows on the same footing do not seem to be aggrieved. This case at hand can be treated in the same way; a case involving several persons, and an order for maintenance of *status quo* is issued, a breach of the order may affect any of the parties, not necessary that all the plaintiffs must be affected. Same way, response and reactions cannot be equal.

I have made reference to precedents from other jurisdictions and writings by authoritative jurists. India and Pakistan are among the states that actually hold a specific legislation for contempt of Court. The Indian High Court of Judicature in the case of **K. B. Rajendran vs. The Registrar-General and 3 others, Cont. P. SR. No. 18117 of 2017** as to who may initiate civil contempt proceedings, it held *inter alia*: -

> *"The initiator of contempt proceeding in civil contempt is really an aggrieved person. The civil contempt may be waived by an individual."*

A further survey to the English and America jurisdictions gives it that that proceedings for civil contempt may be initiated *suo motu* by the court or at the instance of an aggrieved party. I prefer an extensive quote from a Journal Article ***Procedure in Contempt Cases*** **Virginia Law Review, Jan., 1915, Vol. 2, No. 4 (Jan., 1915), pp. 265-269** by E. Leland Taylor having also referred to the case of **Bassette v. W. B. Conkey Co., 194** observed that: -

"The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. If the authority and power are to be upheld, the affidavit bringing the infraction to the notice of the court is sufficient. The court may be relied on to take care of its dignity."

The main case before this court is such that plaintiffs sued jointly and severally, their rights are therefore divisible. The nature of breach complained of is capable of affecting an individual person discriminately. I have asked myself if the 75 others were not aggrieved by the alleged disobedience made by the respondents, or if they waived the civil contempt, whether any law would force them to sue or join the suit by one of them? Assuming that the others, not aggrieved neither sued nor joined in the suit filed by the aggrieved among them, can the aggrieved person be barred from suing? The above reasoning suggests a bold conclusion that, depending on the circumstances of the case, one of the parties may institute an application for himself without joining the others and such application cannot be incompetent. Therefore, failure to take other 75 plaintiffs aboard did not affect anybody and no law was contravened, I do not think the issue of *locus standi* can arise as respondent's counsels suggest. The first issue is resolved in affirmative.

In regard to the second issue, it is clear, strangers have been joined in this application as respondents who are not parties to the main case. The danger of determining this issue is to discuss the main application prematurely. However, I will try to escape that danger by slightly touching on who are they and how are they connected with the main suit. It seems the applicant's affidavit discloses some connections of those strangers with the 1st respondent. It seems all strangers have

entered into the suit land as invitees of the first respondent who is actually a party to the main case and is well aware of the court's order on maintenance of *status quo* issued by this court.

It is a cardinal principle of law which should not be forgotten that court orders must be obeyed, even if it is arrived mistakenly or is made contrary to law or by whatever means there is an error to that order, yet must be obeyed until it is nullified by the superior court either on appeal or by revision. It was so decided in **Tanzania Bandu Safaris Ltd vs. Director of Wildlife & Another [1996] T.L.R 246** and similarly insisted in the case of **Wildlife Lodges Ltd vs. County Council of Narok and another [2005] 2 EA 344 (HCK),** that: -

> *"I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked... A party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular"*

As a general rule since this court's order on maintenance of status quo still exist, whoever entered in such land and proceed with activities contravened this court's order.

Equally important is the maxim of *ignorantia juris non excusat* thus, ignorance of law is not a defence, however ignorance of fact sometimes is a defence. As such, the remaining issue is whether those strangers were aware on the existence of that court order?

To resolve this issue, I have opted the conceptual input of the nature of action and orders. Briefly, orders in rem binds the property or status of the matter, while orders in personam crystalizes over the person (a party to the case). Some of the legal writings I managed to lay my hands on is **George B. Fraser Jr., *Actions in Rem*, 34 Cornell L. Rev. 29 (1948),** where the author introduces his good work at page 29 that: -

> *"To define actions in rem is not difficult; they are legal proceedings directed against property itself* ***in order to reach and dispose of the property or of some interest therein.***"

The author proceeded to explain that, sometimes to determine effect of the orders or proceedings, it will depend on the purpose of such order or proceeding and that distinction is important.

Black's Law Dictionary (9th Edition), provide distinction between action *in rem* and action *in personam*. It construes action *in personam* as: -

> *"An action brought against a person rather than property. An in personam judgment is binding on the judgment-debtor and can be enforced against all the property of the judgment-debtor."*

And as to what is judgment *in rem* is, the Dictionary provides thus: -

> *"action in rem (in rem). (18c) 1. An action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action."*

In the case of **Andrew John Chenge Vs. Public Leaders' Ethics Secretariat (Misc. Civil Cause 18 of 2015) [2015] TZHC 5,**

this court ruled that an order in rem is an order touching on a particular subject matter. Also, the Court of Appeal's decision in the case of **The National Bank of Commerce Vs. Dar es Salaam Education and Office Stationery (1995) T.L.R 272 (CAT)**, it was held: -

> *"A judgment in rem, I conceive to be an adjudication pronounced (as indeed the name denotes) upon the status of some particular subject matter, by a tribunal having competent authority for that purpose."*

To tell whether the injunction and *status quo* order made by this court on 13/12/2022 was *in rem* or *in personam,* in addition to the above I revisited the said order to grasp its contents. The court order was to the effect that: -

1. The prayer for maintenance of status quo as was in the date of institution of this suit is granted;
2. Status quo as on the date of instituting this suit on 28th April, 2022 is ordered;
3. Each party should avoid doing anything over the suit land until final determination of this suit; and
4. Without prejudice to the above orders, these orders shall not apply to any criminal related actions by law enforcers.

Due to the nature of those orders, I am convinced in my mind that, the purpose of those orders was to bar any person from interfering with the property in dispute pending final determination of the main case. Therefore, it was an order *in rem.*

Alternatively, and without prejudice to the above and to the main application, all the respondents who are termed as strangers, according to the pleadings secured justification of their actions from the first respondent who was/is a party to the main suit and well aware of the

existing court order, in such circumstance, even if it was an order only against the first respondent, it would bind all the respondents for them being agents, servants, assignees or at least acting through the first respondent.

Further it is considered that, if *status quo* orders could not extend to agents, invitees, assignees, servants and whoever, dispensation of justice would be in havoc. A party to the case who wished to disobey the court order would do so by proxies now and then, without going forward by himself. Again, if any legal action will be taken against this specific proxy, the disobedient party would hire another person for that and in so doing the main case and its orders will be rendered nugatory and ineffective, thus turning the court into a laughing stock.

In anyway, the decision in a case of **EWURA Vs. Jambo Petroleum Products Ltd and Managing Director,** was made by this court, though are highly respected with a view to preserve court's respect before the public, yet it is a cardinal rule which should not be forgotten that same do not bind this court as rightly argued by advocates for the applicant. However, I am fully aware and respectfully follow the guiding principles propounded by the late Chief Justice Nyalali in **Ally Linus and others Vs. Tanzania Harbours Authority [1998] T.L.R 6** when lucidly held: -

> *"It is not a matter of Judicial Courtesy but a matter of duty to act judicially that requires a judge not lightly to dissent from the considered opinion of his brethren but individual judges are not bound by each other's decisions. This is necessary to avoid giving the parties and the general public a false impression that results of cases in courts of law*

perhaps depend more on the personalities of judges than on law of this land"

Much as I follow religiously on the above principle, yet the EWURA's case is distinguishable from the matter at hand. *First* - in that case there was an injunction issued specifically against the Government agencies and EWURA inclusive, when EWURA was not a party to the main case and not even in the Misc. Application. *Second:* The trial court purported to issue such injunction while knowing that Order XXXVII Rule 1 of the CPC prohibits such injunctive orders against the government. In the contrary, this application is against private persons. Therefore, the second issue is answered in affirmative.

Regarding the last question as to whether or not this court was properly moved, I wish to observe briefly that, section 95 of the CPC provide general powers of this court to undertake any matter for the ends of justice and prevent an abuse of law. Likewise, Order XXXVII Rule 2 (1) & (2) read together with Order XLIII Rule 2 of the **Civil Procedure Code, Cap 33 RE 2019** are proper citation to move this court to determine the application of this nature. The interpretation of section 95 provided for by advocate Funuki has misconception. I think the wording of the provision is self-explanatory, I devote to labour quoting all the provisions for easy of follow up: -

"Section 95. *Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

The interpretation of this section does not require any expert of legal writing to grasp its contents. It was not correct to state that section 95 applies only when there is no other enabling provision. That was an

attempt to impute an alien interpretation with the effect of confining the powers of this court more than what the legislature intended. It is this court's position that section 95 may also apply along with other compatible provisions, mostly depending on the reliefs sought.

Order XLIII Rule 2 of the CPC provides for the mode of application, generally it shall be by chamber summons supported by affidavit, and Order XXXVII Rule 2 (1)(2) of the CPC is what gives specifically a remedy of injunction or a detention order to be applied by the court in case of disobedience of court orders. The rule is quoted hereunder: -

> *"2.-(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant form committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right:*
>
> *Provided that, no application shall be made for a temporary injunction where the defendant is the Attorney - General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties.*
>
> *(2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release."*

Again, as the provision above reads, the same does not apply to contract cases alone as the respondents' counsels endeavoured to persistently argue, instead it applies to a breach of contract or other injury of any kind.

In total the above provisions were proper and sufficient to move this court for the prayers sought in the chamber summons. Without prejudice to the above, I accept the respondents' counsels arguments that, citation of section 124 of the **Penal Code** was misconceived in the application of this nature. Thus, the citation of the section was improper. For a brief reason, section 124 is not couched to apply in Civil cases summary procedure, but due to its nature, there must be a complaint and a charge presented before the court. Contempt of Court, correctly as Ms. Martha and Mr. Funuki pointed is a summary procedure. The preceding provisions are as well-crafted to that spirit.

The remaining question is what is the effect and the remedy for wrong citation of the provision? This will not drag me any farther, I know this issue falls within the armpits of overriding objective under section 3A and 3B of the **Civil Procedure Code**. A mistake that can be cured by inclining towards substantive justice only, that it remains redundant but has no any other effect on propriety of the application. This was well considered in many cases of this court and of the Court of Appeal. For instance, in the case of **Lilian Stephen Ihema (executrix of the Estate of the Late Stephene Ernest Ihema) Vs. Receivership and Manager of Sky Developers Limited & Another (Misc. Land Application 328 of 2021) [2021] TZHCLD 6855,** where the applicant was seeking for injunction order, cited proper provisions of the law that sufficed to move the court, but also cited some other irrelevant provisions, which were redundant. The High Court, Land Division (Hon.

Makani, J) despite the observation, proceeded to determine the application. She observed as follows: -

> *"There is no dispute that this application is for restraint orders by the applicant as against the respondents. Though as observed by Dr. Kyauke, the orders in the chamber summons extend to the main case, but he also admitted that the proper provisions applicable for temporary injunctions are Order XXXVII Rules 1 (a) and section 68 (c) of the CPC, which have been duly cited. On the basis thereof, the other provisions cited are currently redundant as they relate to the main case. As Order XXXVII Rules 1 (a) and section 68 (c) of the CPC have been cited then, this court is properly moved to consider and determine the application"*

Likewise, this court despite of being a court of law, under the Oxygen Principle above pointed desists to dwell on the technicalities at the cost of delaying cases or closing its doors at the faces of those with genuine complaints when they thirst for being heard, only for trivial errors spotted in their pleadings while in substance they have properly lodged their cause. Instead, it will diagnose the alleged defect to see if it impedes the matter from proceeding without serious flout of law. In this case, just like it was in **Lilian Stephen Ihema's** case the pointed errors were mere redundance which can be pardoned.

Having so reasoned and save only for the errors discussed and cured in this ruling, the Preliminary Objection has no merit. I accordingly proceed to overrule it, and order the main application be heard on its merits.

I accordingly Order.

DATED at Morogoro in Ifakara this 10th day of February, 2023.

P. J. NGWEMBE,

JUDGE

10/02/2023

Court: Ruling delivered at Morogoro at Ifakara in Chambers on this 10th day of February, 2023 in the presence of Mr. Abraham Hamza Senguji and Henry Kitambwa, learned advocates for the Applicant and advocate Frank Malebeto holding brief of Martha Martin and Sikujua Funuki, learned advocates for the Respondents.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE,

JUDGE

10/02/2023