

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL REVISION NO. 08 OF 2023**

*(Original Application Case No. 10 of 2023 of the Resident Magistrate's Court of Musoma)*

**OLOOMU KURSAS ..... 1<sup>ST</sup> APPLICANT**

**SINJORE MAITIKA ..... 2<sup>ND</sup> APPLICANT**

**NDAGUSA KOROS ..... 3<sup>RD</sup> APPLICANT**

*VERSUS*

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**MAULIDI IBRAHIM MAULIDI t/a ROCK CITY**

**TAKERS AND COURT BROKERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

8<sup>th</sup> & 10<sup>th</sup> November, 2023

**M. L. KOMBA, J.:**

This is the ruling in respect of the application filed through chamber summons under section 372 and 373 (1) of the Criminal Procedure Act, Cap 20 R. E. 2022 (Cap 20) and section 43(1) and 44(1) (a) of the Magistrate Courts Act, Cap 11 R.E 2019 (Cap 11) and other enabling provisions. Chamber Summons was accompanied by joint affidavit of all

applicants. The applicants above mentioned are moving this court to call and inspect the legality propriety and correctness of proceedings, decision and orders of Resident Magistrate's Court of Musoma (RM's Court) in Application Case No. 10 of 2023 by Hon. E.R Marley, PRM for purpose of satisfying itself as to the correctness, legality or propriety of the decision therein and as to the regularity of the proceedings therein, and quash the proceedings, decision and orders thereof.

There was an ex-parte Chamber Application No. 10 of 2023 supported by affidavit which was filed by the 1<sup>st</sup> respondent herein at the (RM's Court) which was heard on 31/10/2023. On the scheduled date, Resident Magistrate proceeded hearing of the matter ex parte. State Attorney submitted that there are 806 cow, 420 sheep and 100 goats were found at Longasa area Serengeti District were kept at *Lobo Rangers Post* in Serengeti National Park. The said animals being found more than a week and were unclaimed, State Attorney prayed the same be forfeited and be disposed by way of public auction. The prayer was granted and Maulid Court Broker (second respondent) was appointed to conduct public auction in accordance with the law.

In the following day, that is 1<sup>st</sup> November applicants herein rushed to this court with certificate of urgency in their hands filed chamber summons as narrated above requesting for revision of the RM's court order. In making sure every legal requirement is met they hired legal service of Mr. Cosmas K. Tuthuru and Mr. Edson Philipo both leaned advocates.

Both respondents filed counter affidavit and the 1<sup>st</sup> respondent had Preliminary Objection (PO). During hearing of this application, Mr. Philipo appeared and when addressing this court for the business of the day, Mr. Anesius Kainunura, Senior State Attorney prayed to this court to withdraw PO on behalf of the 1<sup>st</sup> respondent, prayer which was not objected and it was granted. The matter has to be heard on merit of the application.

Mr. Philipo being counsel for applicant was the first to address this court, he submitted that applicants are praying to set aside order issued by the RM's Court because they are owners of the said animals which were found in the National Park and their prayer is based on the fact that procedures were not met before declaring that the properties were unclaimed as the owners were known. It was his submission that the RM's Court was supposed to adhere to the procedures as stipulated in S. 47 of the Police Force and Auxiliary Act, Cap 322 together with S. 25 of National Park Act,

Cap 282 together with GN No. 50 of 2002 which was made under Cap 282. He said all these legislations demand unclaimed property to be announced publicly so that owners can show up. He said in the affidavit which supported ex-parte application, the first respondent has never informed/deponed that notice was published that there are unclaimed cattle, that action he said cause loss to or harm applicants. He referred this court to the case of **Itwa Lugwisha Njenjiwa vs The D.P.P. (Criminal Revision 7 of 2022) [2023] TZHC 16650 (4 April 2023)** said the cited case is similar to the case at hand where the order was revised and the parties were ordered to be heard interparty.

Insisting that the procedures were not followed he submitted that applicants were allowed to enter in the National Park and identified their cattle. Under the law, parties were supposed to be called and matter heard interparty instead of rushing and pose that cattle were unclaimed, he lamented. It was his further submission that in **Itwa Lugwisha Nyenjiwa vs DPP** (supra), cattle were sold but during revision the order was nullified. In the case at hand there is no evidence to prove that sale by auction took place as in counter affidavit there is no proof of sale no receipt, he finds this court is in a position to order nullification.

He said proceedings in RM's court seems to be in darkness as the 1<sup>st</sup> day only one party appear and the submission by State Attorney did not show any hardship to warrant ex-parte order and it was Resident Magistrate who was supposed to order publication as per law. The sale or auction was supposed to be announced publicly as the number of herds of cattle are huge and applicants depends on them for living therefore it is unfair for the Resident Magistrate's Court to order forfeiture without taking into consideration other issues. He prayed this court to reverse the order and nullify everything and parties be heard interparty as applicants are owners.

Mr. Kainunura who represented the 1<sup>st</sup> respondent submitted that there is no proof from applicants that they are owners of the cattle and their submission is mere allegation as they have no letters from village chairman to introduce them that they are looking for their cattle neither have loss report from police. For failure to prove he find them as merely middleman who wants to restrain Government process. He further submitted that applicants deponed that cattle were found in Longosa Ngorongoro District while in the real sense they were seized while in the Serengeti District Mara Region. He further analysed affidavit by applicants and submitted that permit referred at paragraph 3 was issued to one Mark Morenja while

applicants are three in number. He said the referred permit was issued to different person.

Submitting on application before Resident Magistrate Court he said, application was under S. 47 (1) and (6) of the Police Force and Auxiliary Service Act, Cap 322 and Regulation 7(i) and 20 of GN 50 of 2002 reading together with S. 29 of National Parks Act, Cap 282 and was accompanied with an affidavit from the one who seized the said cattle. At paragraph 12 and 13 applicants narrated that cattle were at *Lobo Rangers Post* and it was expensive to handle them and the cattle could disturb eco-system of the National Park that's why the applicant in RM's court prayed for the sale by auction, the prayer was granted.

Elaborating further he said, the order by Resident Magistrate was based on affidavit that respondent could not handle cattle for six months due to vulnerability as cattle were domestic animal need somebody to take care. To him the order for the Resident Magistrate's Court was correct and its discretion was exercised judiciary.

It was his submission that, so far as cattle were found in the National Park and S. 29 (2) and the regulation 7 (i) prohibit to cause animals to be found

in the National Park therefore those cattle were supposed to be forfeited and become the property of the Government. That's why RM's court issued an order. He supports his argument by the case of **Kayo Donyo Shangalima vs Director of Public Prosecutions (Criminal Revision No. 4 of 2023) [2023] TZHC 21861 (17 October 2023)** where High Court Dar es salaam had discretion. The matter in referred case is similar to the case at hand and he pray the applicants not to be refunded as was in the case **Kayo Donyo (supra)**. Further, he submitted that Resident Magistrate's Court considered preservation of the National Park as was in Article 27 of the Constitution of United Republic of Tanzania on preservation of natural resources as National Park has to be preserved. He prayed this court to find that applicants are not owners and maintain the order by Resident Magistrate's Court.

Counsel for the second respondent, Mr. Ernest Mhagama complained that application is frivolous as the second respondent has no quarrel with applicants even the affidavit of applicants doesn't mention the 2<sup>nd</sup> respondent and applicants did not say why they joined second respondent. He said they were aware of the need of six months' notice as is under S. 47 (2) of Cap 322 but the circumstance of this case was unique as

stipulated under S. 47 (6) of Cap 322 and prayed the suit be dismissed against second respondent with costs.

During rejoinder Mr. Philipo was of the view that the second respondent in his counter affidavit agree that he know the facts and he mentioned them, the order which is claimed by applicants herein mentioned 2<sup>nd</sup> respondent so he was supposed to be joined. He further clarified that the issue that applicants are not owners is not supposed to be argued in this court at this stage except in Resident Magistrate's and it will be decided at that Court.

He complained of the ruling of the Resident Magistrate that if cattle were seized for five days or a week, he asked why didn't them announce? He said in the supplied case of **Itwa Lugwisha Nyenjwa vs DPP** (supra) it was analyzed that even summons was supposed to be affixed before hearing. The order is silent about the account if the cattle were to be sold then the proceed were supposed to be in what account. He insisted the applicant also has right to be heard as it is provided in Constitution the way it provides National Park has to be protected.

He further submitted that there is no proof that the sale was done and the issue of forfeiture attract discussion, or the issue of permit, issue of sale

report will be determined by Resident Magistrate's Court interparty. On the issue that cattle who are subject matter of this application were domestic and there was nobody to take care of, he lamented that those are words of State Attorney as the record is clear even affidavit supported application No. 10/2023 at Resident Magistrate's Court is silent. Basing on the case of **Itwa Lugwisha** (supra) he prayed this application to be found with merit.

As indicated earlier, this court is tasked to inspect the legality, propriety and correctness of proceedings, decision and orders of Resident Magistrate's Court of Musoma (RM's Court) in Application Case No. 10 of 2023. In its order, RM's court confirm herds of cattle were found with Serengeti National Park at the point as shown in coordinates to be within Serengeti District which is in Mara Region. Further, he finds that the said herds of cattle were unclaimed for a week and it was not easy to take care of them. Satisfied on these issues he ordered forfeiture and sale through public auction, that was 31 October, 2023.

From the submission, Mr. Philipo complained that procedures were not adhered as owners of the said cattle were known to respondent and further, before declaring cattle to be unclaimed there were supposed to be

announcement as per section 47 of Cap 322 so that public may know there is property which is in danger of being sold. The section reads as follows;

*47.- (1) It shall be the duty of every police officer to take charge of all unclaimed movable property and to furnish an inventory or description thereof to a magistrate.*

*(2) If such property is neither money nor property subject to speedy and natural decay nor property the immediate sale of which would, in his opinion, be for the benefit of the owner, the **magistrate shall detain or give orders for the detention of any such property and shall cause a notice to be posted in a conspicuous place at his court and at the police stations within his jurisdiction specifying such property and calling upon any person who may have a claim thereto to appear and establish his claim within six months from the date of such notice.***

I have read the proceedings in Application No. 10 of 2023 and find there is no direction to give notice to general public that there are unclaimed herds of cattle. Senior State Attorney Mr. Kainanura submitted that their application was based on S. 47 (1) and (6). Nevertheless, cattle were seized on 26/10/2023 and respondent appeared in court for order on 30/10/2023 claiming they kept animal for a week. In their affidavit which supported the said application, at paragraph 8 respondent deponed that all

necessary steps to procure the owners proved futile but they did not specify which efforts were made before declaring that cattle were unclaimed. They did not inform Magistrate how they provide notice to general public when they record their effort. In responding the 6<sup>th</sup> paragraph which applicants herein are claiming for procedures, in counter affidavit deponed by Mr. Yesse Temba (SA) paragraph 7 is to the effect that all what was done was due to prevailing circumstance and public interest to prevent eco-system of the National Park. I agree with those assertion, however, the law was to be followed. As I have said, they were supposed to explain effort laboured in looking for owners instead of jumping on the blanket in the name of hardship disposing of the cattle. One may ask, what has been done in the whole week which they claim to keep the said cattle in making sure public is aware that there are cattle seized and the 1<sup>st</sup> respondent and others are looking for owners.

In paragraph 3 the applicants herein deponed that they were allowed by TANAPA to enter into the National Park looking for their cattle and were informed that the matter was reported to police via MUG/IR/2977/2023. That was on 27/10/2023. I find the TANAPA and Serengeti Game Rangers (and impliedly the 1<sup>st</sup> respondent) were aware of the movement done by

the applicants. Facts are silent on what steps were done after opening of file MUG/IR/2977/2023. How policemen at the Mugumu Police Post were satisfied that the cattle were unclaimed. Was there any notice to Public issued by police before term them unclaimed? The answer is no. The issue that permits had different name not of applicants, that they were not introduced by the village leader were to be argued before the Magistrate prior the forfeiture order.

Furthermore, application before RM's court was made under section 392A of Cap 20 which provide mandatory requirement to serve the application to the respondent. The RM's court having receive the application ought to have inquired on the issuance of summons as per law or to demand the proof the notice to public has been issued and no one identified himself as owner of the cattle before he proceeds with hearing. This go squarely to Senior State Attorney, Anesius Kainunula who represented 1<sup>st</sup> respondent that he ought to know that the section referred provide mandatory requirement to serve the respondent.

I find the base of the application was the notion that cattle were unclaimed. I failed to get information where and when notice was given which prompted respondents under section 47 of Cap 322 to term the said

cattle were unclaimed and deponed they laboured to find owners without explaining where and how.

In the case of **Itwa Lugwisha** (supra) as supplied by Mr. Philipo, the key issue was right to be heard to parties although the facts differ in the case at hand as in that case, applicant had an introduction letter, herein, it was not revealed whether applicants were introduced as they did not appear when the ex-parte order was issued. The case of **Kayo Donyo** (supra) is distinguishable with the one at hand because in the **Kayo Donyo's** case revision was done when the sale was concluded and the proceed was known, in other way the matter was taken by event. But in the application at hand, up to hearing date (08/11/2023) the records were silent on whether execution of the order (forfeiture and sale by auction) was done. Each case is decided basing on its own fact, I will dwell in that principle. Respondents failed to prove efforts done as deponed in paragraph 8 of their affidavit before they decided to announce cattle had no owners, and the fact that cattle is not properties which are easily decay as there are incidences cattle were kept for more than 10 days waiting for legal procedures, am moved to find procedures were not followed.

Bearing in mind that right to be heard is a constitutional right and that under article 107A of the Constitution of United Republic of Tanzania, the judiciary is mandated to be the authority with final decision in dispensation of Justice; Courts are expected to abide with the principles of natural justice, one being right to be heard which is well stated under article 13 (6) and there are numerous decisions of the courts of record that has held that denial of the right to be heard would obviously vitiate proceedings see **Mbeya Rukwa Auto Parts Transport Limited vs Jestina George Mwakyoma** (2003) TLR, **Margwe Error & Others vs Moshi Bahalulu (Civil Appeal 111 of 2014) [2015] TZCA 282 (25 February 2015), Patrobert D. Ishengoma vs Kahama Corporation Limited and two others**, civil application No. 172/10 of 2016, and **Nuta Press Limited vs Mac Holdings & Another (Civil Appeal 80 of 2016) [2021] TZCA 665 (3 November 2021).**

**All being said and done,** I hereby reverse the order as uttered in Application No. 10 of 2023 and I order the matter be heard interparty in the earliest possible schedule.

It is so ordered.

**GIVEN** under my **Hand** and **Seal** of the Court this 10<sup>th</sup> day of November, 2023.



  
M. L. Komba

**JUDGE**

Ruling delivered in chamber in the presence of Mr. Jonas Kivuyo, State Attorney for the 1<sup>st</sup> Respondent, Mr. Ernest Mhagama who was counsel for the 2<sup>nd</sup> respondent and before dual counsel who represented applicants Mr. Cosmas Tuthuru and Mr. Mr. Edson Philipo.

  
M. L. Komba

**JUDGE**

**10 November, 2023**