

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT – LAND DIVISION
(MUSOMA SUB REGISTRY AT MUSOMA)
AT MUSOMA
LAND CASE NO. 20 OF 2023

SAMSON MRIMI GESASE& 151 OTHERS PLAINTIFFS

Versus

NORTH MARA GOLD MINE LIMITED DEFENDANT

RULING

14.06.2024 & 18.06.2024

Mtulya, J.:

In the course of hearing the present case, **Mr. John Matete** (PW2), former Nyakunguru Village Executive Officer, prayed to tender three (3) documents in photocopies namely: first, *Mwaliko wa Kushiriki Zoezi Malipo ya Tathmini ya Awamu ya 24 na 34 Kitongoji cha Nyamichele, Kijiji cha Nyakunguru (Mwaliko)*; second, *Ratiba ya Malipo ya Fidia na Orodha ya Walipwa Fidia Awamu ya 24 na 34 kwa Wananchi wa Kitongoji cha Nyamichele, Kijiji cha Nyakunguru (Ratiba)*; and finally, *Taarifa kwa Umma Tarehe 27 Mei 2014 (Taarifa)*. According to PW2, the original documents are in the village offices.

The prayer was backed by the plaintiffs' learned counsel, **Mr. Stephen Ndila Mboje**, who submitted that the documents may be tendered and admitted under section 67 (1) (b) of the **Tanzania Evidence Act [Cap. 6 R.E. 2019]** (the Evidence Act). in giving

reason of the support, Mr. Mboje stated that the defendant has *impliedly* admitted the existence and contents of the original documents in the seventh and eighth paragraphs of the Written Statement of Defence (the defence). According to Mr. Mboje, the defendant has *expressly* admitted, in the ninth paragraph of the defence, the document called ***Taarifa***, which displays the same transactions of valuation and compensation of the disputed land, hence the defendant cannot dispute admission of the two (2) indicated documents, namely ***Mwaliko*** and ***Ratiba***.

The prayer of admission of the document ***Taarifa*** was not protested by **Mr. Faustin Malongo** and **Ms. Caroline Kivuyo**, learned counsels for the defendant, for a reason that the defendant is aware of the document and admitted the same under the ninth paragraph of the defence. However, the dual learned counsels have protested admission of the two (2) documents, namely ***Mwaliko*** and ***Ratiba***. In their protest, the dual had registered three (3) reasons, namely: first, the two (2) documents ***Mwaliko*** and ***Ratiba*** were not pleaded either in plaint or annexures; second, the defendant did not admit the document ***Mwaliko*** and ***Ratiba*** in his defence, whether express or by necessary implication; and finally, PW2 had testified that the documents are in the village office.

In order to persuade this court to resolve the protest in favor of the defendant, the dual counsels have produced two (2) precedents regulating pleadings and application of section 67 (1) (b) of the Evidence Act in **Yara Tanzania Limited v. Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019 and **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another**, Commercial Case No. 203 of 2017 respectively.

In replying the materials brought by the dual counsels, Mr. Mboje insisted that the defendant had impliedly admitted existence and contents of the document in the eighth paragraph of its defence. In making this court appreciates his submission, Mr. Mboje contended that the eighth paragraph of the defence shows that the defendant had exercised some right of entering into the land and did valuation sometimes in 2013, which corroborate issues of **Mwaliko**, **Ratiba** and compensation. In the opinion of Mr. Mboje, it is not necessary for pleadings to specifically cite **Mwaliko** and **Ratiba** in specific paragraphs or annexures.

Regarding the precedents in **Yara Tanzania Limited v. Ikuwo General Enterprises Limited** (supra) and **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another** (supra), Mr. Mboje contended that the precedents are not applicable in the present circumstances. In his opinion, the precedent in **Yara**

Tanzania Limited v. Ikuwo General Enterprises Limited (supra) the plaintiff had produced additional claim distinct to the pleadings, whereas in the instant case, there are no new claims and the two documents were brought to support the claim of plaintiffs. On the other hand, the decision in **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another** (supra) was distinguished at two (2) levels, namely: first, the case had borrowed Order VIII Rule 5 of the **Civil Procedure Code [Cap. 33 R.E. 2019]** (the Civil Code), which is totally in favor of the plaintiffs on want of implication of necessary materials; and second, there is no where in the case where it is said that admission must be cited specifically in pleadings, and that even if that is the case, the defendant had *impliedly* admitted in the eighth paragraph of the defence. Mr. Mboje had concluded his submissions contending that it is not necessary to put everything in pleadings. It is witnesses who are expected to produce further materials in terms of testimonies in courts.

In my considered opinion, I think, this court is asked to reply three (3) short questions, namely: first, whether the two (2) documents ***Mwaliko*** and ***Ratiba*** are relevant materials in the case; second, whether important materials must be expressly pleaded; and finally, whether the defendant is aware of the materials in the instant case.

According to Mr. Mboje's submission, the materials are relevant to the case to show a series of events in valuation and compensation of the disputed land. Mr. Malongo and Kivuyo on the other hand had remained silent on the subject whether the documents are necessary and form part of the same transactions of valuation of the land. In brief, all parties agree that the documents are important. If that is the case, in my opinion, it is obvious that the materials derive issues in the case hence must form part of the pleadings in *express* terms. Otherwise, it will be a drama of rats and cats, which this court would not like to cherish. If this court is persuaded by the submission of Mr. Mboje, it will not be certain as to when he will stop producing un-pleaded documents in this case by using a pigeon hole of implied admission of documents.

In any case, in the present prayer, Mr. Mboje cited the provision of section 67 (1) (b) of the Evidence Act to produce copies of the original documents in ***Mwaliko*** and ***Ratiba***. Section 67 (1) (b) of the Evidence Act is an exception to section 66 of the Evidence Act on want of primary or original documents. However, in the instant case, PW2 categorically stated that the original documents are in the village offices and had declined to state further on how it was difficult to bring the same in the case.

Again, I took time off-schedule to scan and appreciate the materials in the two (2) cited and contested decisions in **Yara Tanzania Limited v. Ikuwo General Enterprises Limited** (supra) and **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another** (supra). The precedent in **Yara Tanzania Limited v. Ikuwo General Enterprises Limited** (supra) was issued by our superior court, the Court of Appeal (the Court). The Court at page 13 of the judgment, had briefly resolved that:

*...documents to be relied upon by the plaintiff must be attached to the plaint or entered in the list of documents ... all material facts constituting the claim should be founded on pleadings and that new facts not pleaded cannot be relied upon in determining cases...documents which constitute the plaintiff's cause of action must be **expressly** pleaded.*

(Emphasis supplied).

Much as I am aware that the Court was busy in resolving whether exhibit P.1 in the precedent was pleaded in the fifth paragraph of the plaintiff's plaint, the statement of the Court that: *documents which constitute the plaintiff's cause of action must be **expressly** pleaded*, in my considered opinion, replies Mr. Mboje's contention on necessary implication of documents **Mwaliko** and

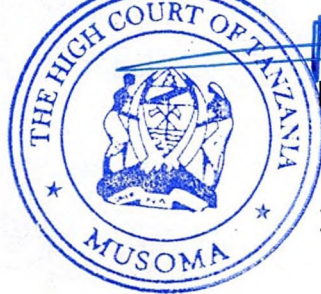
Ratiba. On the other hand, the decision of this court in **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another** (supra), at pages 2 and 4 of the Ruling, shows that for plaintiffs to enjoy the enactment of section 67 (1) (b) of the Evidence Act, they must plead in their plaint and defendant must admit or remain mute on the subject. The precedent is silent on whether pleadings must be *express* or *by necessary implication*, but the Court has already indicated that *documents which constitute the plaintiff's cause of action must be expressly pleaded*. In the current case, there is no dispute that the plaintiffs have not expressly pleaded **Mwaliko** and **Ratiba** in any paragraph of their plaint.

As to the officers of this court, when there is precedent of the Court of Appeal in a certain subject, this court is bound to follow the decision. It has to follow not only for reasons of inferiority of the court, but also for reasons of respect. This court cannot interpolate directives of our superior court, even if it has good reasons of doing so. Similarly, this court cannot depart from its own previous decisions, unless there are compelling reasons. In the instant case, there are no any compelling reasons produced by the plaintiffs' learned counsel. Finally, section 67 (1) (b) of the Evidence Act has already received interpretation of this court in **JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited & Another** (supra). I support the interpretation without any reservations, until when the

Court of Appeal issues a distinct directive on the application of the section.

Having said so, I am persuaded by the objection raised by Mr. Malongo and Ms. Kivuyo for the defendant and hereby sustain the same. The intended exhibits **Mwaliko** and **Ratiba** are hereby refused admission into the record of the case. PW2 to proceed in producing his evidence in accordance to the law regulating civil cases. I award no costs as the case is in the course in search of the rights of the parties.

It is so ordered

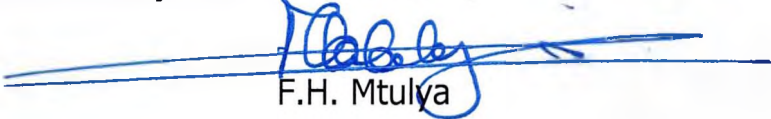



F.H. Mtulya

Judge

18.06.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of **Mr. Stephen Ndila Mboje**, learned counsel for the plaintiffs and in the presence of **Mr. Faustin Malongo** and **Ms. Caroline Kivuyo** for the defendant.


F.H. Mtulya

Judge

18.06.2024