

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 123 OF 2013

MISC. COMMERCIAL APPLICATION NO. 123 OF 2013

[Arising from Commercial Case No. 138 of 2013]

FERECK SAFARIS LIMITED.....APPLICANT

VERSUS

THE DISTRICT EXECUTIVE DIRECTOR
MEATU DISTRICT COUNCIL.....RESPONDENT

RULING

[13/02/2014 & 13 03 2014]

Nyangarika, J

Alongside with a plaint, the applicant has also filed an application under certificate of urgency seeking interim orders restraining the respondent, its agents and whoever acts under its authority from entering 'Makao Zabuko Wildlife Management Area' , preventing the applicant to construct camps and/or demolish the camp thereat pending determination of the suit.

Upon being served, the respondent and with leave of this court, filed both, counter affidavit in opposition and raised a notice of preliminary objection that:-

“This Honourable Court has a jurisdiction to hear and determine the application and therefore it should be dismissed with costs” .

This ruling is in respect of the notice of preliminary objection filed.

The Objection was argued by way of written submissions as filed by both counsels as scheduled by this court.

But, in order to have a good flow, I shall, first, canvass on the arguments raised by counsels but before I do so, I shall record how the parties were represented in this matter. The applicant enjoyed the legal services of Mabere Nyauchio Marando, learned counsel and the respondent was represented by the Municipal Solicitor one, Mr. Mashauri Msui.

I do not wish to repeat in this ruling what has been submitted by the learned counsels so as to make this ruling unnecessary longer. But, briefly, the gist of the objection as raised by the

respondent' s solicitor is that the application as well as the suit are both founded on land matters.

The solicitor contended that, first, this matter is pegged on failure by the applicant to obtain a building permit for erecting permanent structures at the site of "Makao Wildlife Management area", which is alleged to be within the respondents planning area governed by TOWN PLANNING BUILDINGS RULES.

Second, that the instant dispute has no Commercial Significance within the meaning and categories of commercial CASES AS PROVIDED UNDER RULE 5 OF THE HIGH COURT (COMMERCIAL DIVISION) PROCEDURE RULES, 2012.

The Learned solicitor invited me to dismiss the application together with the suit with costs for lack of jurisdiction.

On another dimension, the applicant' s counsel is against the objection and has submitted that the objection has been misconceived because this court has jurisdiction under SECTION 68(e) AND ORDER OF 37 RULE 2(1) OF CIVIL PROCEDURE CODE, CAP. 33 RE 2002, to entertain this application as well as the pending suit.

The applicant's counsel maintains, that, first, the order for interim injunction sought by applicant is not pegged on a suit founded on land, but only seeks this court intervention to restrain the respondent's interference, impediment and disruption of the applicant's business activities in the hunting block at "Makao Zabuko Wildlife Management Area".

Further, the applicant's counsel alleges that the applicant have invested a lot in that area for more than USD 500,000/= in respect of the five (5) years investment agreement entered for the hunting activities in the area in dispute.

Therefore, counsel for the applicant contends that the business activities conducted in the area does not make the same to be a land matter, but just hunting business activities which falls under RULE 5 OF GN. NO. 250 OF 2012.

The advocate made references to the cases of EAST AFRICAN MINES LIMITED VERSUS ELIAS KAPULA, MSANJA MASUGULE AND 32 OTHERS, COMMERCIAL COURT MANUAL AND DHOW MERCANTILE (EA) LIMITED VERSUS PSRC, COMMERCIAL CASE NO. 42 OF 2003 AND NEW PUT LIMITED AND 2

OTHERS VERSUS DZEKO SKENDEROVIC AND 4 OTHERS COMMERCIAL CASE NO. 35A FO 2002 (HC) (UNREPORTED).

The applicant's counsel argued further that this court has jurisdiction to hear, determine and grant temporary injunction to restrain the injury of the business rights and activities, which injuries are being occasioned by the respondent in the area.

In order to decide the objection correctly I need to refresh my thought on similar objections raised in the cases of MANGALAS TAICHURA AND OTHERS LAVENDER VILLA LIMITED AND OTHERS, COMMERCIAL CASE NO. 197 OF 2002 (HC) (UNREPORTED), BRITANIA BISCUITS LIMITED VERSUS NBC LIMITED AND 3 OTHERS (HC) (UNREPORTED).

In these cases, the court has held that the LAND ACT did not repeal the establishment of the Commercial Division, no inhibits its jurisdiction.

Further that, it was held that any litigation, whose cause of action accrued from mortgage transaction or Commercial Contract or activity, regardless of its aftermath to land property/ real property, is not necessary a matter that falls within the jurisdiction of the LAND DIVISION OF THE HIGH COURT, and that it

has to be dealt by the COMMERCIAL DIVISION OF THE HIGH COURT unless the transaction was on conveyance.

In MICHAEL MWAILUPE VERSUS CRDB BANK LIMITED AND OTHERS LAND CASE NO. 7 OF 2003 (HC) (UNREPORTED) This court sitting with E.A. Kileo, J (as she then was) observed as follows:-

"It may be possible that a matter may sometimes consists of both commercial and land elements. Since the main reasons behind the establishment of the two specialized Division ie. The Commercial Court and the Land Division of the High Court was to expedite dispute settlement, I consider that the interest of justice would be best served, if the law would make provisions of an option for a party who has a matter comprising of both commercial and land elements to either file it in the Land Division of the High Court or the Commercial of the High Court".

There is no wonder therefore that in BRAND INTERNATIONAL LIMITED VERSUS SHIRIKA LA USAFIRI DAR ES SALAAM (UDA), IN COMMERCIAL CASE NO. 68 OF 2011, [HC] (COMMERCIAL COURT) (UNREPORTED), I have observed that a lease is captured under the definition of Commerce case as it has Commercial Trapping.

As both counsels are well aware the categories of cases considered to be a Commercial nature are not exhaustive as provided for under RULE 2 (A) OF THE HIGH COURT REGISTRIES (AMENDMENT) RULES, 1999 GN. NO. 141 OF 1999.

Therefore, in the interpretation of the question of Commercial significance regarding the hunting business one has to observe the ejusdem generis cannon of interpretation and will find that the hunting business now in dispute at " Makao Wildlife Management Area" has a commercial trapping within the categories listed under RULE 2 (A) OF THE HIGH COURT AMENDMENT RULES, 1999, GN. NO. 141 OF 1999.

With the above guidance and coming back to the objection raised, it is obviously that the centre of the controversy arises from some structures or rather the so called 'buildings' erected in "Makao Wildlife Management Area" for purposes of the hunting business.

The issue regarding the hunting plots has not been disputed by both sides and therefore, geographically, it is true that the conservation area is within Meatu District in Shinyanga Region.

Now, the thorniest issues here is whether that area now in dispute is a planned area within the management Meatu District Council under the TOWN PLANNING RULES, which require building permits for the construction of any structure therein or is within the management of the Wildlife Management Area.

I am well aware that in the establishment of Wildlife Management Area, under SECTION 31 (7) OF THE WILDLIFE CONSERVATION ACT, 2008, like the one at hand, the representative of the District and the District Council are involved during the process.

After the establishment, a general management plan for each Wildlife protected area is put in place, where the respondent's role is that of just advisory roles.

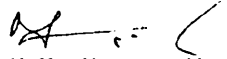
Mind you, Wildlife Management area for purposes of conservation may be established (a) outside of core protected area (b) area used by local community members and (c) within the village land.

Therefore, it is not necessary that Wildlife Management area will always falls within the planned area in the district, or Municipal Council subjected to town planning rules.

Therefore whether " Makao Wildlife Management Area" is within the Meatu District Planning area or not, is an issue to be determined during trial upon receiving evidence from both sides.

The objection is misconceived as it does not raise a pure point of law as required since the issue needs to be proved one way or another and therefore cannot be relied up to dispose of this suit [MULLA, CODE OF CIVIL PROCEDURE, 8TH EDITION VOL. 1 PAGE 221, BIKUBWA ISSA ALLI VERSUS SULTAN MOHAMED ZAHARAN (1997) TLR 295 (HC) AND MUKISA BUSCUIT MANUFACTURING COMPANY LIMITED VERSUS WEST END DISTRIBUTORS LIMITED (1969) EA 696, followed].

In upshot and for the reasons given, the preliminary objection crumbles. It is hereby dismissed with costs.


K. M. Nyangarika
Judge
13/03/2014