IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 1 OF 2015

SALMIN MBARAKA SALIM t/a EAST

AFRICAN INVETMENT.....PLAINTIFF

VERSUS

THE PERMANENT SECRETARY MINISTRY

OF WORKS .....1ST RESPONDENT

TANZANIA NATIONAL ROAD AGENCY.....2ND DEFENDANT

RASI INVESTMENT.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

MAIGE, J

JUDGMENT:

The dispute I am called upon to resolve pertains to the validity and legality of the two irreconcilable decisions of the second defendant in response to applications for permission to develop temporary parking lots within the road reserve area, along Nyerere/ Chang'ombe road adjacent to Plot No. 2701/1B ("the disputed

space"). In the first decision (exhibit **P10**), the plaintiff application was refused for the reason contained therein. In the second decision, permission to make use of the **disputed space** for car parking was granted to the third defendant (exhibit **D3**). The plaintiff blames the second defendant for illegally and unjustifiably refusing his application and illegally granting the same to the third defendant. He therefore, urges the Court to, by way of mandatory injunction, compel the third defendant to grant the said permission to him. He more so, calls upon the Court to declare that the grant in exhibit **D3** is illegal and ineffectual and further declare that the third defendant has no capacity to develop a parking lot on the **disputed space**.

The material facts of this case briefly stated are as follows. Both the plaintiff and the third defendant claim in essence to have ownership interests on the property on Plot No. 2701/1B along Chang'ombe/ Neyerere Road Dar Es Salaam ("the adjoining property"). They each claim to have joint ownership with the National Housing Corporation by virtue of development agreements. Neither of them has produced in evidence any agreement with the National Housing Corporation nor any document of title.

It is irrefutable that each of the parties applied to the second defendant for permission to make use of the **disputed space** or part thereof for developing car parking slots thereon. Initially, the third defendant applied for and was granted a permit to develop part of the disputed space (exhibit **D1**). For the alleged reason that the granted area could not suffice for her project, the third defendant did not develop any car parking slot despite the lapse of a period of

more than a year. When the application by the plaintiff to the second defendant was still pending, it is not in dispute, the third defendant successfully lodged a formal application for grant of the whole **disputed space**. Subsequently, the plaintiff's application was refused for reasons among others reasons that the **disputed space** had been sought by another person. It was also among the reasons for the refusal that the plaintiff's construction of the car parking slots would operate as to destroy the trees surrounding the main road.

It may conceivably be relevant to divulge that, before lodging a formal application to the second defendant, the plaintiff had applied and procured a permit from the Temeke Manicipal Council (exhibit **P2** and **P3**). On being informed about the said grant, the second defendant restrained the plaintiff from making any development on account that the municipal authority was incompetent to grant the permission.

During the Final Pretrial Conference and upon there being discussions with the parties counsel, the following issues were framed:-

1. *Whether the Plaintiff is lawfully entitled to be granted by the 2nd Defendant permission to develop a temporary parking lot for public use within the road reserve along Nyerere/ Chan'gombe Road adjacent to the Plaintiff's building.*

2. *If the first issue is in the affirmative, whether the 2nd Defendant correctly exercised its discretion in declining the Plaintiff's application.*

3. *Whether the permit granted and extended by the 2nd Defendant to the 3rd Defendant to develop parking space in the suit area was unlawful and void ab initio.*

4. *To what reliefs are the parties entitle.*

In a bid to establish his case, the plaintiff called three witnesses including himself who testified as **PW1**. The other two witnesses were Zuberi Yahya Mfaume (PW2), the plaintiff's external relation officer and Hamis Abdallah Jafar (PW3), an environment officer from Ilala Manicipal Council. The testimony of **PW1** which was essentially documentary, depicted the procedure involved in the refusal of the plaintiff's application as well as the procedure used in the grant of the third defendant's application. From the factual demonstration of the two procedure, **PW1** informed the Court that, while the grant in favour of the third defendant was illegal and ineffectual, the refusal to grant his application was unjustified. He tendered 14 documents of which 8 were unconditionally admitted into evidence. The remaining six documents whose admissibility was objected on account of being photocopies, were tentatively admitted on condition that the issue of admissibility would be considered in the final judgment.

The testimony of PW2 was based on secondary evidence envisaged in section 65 (e) of the Evidence Act. It was pursuant to the order of my Lord judge Kente dated 16th March 2018 consequential upon refusal of the first, second and third defendants to produce a document on notice. His testimony was therefore on account of the contents of a document he claimed to have personally seen and

read through a computer screen of the relevant ministry. It was his evidence that, in accordance with the contents of such electronically recorded letter, the ministry directed that the plaintiff be granted the relevant permit.

PW3 on his part, testified that he was in a team of experts who participated in the preparation of the Environmental Management Plan for the Plaintiff's project. It is his evidence that, in the course of preparing the Plan, consultation with the neighbors and interested parties, including the officers of the third defendant, was made and that all of them were in support of the project. To that end, he produced into evidence a chapter from the said plain (exhibit P14).

The first, second and forth defendants placed reliance on the testimony of Eliseus Vicent Mtenga (DW1), the maintenance engineer of the second defendant. He claims to have been involved in the grant of the permit to the third defendant and in the refusal to grant the same to the plaintiff. The procedure involved in the grant of the permit in question, he testified further, starts with an application which has to be accompanied with relevant documentations including drawings. Upon examination of the drawings and establishing that it is not in conflict with road use or not involved in any dispute, the second defendant may grant the permit. He confirmed to have granted a permit to the third defendant in exhibit **P12**. He also confirmed that the third defendant did not make use of the said permit because she wanted to expand her development. He also identified and confirmed the second permit to the third defendant in exhibit **P13**. More so, he identified the refusal letter to the plaintiff in exhibit **P10** and testified that the same was correctly supported by the reasons therein assigned.

For the third defendant, the evidence in rebuttal was testified by its director one Asmina Akbar Ali. Like PW1, her evidence was basically documentary. She produced five documents into evidence whose admissibility was however challenged on account that they were not attached in pleadings. The documents were tentatively admitted with a note that the issue of admissibility would be considered in the final judgment.

In the conduct of this matter, the plaintiff was represented by Walter Chipeta and Shirima, learned advocates. The first, second and fourth defendants were represented by Asante Hossea, learned state attorney. Mr. William Mang'ena, learned advocate represented the third defendant. At the end of the trial, parties were allowed to address the Court generally by way of written submissions. I recommend the counsel for their very instructive submissions. I have carefully gone through them and considered in my judgment the relevant parts thereof. I have however to state right away that for the reason of the narrowness of the proposition upon which my decision is based, most of the cited authorities could unfortunately be inapplicable. Equally so for the evidence adduced.

Before I venture into the substantive issues, I find it imperative to determine the issue of admissibility of documents. As I said above, in the course of trial, some documentary evidence from both sides whose admissibility was challenged for various technical grounds, were tentatively admitted with notes that the issues involved would be determined in the final judgment. What prompted me to take an asylum to this procedure is the fact that the case at hand far from being an

old case, was to be resolved within a special session. As I understand the law, the procedure involved though not very much common in our jurisdiction, is applicable in certain cases. Therefore, in BIPIN **SHATILAL PANCHAL VS. STATE OF GUJARAT AND ANOTHER, 2002 (1) LW (Cr.) 115**, which was quoted with approval in **REPUBLIC v. SHULE S/O TANZANIA AND ANOTHER CRIMINAL SESSION NO. 212 OF 2013, HIGH COURT, MWANZA REGISTRY** and **EAST WEST (1991) INVESTMENT COMPANY VS. KARPESH SANGAR, LAND CASE NO.54 OF 2015,** the Supreme Court of India was of the considered opinion that, for the purpose of accelerating trials, admission of a document with a note that its admissibility shall be considered in the final judgment is the best approach. In their words, their Lordships, the Justices of the Supreme Court of India had the following to say:-

> *Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed. The above procedure if followed will have two advantages.*

First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witness. Second is that the superior court, when the same objection is re-canvased and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding the objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that the measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

I reiterate as I said in my two referred decisions that, the principle propounded in the above Indian authority is very relevant in our jurisdiction. For, strict adherence to the existing practice of determining each and every objection as to admissibility of evidence whenever raised, can in some cases, be an obstacle towards steady and swift disposal of proceedings.

With that remarks, let me address the issues starting with admissibility of documents in PE-1, PE-2, PE-5, PE7, PE8 and PE11. The point of objection in all the said documents was common. They were objected on account of being photocopies. The objection was based on the rule of primacy of documents set out in section 66 of the Evidence Act which provides that a document must be proved by primary evidence. The rule as to primacy of documents, it is settled, is not absolute. It admits some exceptions provided in the Evidence Act and other relevant written laws. Under section 67(1) (c) of the Evidence Act for instance, a secondary document can be admitted if the existence or contents of the original

have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. More so, under section 51 (1) Land Disputes Courts Act, Cap. 216, R.E. 2002, the trial judge has discretion to, regardless of any law governing production and admissibility of evidence, accept such evidence and proof which appears to be worthy of belief.

Exhibits **PE1**, **PE2** and **PE5** are pleaded in paragraphs 8, 9 and 11 of the plaint, respectively. Their existence is expressly admitted in paragraph 3 of the Written Statement of defense ("WSD") of the third defendant. In the WSD of first, second and fourth defendants, it would appear, the existence of the same is not denied but the authority of the Temeke Manicipal Council to issue them. Exhibits **PE7**, **PE8** and **PE11** are pleaded in paragraphs 13, 14 and 16 of the plaint, respectively. Their contents are not disputed in paragraphs 5,6 and 8 of the **WSD** of the first, second and fourth defendants. Besides, in paragraphs 4 and 5 of the 3rd defendant's **WSD**, the existence of the same has been expressly admitted.

Since the existence of the documents under discussion is not denied by the parties against whom they are sought to be proved, I think, the same can be admitted in terms of section 67 (1)(b) of the **Evidence Act** read together with section 51 (1) of the **Land Disputes Courts Act, Cap. 216, R.E, 2002** without causing injustice to either of the defendants. It is on that account that I will, as I hereby do, overrule the objections as to the admissibility of the said documents.

This now takes me to the admissibility of the documents by the third defendants. The third defendant tendered five documentary exhibits which were tentatively

admitted in view of the objection by the Plaintiff's counsel that they were neither pleaded nor attached in pleadings. In the WSD of the third defendant, the documents to be relied upon were pleaded in paragraph 4 and were annexed and marked FB-1. Exhibit **D1** consisted of a permit dated 10th July 2012 in favour of the third defendant. It is accompanied with a drawing. The permit letter, I have observed, is attached in annexure FB-1 and the drawing is part of exhibit **PE12**. The objection as to the admissibility of exhibit **D1** is henceforth overruled.

Exhibit **D2** consists of a permit letter dated 13/07/2012. It has been also produced by the plaintiff and marked PE12. There are two official receipts in exhibit D2. The receipt with serial number 49322 was attached in the **WSD** and its is therefore admissible. The receipt with serial number 383775 is not in the attached documents. Equally so for the documents purporting to be company profile. Therefore, with the exception of the permit letter dated 13th July 2012 and the official receipts with serial number 49322, the objection to the admissibility of the documents in the said exhibit succeeds and is hereby sustained. Therefore, receipt with serial number 383775 and the documents purporting to be the company profile of the third defendant are expunged from the record.

Exhibit **D3** is neither pleaded nor contained in annexure FB1. The objection as to its admissibility is sustained and the same is accordingly expunged from the record. Exhibit **D4** consists of the permit letter dated 11th July 2014 and letters from the third defendant to the second defendant dated 6th February 2014 and 19th July 2014. They are not in annexure FB1 to the Plaint. Nonetheless, the

permit letter, I have noticed, has been produced by the plaintiff as exhibit PE13. It is thus admissible. The objection therefore succeeds to the extent of the last two letters which are erased from the record.

With the disposal of the issues of admissibility, it is desirable to consider the substantive claim. I propose to start with the first issue as to whether the plaintiff is lawfully entitled to be granted, by the second defendant, permission to develop parking lot on the **disputed space**. The **disputed space**, it is not in dispute, is within the road reserve in terms of the Public Road Act, 2007. There is a common understanding between the parties that a road reserve is, according to section 29(1) of the Act, exclusively for the use of the road. Equally not in dispute is the fact that in terms of section 29 (2) of the Act as judicially considered by the Court of Appeal of Tanzania in **Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Civil Appeal No. 223 of 2017**, the road authority has discretion to permit or license temporary use of part of the road reserve in cases where such use does not hinder any future statutory use of the road reserve. The permits grantable under the respective provision, parties are in agreement, are of temporary nature and a person cannot enforce a claim thereon unless he has a legally recognizable interest. Thus, in **Shadrack Balinago vs. Fikiri Mohamed @ Hamza, *(supra*)** which was relied upon by the plaintiff's counsel, the Court of Appeal remarked at pages 14 and 15 as follows:-

> *The above provision stipulates expressly that it is the discretion the road authority to permit or license temporary use of a part of the road reserve in cases where such uses does not hinder any future statutory use of road reserve.* ***It seems to us untenable that the appellant herein, not***

having easement over the road reserve, could establish and assert any standing to restrict the first respondent's licensed use of the road reserve. *(emphasized supplied)*

The plaintiff claims in essence to be permitted to develop parking lots within the road reserve along Nyerere/ Chang'ombe road which is alongside Plot No. 2701/1B. The factual materials justifying his standing are pleaded in paragraph 7 of the Plaint wherein the plaintiff asserts joint ownership of the **adjoining property** with the National Housing Corporation by virtue of a property development agreement. The plaintiff alleges further that the second defendant illegally granted permit to the third defendant in respect of the same area. He thus prays that, the grant in favour of the third defendant be nullified. Like the plaintiff, the third defendant claims in her written statement of defense joint ownership of the **adjoining property** jointly with the National Housing Corporation.

From the facts in the plaint and the written statement of the third defendant, it would appear, both the plaintiff and the third defendant justify their entitlement for a grant of permit on account that they have ownership interests on plot number 2701/1B along Chang'ombe Road. More to the point, both of them allege joint interest on the said plot with the National Housing Corporation by virtue of property development agreements existing between each of them and the said National Housing Corporation. On this, the learned advocates for the plaintiff submit, at pages 15 and 16 of their written submissions as follows:-

"My Lord, the testimony of PW1 is to the effect that he applied for grant of permit for construction of temporary parking lot for public use. The Plaintiff

(just as the 3rd Defendant) both occupy Plot number 271/1B- which has been developed jointly with the National Housing Corporation. Being on the same plot, each the Defendant and the 3rd Defendant has separate building/ structure on the ***plot which is yet to be subdivided****" (emphasis supplied)*

It is therefore implicit from the pleadings and evidence that, for the reason of being a joint owner of the property at Plot 271/1B, the National Housing Corporation, unless otherwise provided for in the property development agreements, has *prima facie* interest in the plaintiff's claim as much as it is in the third defendant's defense. Quite unexpectedly, the plaintiff did not, in his evidence, produce any property development agreement. Neither did he produce any document to establish his title on the plot under discussion. In the absence of an agreement between the plaintiff and the National Housing Corporation or any document of title, this Court remains with no factual materials on the basis of which it can determine whether the plaintiff has the necessary standing to institute the instant case. Neither can the Court be certain that any decree to be issued will not affect the interest of the National Housing Corporation on the **adjoining property**.

In my opinion therefore, this suit is incompetently before the Court for want of necessary standing. It is accordingly struck with costs. It is so ordered.

I. Maige
JUDGE
01/11/2019

Date: 01/11/2019

Coram: Hon. W.A. Hamza - DR

For the Plaintiff: Baraka Msana holding brief of Shirima advocate for Plaintiff

For the 1st Defendant: Present in person

For the 2nd Defendant Absent

For the 3rd Defendant: Msama also for 3rd Defendant

For the 4th Defendant: Absent

RMA: Bukuku

COURT: J

Judgment is delivered this 1st day of November, 2019 in the presence of counsel Baraka Msana for the 3rd Defendant, also holding brief of Shirima counsel for the Plaintiff.

THE HIGH COURT OF TANZANIA
LAND DIVISION

W.A. Hamza
DEPUTY REGISTRAR
01/11/2019