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

COMMERCIAL CASE No. 33 OF 2004

NORTHERN HUNTING ENTERPISES (T) LTD. ..... PLAINTIFF/RESPONDENT

VERSUS

1. KIBO GUIDES LTD
2. TANGANYIKA WILDERNESS CAMPS LTD. ..... DEFENDANTS/APPLICANTS

Counsel: E. Maro and F. K. Stolla for Applicants
S. Kiwango for Respondent

RULING

BWANA, J:

Two interlocutory matters are before me for determination. The first one is on four points of preliminary objections raised by the defendants against the plaintiff. They ask this Court to "dismiss the suit or the plaint be struck out". The second matter is an application by the same defendants to this Court requesting it to discharge the injunctive orders granted on 16 July 2004. Those orders were granted in favour of the plaintiff after the defendants refused to accept service of summons issued to them.

Through both matters runs a single thread and that is, the plaint filed at this Court on 8 July 2004. Together with the two declaratory orders sought therein, the plaintiff also prays for the perpetual injunction restraining the defendants – whether by themselves their servants or agents, from entering the two hunting blocks and conducting any form of tourism therein. The two declaratory orders sought are first, that the Court declare that it is illegal for the defendants to interfere with and to

frustrate the plaintiff's Agreement with the Director of Wildlife, granting it exclusive tourist hunting rights over the two hunting blocks. Second, to declare that it is illegal for the defendants to enter into the two hunting blocks and conducting any form of tourism or erect camps for that purpose therein.

Together with the filing of the main *suit*, the plaintiff filed an application, under a certificate of urgency, for an injunction *pendente lite*, an order that was granted by this Court, on 16 July 2004. The defendants are requesting this Court to discharge that order as will be shown herein. The plaintiff resists that prayer and further requests this Court to order punitive costs, following the two abortive attempts to serve summons to the defendants, hence amounting to Contempt of Court. In my ruling dated 10 September 2004, I reserved my decision on that point. I will settle it in this Ruling.

I will now get down to the *nitty gritty* of the issues before me. I start with the preliminary objections. Four points have been raised by the Defendants cum Applicants namely:-

1. The purported cause of action is in respect of matters concerning LAND, hence the Commercial Court is without jurisdiction to entertain the dispute.

2. The plaint does not disclose a cause of action at all against the defendants.

3. The suit is bad for non – joinder of parties; and

4. The claim for special damages set out in para 9 of the plaint is vague and without particulars.

Counsel for both parties presented Written Submissions in respect of the above listed points. It seems, however and if I may note, that both sides spent considerable time in arguing point No. 1 – whether this Court has jurisdiction or not. I must state at the outset that most of the arguments on this point (which I now do discuss) are irrelevant. While I do agree with the exclusivity provisions of the Land Act in respect to jurisdiction over land issues – as per Acts No. 4 and 5 of 1999, the issue before this Court (in the main suit) is far from that. Paragraphs 4, 5, 6, 7 and 8 of the plaint are very elaborate. For purposes of convenience I reproduce them.

"4. That the Plaintiff entered into an Agreement with the DIRECTOR OF WILDLIFE OF THE MINISTRY OF NATURAL RESOURCES AND TOURISM whereby in return for valuable consideration it has been granted rights to conduct tourist hunting activities within the aforementioned two hunting blocks for a period up to 2009. Annexed hereto and marked NHE – 1, NHE – 2, NHE – 3, and NHE – 6 are copies of Allocation Agreements, block fee receipts, TANZANIA LICENCING AGENCY (TALA) licence, receipts for the TALA licence and copies of Hunting Permits already paid for the July 2004 hunting season and correspondence clearly showing the sums expended by the Plaintiff towards community developments of the communities around the two hunting blocks and the Plaintiff shall crave leave of this Honourable Court to refer to them as part of this Plaint.

5. That it is an implied term of this Agreement that the two hunting blocks are exclusively for use by the Plaintiff for tourist hunting and no other form of tourism nor tourist hunting by other entity can be undertaken within the boundaries of the two hunting blocks.

6. That the Defendants have at all times been aware of the existence of the Agreement and its implied terms but have been entering in the two hunting blocks setting up camps and conducting wildlife based tourist activities therein. Annexed hereto marked NH-7 are copies of photographs and correspondence on the matters and the Plaintiff shall crave leave of this Honourable Court to refer to them as part of this Plaint.

7. The Defendants have been actively canvassing villages neighboring the two hunting blocks including SINYA VILLAGE in LONGIDO GAME CONTROLLED AREA and KIJIJI CHA VILIMA VITATU in BURUNGE GAME CONTROLLED AREA to demand that the DIRECTOR OF WILDLIFE terminate its Agreement with the Plaintiff. Annexed hereto marked NHE – 8 are copies of correspondence and minutes of meetings showing the Defendants activities and the Plaintiff shall crave leave of this Honourable Court to refer to them as part of this Plaint.

8. That the Defendants' action is intended to and has had the effect of frustrating the Plaintiff's Agreement over the two hunting blocks by making it impossible for the Plaintiff to conduct tourist hunting and therefore fail to meet its obligation under the Agreement".

The five paragraphs above are further supported by the kind of prayers sought. Again I reproduce them.

1. That the court declare that it is illegal for the defendants to interfere and to frustrate the plaintiff's Agreement with the Director of Wildlife granting it exclusive tourist hunting rights over the two hunting blocks.

2. That the Court declare that it is illegal for the defendants to enter the two hunting blocks and conduct any form of tourism or erect camps for the purpose therein.

3. The Court issue a perpetual injunction restraining the defendants... from entering the two hunting blocks and conducting any form of tourism therein.
4. ...
5. ...
6. ...

(emphasis mine).

From the above (1 – 3) points, it is clear and leads me to the inescapable conclusion that the issue before the Court is not ownership of land, nor is it on mortgage arrangements – issues that could invite/ or attract arguments based on the provisions of sections 167(1) and, 181 of Act 4 of 1999 or Section 62 of Act 5 of 1999, or further, even section 3 of the Court (Land Dispute Settlement) Act No. 2 of 2002. The plaint and prayers sought thereunder all concern an Agreement between the plaintiff and Director of Wildlife. It is a hunting Agreement entered by the two parties covering two hunting blocks. Nothing therein gives (or is claimed to give) ownership of the two blocks (of land) to the plaintiff. Doing so would be inconsistent with the fundamental tenets of our laws. What is given – in my firm view – is hunting rights. And those rights – again in my respectful view – are commercial hunting. Commercial hunting (or even modern hunting perse) cannot – in my opinion – be

classified as granting ownership of the land to be covered, to the hunter (the plaintiff). To do or interprete it to mean so, would lead to a terminological inexactitude. Therefore the exclusivity of the provisions of the Land Laws (supra) does not apply herein. As was trenchantly stated by this Court (per Kalegeya, J) in NBC versus Universal Electronics and Others – Commercial Case No. 198 of 2002), "in enacting s.167, the Legislature had in mind an action which centers on land, pure and simple". If I were to concur with the Applicants herein, then I do not see the limit to such claims. It would be opening the floodgates of all aspects of cases to the exclusivity of the Land Court. There is no limit to relationship with land. Buildings, farms, roads and what have you – would all fall under that exclusivity. The issue herein is an Agreement between the plaintiff and the Director of Wildlife and further as alleged now, that the Applicants are violating this Agreement by entering and conducting some form of tourism in the two hunting blocks. These are commercial undertakings and the Applicants' actions are but an encroachment to the Agreement. All this falls under the provisions of Rule 2 of the High Court Registries (Amendment) Rules, 1999. Therefore this Court has jurisdiction to hear this case. The preliminary objection based on that issue thus fails.

I will now discuss the issue of lack of cause of action. It is the Applicant's averment that the suit does not disclose a cause of action particularly to the second Applicant. The Respondent avers that paras 4 to 8 of the plaint clearly show that there is a cause of action against both Applicants.

It is a settled principle that whether a plaint discloses a cause of action must be determined upon a perusal of the plaint (together with its annextures if any) and upon the assumption that any express or implied allegations of fact in it are true. There is a raft of authorities on this settled principle. What is important to note here

is that at that stage, there is no evidence required to be adduced to support the allegations. The Court has just to assume that what is alleged by the plaintiff is correct and then the defendant is required to respond accordingly as provided under the Civil Procedure Code. A defendant may have a good defence but that is not a determining factor at that stage of the proceedings. A plaintiff, on the other hand, may have made up a story against the defendant but that cannot be dismantled by a preliminary objection. The decision of this Court (Bwana, J) in NBC Holding Corporation versus SUKITA and 63 Others (Commercial Case No. 24 of 2001) lists a number of authorities on the subject. Considering the matter at hand, it is evident that the contents of para 4 to 8 of the plaint establish sufficient ground to convince me that there is a cause of action established herein. Therefore the preliminary objection based on this point also fails.

The Applicants decided to abandon the issue of non – joinder of parties. Therefore there is no need to discuss it here.

The last point is on the claim that para 9 is vague. It is trite law that where a party claims special damages, that party must show specifically what is being claimed. That is different from a claim for general damages. Again there is no dearth of authorities on this subject. It is however important to note the following as stated in the said para 9 of the plaint:

> "That the plaintiff has suffered loss as a consequence and claims shs. 60,000,000/- as damages. The plaintiff shall crave leave of this Court to rely on its records and correspondence showing the extent of the loss it has incurred".

I consider the above to be elaborate enough. Presently there is no need to enclose all the correspondence and/or records. It is, however, expected that should the case come up for trial, then the plaintiff will have to produce all those documents and records in support and so long as the total value shown therein does not exceed shs. 60m/-. Indeed, if the Applicants think that they need the said documents/records for their proper preparation of the defence then they can invoke the provisions of Order VI Rule 5 of the CPC and require the Respondent to furnish better and further particulars. Therefore this point of preliminary objection also fails. Therefore all the issues raised in the preliminary objection fail and are dismissed with costs.

I will now consider the other limb of this Ruling – the application to raise the injunctive orders granted by this Court on 16 July 2004. I must note at the outset that the parties seem to have gone beyond the necessary requirements of this issue. The parties were supposed to argue as to whether the injunctive orders of 16 July should be lifted or remain in force. What I note, in the parties respective affidavits and counter affidavits however, is elaborate evidence and citation of laws - matters that may be conveniently left for trial – should the main suit reach that stage.

To put the record right, let it be stated here that the orders of this Court dated 16 July 2004 were granted to the Respondent herein after the unsuccessful attempt to effect service of Summons to the Applicants. The Affidavits of Mpingwa Duma (of Super Auction Mart and Court Broker) was examined at great length and formed part of the reasons why this Court decided to proceed ex parte in so far as that application was concerned. For purposes of clarity again, I reproduce the relevant parts of that affidavit.

"Mimi, Mpingwa C. Duma wa Super Acution Marts Court Broker, Mwislamu, Mtu mzima wa S. L. P. 45001 Dar es Salaam, ninathibitisha kama ifuatavyo:-

1. Kwamba Mahakama Kuu ya Tanzania Kitengo cha Biashara siku ya tarehe 8/7/2004 ilinikabidhi SUMMONS TO APPEAR AND FILING WRITTEN STATEMENT OF DEFENCE ili niwapelekee wadaiwa wa Commercial Case No. 33/2004 ambapo Mdai ni Northern Hunting Enterprises (T) Ltd dhidi ya Wadaiwa ambao ni Tanganyika Wilderness Camps na Kibo Guides Ltd zote za mjini Arusha zikiwa zinapatikana katika anuani moja.

2. Kwamba siku ya tarehe 9/7/2004 nilikwenda Arusha kwa ajili ya kuzipeleka Summons hizo kwa Wadaiwa. Nilipofika mjini Arusha moja kwa moja nilikwenda katika Mahakama Kuu ya Tanzania kanda ya Arusha kwa ajili ya kupata endorsement ya Summons hizo.

3. Kwamba baada ya Summons hizo kuwa endorsed na kwa maelekezo niliyoyapata kutoka kwa Mdai, nilikwenda katika barabara ya Oljoro katika eneo la Mbanda Village zilizopo ofisi za makampuni ya Tanganyika Wilderness Camps Ltd na Kibo Guides Ltd kwa ajili ya kuapa summons hizo.

4. Kwamba nilipofika ofisi hizo ambazo zote zipo sehemu moja nilimkuta sekretari na kampuni hizo. Na nikajitambulisha kwake pamoja na kumweleza dhumuni la mimi kwenda pale.

Baada ya kumweleza dhumuni langu pale kwao, secretari huyo ambaye alikataa kata kata kunitajia jina lake, aliniambia kwamba nisubiri kidogo ili yeye awasiliane na Mkurugenzi wake.

5. Kwamba baada ya secretari wa wadaiwa kuwasiliana na mkurugenzi wake, aliniambia kwamba kapewa maelekezo na huyo mkurugenzi wake kwamba asizipokee summons hizo kwa kuwa madai yaliyopelekwa na mdai mahakamani dhidi yao ni upuuzi mtupu na wao hawako tayari kutoa ushirikiano wowote kuhusiana na swala hilo.

6. Kwamba nilipotaka kumwelewesha umuhimu wa wao kuzipokea summons hizo, secretari huyo alinifukuza ofisini hapo na kumwita mlizi wa getini wa Makampuni hayo ambaye alikuja akanikunja shati langu na kunisukumiza nje ya ofisi zao huku akizitupa ovyo ovyo sile summons nilizotaka kuwapa.

7. Kwamba nilirudi Mahakama Kuu ya Tanzania Kanda ya Arusha ambapo nilipatiwa process – server wa mahakama hiyo ili niende nae tena ili labda wakimwona mtu kutoka Mahakama ya hapo hapo Arusha wangeweza kuzipokea Summons hizo, lakini process-server huyo aitwaye David Millia alipofika pale katika ofisi za wadaiwa, yule secretari alikataa kuzipokea summons hizo, na kwa kushirikiana na mlizi wa makampuni

hayo walimfanyia fujo, process-server huyo na hata tai aliyovaa wakaichana.

8. Nathibitisha kwamba yote niliyosema ni kweli tupu.

9. Pamoja na kiapo hiki naambatanisha na tiketi za usafiri niliyotumia kwenda Arusha na kurudi Dar es Salaam pamoja na usafiri wa Taxi niliyotumia nilipokuwa Arusha.

I must note here that the contents of Mr. Duma's affidavit have not been expressly denied by Mr. W.G. Chambulo in both his detailed affidavit and reply to the reply to the counter affidavit by M. M. Abdallah, the Managing Director of the Respondent herein. According to the former, he became aware of this suit only after substituted service by publication.

I have carefully considered this issue and examined the photographs taken at the scene, showing the two Court Officers attempting to effect service and an employee of the Applicants defiantly returning the documents! I have come to the conclusion that normal physical service of summons could not be effected even though the Court Officer had valiantly tried to effect the same.

It would have been considered differently if the said Court Officers failed to trace the physical address of the applicants. However defiant refusal to accept service and physically roughing up the Court Officer amounts to nothing less than an affront to justice and the due process of law. People must respect the decencies of civilized conduct by avoiding conduct that shock conscience or offend the sense of justice. What transpired at the applicant's premises at Arusha is just contrary to

what was expected. Roughing up Court officers cannot be tolerated. That was the least behaviour expected. I had reserved my punitive orders against the Applicants for the above stated acts. I believe it is an opportune time to mete them out now. For I strongly believe that if the law has to be respected by and in society, the very people/society must show respect to it. The acts by the Applicants (in respect of this matter of service of summons) was contrary to the above. They should not be left to go scot free for to do so is an affront to justice itself. Therefore the Applicants, Kibo Guides Ltd and Tanganyika Wilderness Camps Ltd – jointly and or severally are to pay shs. 500,000/- as punitive costs. The said sum to be paid within four days from the date hereof orelse Mr. W.G. Chambulo should serve a two weeks Civil imprisonment.

The above said, I now consider as to whether the injunctive orders should be lifted or not. It is not in dispute that Northern Hunting Enterprises (T) Ltd (the Respondent herein) has hunting rights over Burunge Game Controlled Area and Longido Game Controlled Area (hereinafter both referred to as "the two hunting blocks"). That right was granted by the Ministry of Natural Resources and Tourism. They have exclusive hunting up to 2009. The Applicants herein have not shown their corresponding licence. What they have shown are agreements with Sinya Village government to allow cultural tourism in their area. The Respondent contends that that Village agreement was rescind two months after its signing. I do not intend to venture into that issue at present.

It will be revisited at an appropriate stage. The pleadings, however, simplify what would otherwise be a complex issue. In their joint statement of defence, the Applicants deny (para 6 and 7) to have ever carried out or conducted Wildlife based tourism in the two hunting blocks. Parties are bound by their pleadings – a well

settled principle of law. If the parties plead so, then I do not see how the injunctive orders of this Court will affect their business. Instead, such orders will only protect the rights of the Respondent as granted by the government of this country – rights which I consider to be lawful.

Again the defendants cum Applicants show in their Written Statement of Defence (para 10) that they have established a permanent camp at "Kambi ya Tembo" within an area of Sinya Village. There is no claim by the Respondent that Sinya Village is within the two hunting blocks. So Kambi ya Tembo, may continue with its operations as "it is within well demarcated area as designed for camping and bordered by about five Masai Villages" (para 16 of Written Statement of Defence). But if the Applicants have any established camps within the two hunting blocks, then they should remove them within seven days from the date hereof. It is accordingly ordered.

Under para 18 of Mr. Chambulo's affidavit, it is avered that the Applicants have never and do not intend to conduct photographic and walking safaris within Longido Game Controlled Area and or Burunge Game Controlled Area. That being the case then, the order preventing the Applicants from conducting tourist activities in the two hunting blocks is valid and proper. In case the Applicants have any other tourist activities in the areas, they should stop forthwith, to make Mr. Chambulo's words before this Court – meaningful and to comply with the order of this Court. I do not see how such stoppage will affect the Applicant's tourism business since – after all – they have never and do not intend to conduct tourist activities in the two hunting blocks allocated to the Respondent.

All the foregoing considered, I am convinced that the orders of this Court dated 16 July 2004 are proper, valid and therefore, should remain in force until the final determination of this suit. For purposes of clarity, the key parts of the 16 July Ruling and which need to be complied with by the Applicants are as follows:-

1. The Defendants (and Applicants herein) should within seven days from today, remove their Camps (and stop tourist activities) located within the two hunting blocks allocated to the Northern Hunting Enterprises (T) Ltd. Further, since the Applicants have shown that they do not have camps in the two hunting blocks and further that they never and do not intend to do so in the two hunting blocks, I do not see how that will harm/hurt their business. They can continue with their business in the other areas outside the two blocks.

2. Temporary injunction remains in force (until final determination of the main suit) restraining the Applicants herein, by themselves, their servants or agents from entering and conducting any form of tourism within the boundaries of the two hunting blocks.

3. Costs of the former application, as ordered on 16 July 2004.

In conclusion I must note in passing one issue raised by the Applicants, namely (and so I paraphrase it), why is the plaintiff suing the two defendants only while leaving many more others (as listed)? I think this is not a proper forum to consider the issue.

It is settled that a plaintiff may prefer whom to sue. Further, a Court of law cannot consider matters related to one who is not a party to a suit.

S. J. Bwana
Judge
7/1/2005

3,734 words