

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. LAND APPLICATION NO. 95 OF 2022

(Originating from High Court of Tanzania at Dodoma in Land Case No. 38 of 2022)

ABDALLAH YUSUFU NDONGWE1ST APPLICANT

MOHAMED JUMA YUSUFU 2ND APPLICANT

VERSUS

IKUNGI DISTRICT COUNCIL..... 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

24th March & 5th June, 2023

KHALFAN, J.

The Applicants **ABDALLAH YUSUFU NDONGWE** and **MOHAMED JUMA YUSUFU**, filed this Application under Order XXVII Rule 1 (a) of the Civil Procedure Code, [CAP. 33 R.E 2022] supported by a joint affidavit of the Applicants themselves sworn on 28th day of October 2022 for orders that this Court be pleased to grant temporary orders against the 1st Respondent or his assignees or his agents from entering or mortgaging the Applicants' land measuring 8.7 acres located at Samumba suburb, Muungano Village within Ikungi District pending the hearing of Land Case No. 38 of 2022 which has been filed in this Court.



The Applicants were represented by Mr. Fred Kalonga, Learned Advocate while the Respondents were represented by Felician Daniel, Learned State Attorney. Prior to hearing of the application, Mr. Daniel raised a preliminary objection on point of law based on the following grounds:

1. This Application is incompetent for being supported by a defective affidavit containing hearsay.
2. This Application is incompetent for want of proper citation of enabling provisions to move this Court to determine the Application.

Mr. Daniel in supporting his preliminary objection, submitted that the Applicants' joint Affidavit especially paragraphs 5, 6, 9 and 11 contain hearsay information against the requirements of Order XIX Rule 3(1) and (2) of Civil Procedure Code. To support his contention, he cited the case of **Yobu Sikilo & 16 Others vs. Furahini Vahaye**, Misc. Land Application No. 105 of 2018, (HCT) Mbeya, page 7 and the case of **Dianarose Spareparts Ltd vs. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021, (CAT) Dar es Salaam, page 9.

Mr. Daniel contended that at paragraph 6 of the joint affidavit, they mentioned the names of the District Executive Director and District



Commissioner of Ikungi without producing their affidavits as required by the law. For such reason, he invited this court to strike out the application. On the second preliminary objection, Mr. Daniel stated that, the Applicants cited Order XXVII Rule 1 (a) of Civil Procedure Code, [CAP. 33 R.E 2022] in the Chamber Summons while the Civil Procedure Code is not among the laws which were revised in the year 2022 under the Government Notice. He added that Order XXXVII, Rule 1 (b) provides that an order for temporary injunction shall not be made against the Government but the Court may in lieu thereof shall make declaratory order on the rights of the parties. They ought to have prayed for declaratory order and not temporary injunction.

To cement his contention, Mr. Daniel cited the case of **Jimmy Lugendo vs. CRDB Bank Ltd**, Civil Application No. 171/01 of 2017, (CAT) Dar es Salaam, page 6 and the case of **John Marco vs. Seif Joshua Malimbe**, Misc. Land Application No. 66 of 2019, (HCT) Mwanza, page 6. Based on the above submission, he prayed for this Application to be struck out with costs.

Mr. Kalonga opposed the preliminary objections. He contended that the paragraphs which the learned Advocate stated that they are based on hearsay, are not based on hearsay statement as alleged. He thus prayed to the Court to overrule the preliminary objection.

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On second Preliminary Objection, Mr. Kalonga stated that, the citing of Order XXVII, Rule 1 (a) of the Civil Procedure Code, [CAP. 33 R.E 2022] in the Chamber Summons is a clerical error as they intended to write Order XXXVII, Rule 1 (a); and because this Court has jurisdiction to grant injunction, that omission is not fatal. He added that it is true that the temporary injunction shall not be made against the Government but the Court in lieu thereof shall make a declaratory order of the right of the parties. He therefore wound up his submission by praying the Court to overrule all the two grounds of preliminary objection as they are not meritorious.

In rejoinder, Mr. Daniel, insisted this Court to consider his submission and pray for this Court to struck out this Application. He added that the learned advocate for the Applicants had agreed with his contention that the affidavit contained hearsay statements, in particular paragraph 6, and on the cited provision of law by saying it was a clerical error.

I have duly considered the parties' submission, and how to determine the preliminary objections on point of law raised. I will start with the first point of preliminary objection.

It is the Respondents' contention that the Application is incompetent for being supported by a defective affidavit containing hearsay. I will agree with the learned State Attorney for the Respondents that the law under

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Order XIX Rule 3(1), and (2) of the Civil Procedure Code, [CAP. 33 R.E 2019] requires the affidavit to constitute facts which are in the knowledge of the deponent. The same provides:

'3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:

Provided that, the grounds thereof are stated.

(2) The costs of every affidavit which unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.'

Therefore, if the affidavit consists of hearsay statements, it shall be defective and the application supported by the same shall be rendered incompetent.

This Court has, therefore, examined the purported paragraph 5, 6, 9 and 11 and found that these paragraphs contain statements which are in the knowledge of the Applicants as required by the law. I am mindful of paragraph 5 in which they have stated that they have been the users of the land in dispute for decades. These facts are obvious from their knowledge unless the other bundle of facts exist to disprove the same.



Also, under paragraph 6, the Applicants have deponed facts on the meeting convened by the District Executive Director and District Commissioner of Ikungi on 30/12/2021 with the residents of Samumba; logically, by them being the residents of Samumba. And as per annexure OSG1 of the Respondents' joint counter affidavit which is the minute of such meeting, it is an undisputed fact that they attended the meeting and therefore such facts deponed are within their knowledge.

Moreover, in paragraphs 9 and 11, the Applicants raised the issue of survey, which should be read together with paragraph 7 in which the Applicants mentioned the valuation number given to them. That being the case, these paragraphs 9 and 11 as well cannot be taken as hearsay since they are clear facts from the Applicant's knowledge. Consequently, the first ground of preliminary objection is overruled.

Coming to the second ground of the preliminary objection that this application is incompetent for want of proper citation of enabling provisions to move the Court to determine the application, it is not disputed that the applicants have moved the Court under wrong provision of the law as admitted by their advocate despite contending that it was a clerical error and contended further that the omission doesn't waive jurisdiction of the Court to entertain this matter.



It is clear that the Applicants cited Order XXVII Rule 1 (a) of Civil Procedure Code instead of Order XXXVII Rule 1 (a). Similarly, instead of citing R.E 2019, they cited R.E 2022. However, it is not disputed that this Court has power to determine the application for temporary orders under Order XXXVII Rule 1(a) of the Civil Procedure Code, [CAP. 33 R.E 2019] which provides that:

1. Where in any suit it is proved by affidavit or otherwise-
a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:

Provided that, an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties.



In such circumstance, this Court is inclined to uphold the principle of overriding objective in rendering justice as enshrined under Article 107A (2) of the Constitution of the United Republic of Tanzania of 1977 as amended. This principle requires the Courts to have regard to substantive justice without being unnecessarily tied up by technicalities. I am, in this respect, mindful of Section 3A of the Civil Procedure Code [CAP. 33 R.E 2019]. It reads thus:

'3A.-(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).'

This position has been illustrated in various cases in our jurisdiction. See the case of **Hasira Mgeni vs. Kigoda Abas Kigoda**; Misc. Land Case Application No.183 of 2019 (HCT) Land Division, Dar es Salaam; **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No.55 of 2017, (CAT) and **Elizabeth Balali vs. Deodata Elias**, Misc. Land Case Application No. 167 of 2020 (HCT) Land Division, Dar es Salaam. In **Elizabeth Balali**, (supra) it was held that:

'...the issue of cited enabling provision section 38(1) of the Land Dispute Act, Cap 2016, section 14 of the Law of Limitation Act, Cap 89 and section 95 of the Civil Procedure



Code Cap 33 appears to be not fatal and can be cured under overriding objective principle.'

For the reason stated above, I resist the invitation by the learned State Attorney to struck out the application for want of proper citation of enabling provision to move this Court to grant the application. It is my considered view that the error of a wrong citation of enabling provision, as is the case in this matter, is not fatal as this Court has jurisdiction to determine the application. In the circumstances of the above, the second preliminary objection is overruled

Consequently the two preliminary objections are hereby overruled with no costs. The Applicants are allowed to insert the proper provision of the law through handwritten form. It is so ordered.

Dated at Dodoma this 5th day of June, 2023




F. R. KHALFAN
JUDGE