

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO. 76 OF 2021

**RAEL JOSEPH (As Administrator of the Estate of the Late
JOSEPH THOMAS)1ST APPLICANT**

TULITO ALARAHA.....2ND APPLICANT

MEPUKORI LEIYAN.....3RD APPLICANT

ALOYCE POROKWA.....4TH APPLICANT

ALAIS KUTITI.....5TH APPLICANT

ZAKARIA MOLLEL.....6TH APPLICANT

MEGOLIKI NGOONGEN.....7TH APPLICANT

PAULO MELUBO.....8TH APPLICANT

CHARLES MEPUKORI.....9TH APPLICANT

NGEITETA KIBIRITI.....10TH APPLICANT

SAIKOON LEMUKOKO.....11TH APPLICANT

SEDERI MIBAKU.....12TH APPLICANT

**ALAIS JOHN KULUO (As administrator of the
Estate of the late JOHN OLE KULUO)13TH APPLICANT**

KUNYALE MELANGIEMURTU.....14TH APPLICANT

MARIAS LEMWAANDE15TH APPLICANT
ALAI PAA LENDARKASHI16TH APPLICANT
MOSES SANGALE17TH APPLICANT
TERENGO KUNDEKI18TH APPLICANT
LUCAS ZAKARIA19TH APPLICANT
LESEESE LONGEJEK20TH APPLICANT
SIMON TENGES 21ST APPLICANT
MUSENGE LENGAI22ND APPLICANT
LEMALALI LEMUKOKO 23RD APPLICANT
KASANDE MUTUNDE24TH APPLICANT
LANDEI LEIYAN25TH APPLICANT
SOIPEI KURIANGA26TH APPLICANT
MASIAYA ALARAHA27TH APPLICANT

VERSUS

EMOREET VILLAGE COUNCIL 1ST RESPONDENT
ASSISTANT COMMISSIONER FOR
LAND MANYARA REGION 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

28/03/2022 & 30/05/2022

KAMUZORA, J.

The Applicants preferred this application under certificate of urgency seeking this court to grant a declaratory interim order to the effect that the Applicants have the right to occupy and use the land in dispute at Ilaimutiak area, in Emboreet village within Simanjiro District and the first and second Respondent have the right to manage the said dispute land without affecting the Applicants current right to occupy and use the said disputed land, pending the expiry of ninety(90) days statutory notice to sue the government, the filling, hearing and final determination of the main suit.

The application was made by way of a chamber summons supported by an affidavit deposed by one Rahel Joseph an administratrix of the estate of the late Joseph Thomas. The application was strongly opposed by the Respondents who filed a counter affidavit deposed by Olterere Lemtunde the Village chairperson of the 1st Respondent. Together with the counter affidavit the Respondents filed a notice of preliminary objection which reads: -

- 1) That, the application is incompetent and bad in law for non-joining of District Executive Director as a necessary party contrary to section 26 of the local Government (District Authorities) Act Cap 287 as amended by section 30 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.
- 2) That, the application is bad in law and unmaintainable for being sworn by incompetent person.
- 3) That, the affidavit of the Applicant is incurably defective as it contains hearsay and false information contrary to Order XIX Rule 3(1) of the Civil Procedure Code [Cap 33 R. E 2019]

On the date scheduled for hearing of the preliminary objection the Applicants were represented by Mr. Frank Stolla, learned Counsel while the Respondents enjoyed the service of Mr. Mkama Msalama and Mr. Clesphine Kaijage both learned State Attorneys.

Submitting in support of the 1st point of preliminary objection Mr. Msalama submitted that, this application is bad in law for not joining District Executive Director (DED) as necessary party contrary to section 26 of the Local Government (District authorities Act Cap 287 as amended by section 30 Written Laws Miscellaneous Amendment Act No

1 of 2020. That, this provision requires the DED to be joined in the suit filed against the village counsel or filed by the village executive counsel. That, the section gives the mandatory requirement by the use of the word SHALL and as per section 53 (2) of the Law of Interpretation Act Cap 1 RE 2019, where the word SHALL is used it imposes the mandatory requirement. That, in the application before this court the Applicant sued the village council of Embulet but did not join the DED of Simanjiro as so required by the law thus prays that the application to be struck out.

Submitting for the 2nd point of preliminary objection Mr. Mkama argued that, the application is bad in law and unmaintainable for being sworn by incompetent person. He pointed out that, this application is supported by the affidavit of Leah Joseph who is the first Applicant who claimed to be the administrator of the estate of Joseph Thomas. That, the first Applicant could not bring this application as administrator as she had no letter of administration of the estate of the deceased Joseph Thomas thus, she has no locus standi. That, the locus standi is the jurisdiction issue touching the jurisdiction of the court as per the case of **God bless Jonas Mrema Vs Musa Hamis Mkanga and two other**, Civil Appeal No. 47 of 2012 pgs. 11 and 12. Mr. Msalama maintained

that, in this application the person who sworn the affidavit did not show if she had locus standi as administrator of the estate of Joseph Thomas or the owner of the disputed property. That, failure for the 1st Applicant to show that her right was infringed or she is the administrator of the estate means that she has no right to file this application or swear the affidavit in support of the application. To cement on this issue, he cited the HC case at Musoma in **Thobias Yakobo Malimbwa Vs Gatawa Magomba and 18 others**, Misc. Land Appeal No 10 of 2021 pg5 as well as the CAT decision in **Ally Ahmed Mbauda (Administrator of the estate of the late Amina Hussein Senyange) Vs Raza Hussein Ladha Damji and 2 others**, Civil Application No. 525/17 of 2016 pg. 14. The Mr. Msalama contended that, the circumstances in those cases are similar to the case at hand as the 1st Applicant did not show if she is the administrator of the estate thus, she has no locus standi to file the application or swear the affidavit in support of application.

Regarding the 3rd point of preliminary objection Mr. Msalama submitted that, the affidavit of the Applicant is incurable defective as it contains the hearsay and false information contrary to Order IX Rule 3(1) of the CPC Cap 33 RE 2019. He argued that, it is the requirement of

the law that the affidavit must bear the facts which the deponent believes them to be true to his/her own knowledge. That, the 1st Applicant in her affidavit stated that, she is the administrator of the estate of the deceased Joseph Thomas while she is not. That, paragraph 2, 3 and 13 also carries false information while the 1st Applicant's deponent stated that all Applicants are owners of the disputed land situated at Simanjiro District other Applicants denied the fact that they sent the Applicant to file the application and they claim not to be owners of the disputed land. That, the facts that all Applicants are owners of the disputed land is false information. That, claim under affidavit that the Applicants were allocated and are now occupying the land is false information as the land is occupied by the 1st Respondent Embolet village. Mr. Msalama prays for this court not to rely on the affidavit which contains false information referring to the case of **Igazio Mesina Vs Willow Investment SPRL, Civil Application No 21 of 2001** pg. 4 and the case is **Kidodi Shuga Estate and 5 others Vs Tanga Petroleum Co. Ltd, Civil Application No 110 of 2009** CAT at DSM at pg. 4 to 5.

Responding to the submission from the Respondent's counsel Mr. Stolla submitted on the first point of objection that, it is true that the

Local Government (District Authorities) Act is amended by Act No 1 of 2020 by amending section 20 of the Act. That, subsection 2 added to section 26 declared the right of the DED to be joined and it is not the duty of the plaintiff or the Applicant to join the DED. He argued that, the DED can join in the suit already instituted thus, the matter can be instituted without impleading the DED but if the DED intends to join, he has right to be joined. That the Village Counsel, shall have the duty to notify the DED of the any impending suit or the intention to institute a suit or matter against the village counsel. Mr. Stolla submitted and insisted that, the application before this court is an impending matter and the Village counsel who is the 1st Respondent has a duty notify the DED so that if the said DED wishes to join, then can exercise that right to be joined.

Mr. Stolla further submitted that, even if it would be mandatory to join the DED still this aspect would be cured by the provision of Order I Rule 10 (2) of the CPC which provide among other things that at any stage of the proceedings, either upon or without application of either party, the court may order that the name of any person who ought to be joined whether as a plaintiff or defendant be added. He was of the view that, the effect could not be to struck out the application as proposed by

the counsel for the Respondent. Reference was made to the case of **Baraka Imanyi Tyenyi Vs Tanzania Electric Supply Ltd**, Civil Appeal No 38 of 2019 CAT at Mwanza(unreported) pg. 3 which referred the case of **TPB Bank PLC (the successor in title of Tanzania Postal Bank) Vs Rehema Alatunyamadza and 2 others**, Civil Appeal No 155 of 2017 (unreported) paragraph 4. He submitted that, the court simply refrained from striking out the appeal for non-joinder and gave leave to the appellant to include the party who was not joined. He stressed that, Order I Rule 9 of the CPC provides that a suit shall not be defeated by reason of misjoinder or non-joinder.

In response to the second PO Mr. Stolla submitted that, Rael Joseph has two capacities, first, she is the 1st Applicant by virtue of being the administratrix of the estate of the late Joseph Thomas and the second capacity is that, she is the deponent of the affidavit supporting the chamber summons. That, she is amongst other Applicants and not the sole Applicant in this application.

On the argument by the counsel for the Respondent that the 1st Applicant has no locus standi and that she did not **prove** that she is the administrator of the estate, Mr. Stolla submitted that, by the use of the word **prove** the counsel is inviting this court to evaluate evidence and

decide whether there is evidence to prove that the 1st Applicant is an administratrix of the estate of the deceased. He argued that, such PO is not a pure point of law because it invites proof of facts that the 1st Applicant is an administratrix of the deceased estate. He insisted that, the affidavit itself states categorically that she is the administratrix of the estate of the Late Joseph Thomas and in the counter affidavit that fact was not controverted. To cement on that issue, he cited the case of **OTTU on behalf of PL Asenga and 106 others Vs Ammi Tanzania Ltd**, Civil Application No 35 of 2011 CAT at DSM (unreported) pg 13 which quoted with approval the case of **Mukisa biscuits Manufacturing company limited Vs Westend distributors Ltd** 1969 EA 696 to the effect that no preliminary objection can be raised if some facts have to be ascertained or which if argued would not dispose of the suit.

Responding to the third objection that the affidavit contains hearsay and false information, Mr. Stolla submitted that, matters concerned hearsay are contained in the evidence Act Cap 6 RE 2019 from section 34. That, section 2 of the Evidence Act provides that the Evidence Act does not apply in affidavits thus, this means that the provision of section 34 of the Evidence Act does not apply to affidavit.

Regarding the falsehood of the facts in the affidavit Mr. Stolla submitted that, whether a certain fact in an affidavit is true or not has to be controverted by another affidavit or if it is admitted by the deponent of the affidavit to be false which are all matters of facts or evidence. Therefore, that, they cannot fit to be called points of law because they attract evaluation of evidence. To support his argument, he cited the case of **Jackson Sifael Mtaresi and 3 others Vs the Director Public Prosecutions**, Civil Appeal No. 180 of 2019 CAT at DSM (unreported).

Mr. Stolla also argued that, in the 3rd PO the Respondent's counsel brought this argument prematurely because this would have been dealt with in the substantive application when the parties will be evaluating evidence. That, the paragraphs that the learned counsel cited, 2, 3 and 13 are on substantive part of the application inviting the court to analyse the strength of the evidence which is not a pure point of law.

In concluding, Mr. Stolla pray this court to find that all three limbs of the 1st objection have no merit because the PO does not have the effect to finalise the application within the principle laid down in Mukisa Biscuits. That, the court should also find that the 2nd PO is premature and invites the analysis of evidence thus not a pure point of law and the

3rd PO is basing on evidence thus a matter of fact and not a matter of law. He thus prays for the three preliminary points of objection to be overruled with costs for being devoid of merit.

In a rejoinder submission Mr. Msalama stated that, the counsel for the Applicant cited authorities which was not supplied to this court, thus if the same are not supplied, then they should not be considered by this court. Re-joining on the first PO the counsel added that it is not the duty of the Applicant to join the DED where the Village counsel is sued. That, section 30 of Act No 1 of 2020 gives the obligation to the person suing the village and obligation to the village council to notify the DED for the pending suit in court. That, if the suit is instituted by the village, the village shall join the DED and if the suit is instituted against the village the one instituting the suit is bound to join the DED.

On the argument that the application can be cured by Order I Rule 10 Mr. Msalama submitted that, that provision is applicable where the person sued is the wrong person. That, the cited provision is inapplicable to the application at hand. He also added that, Order I Rule 9 mentioned by the counsel for the Applicant is not related to the PO.

On the second PO, Mr. Msalama submitted that, being administrator of the estate to attain the locus stand is a legal matter

which does not require evidence as per section 33 of the Probate and Administration of Estate Act. To cement on this issue, he cited the case of **Dima Dominick Polo Vs Inyani Godfrey and another**, Civil Appeal No. 0017 of 2016 Uganda High Court. That the 2nd PO is pure point of law and the application is incompetent.

Regarding the claim that they did not state anything in the counter affidavit that the deponent is not the administratrix Mr. Msalama referred page 2 paragraph 3 of the counter affidavit which shows that they stated that Leah has no locus standi. Mr. Msalama insisted that, there is a pure point of law which does not require the court to evaluate the evidence as suggested by the counsel for the Applicant. He explained that, as per Order IX the affidavit must contain true information to the knowledge of the deponent. That, the affidavit by Leah contains false information as she was never appointed administrator of the estate of the late Joseph Thomas. That, the facts in the case of Jackson Sifael cited by the counsel for the Applicant is different from the PO in this application as the case at hand does not relate to verification clause except that Leah claim to be the administratrix of the estate and that all Applicants are owners of the disputed properties while others refused that fact. The Respondents

pray the court to find the PO meritorious and uphold the same and struck out the application with costs.

After analysing the submissions from the counsel for the parties for I will now discuss the raised objections as they were laid down by the Respondents.

Starting with the first point of preliminary objection the issue for adjudication before this court is whether the application is incompetent for non-joinder of the District Executive Director as a necessary part to the suit. It is the claim by the Respondent that pursuant to Section 26 of the Local Government (District Authorities) Act Cap 287 as amended by section 30 of the written Laws (Miscellaneous Amendment) Act No. 1 of 2020 it is mandatory requirement to join the DED in the suit involving the Village Council. Section 30 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 states that,

“ The Principal Act is amended in section 26, by adding immediately after subsection (2) the following:

(3) Notwithstanding subsection (2), the District Executive Director shall have the right to be joined as a party in any suit or matter instituted by or against the Village Council and for that purpose the village Council shall have a duty to notify the District Executive

Director of any impending suit or intention to institute a suit or matter against the village Council.”

It is apparent from the cited provision that, the law gives the District Executive Director the right to be joined as a party in suit or matter involving the village council. More to say for the said District Executive Director to exercise that right, the law imposes a duty to the village council who is the 1st Respondent herein to notify the DED of any impending suit against the village council. The wording of the provision does not suggest that the suit filed without impleading the DED is defective. As per the provision, the DED has a right to choose to exercise his right to be joined as a party in suit like the present one and in fact the law imposes the duty to the Village Counsel to notify the DED of the existence of a suit before the court. I therefore find that not impleading the DED is not fatal and if the DED is so interested, can still apply to be joined in the case. The 1st point of preliminary objection lacks merit and its hereby overruled.

Coming to the 2nd point of preliminary objection, it was alleged that the application is bad in law and unmaintainable for being sworn by incompetent person. It was alleged that the Applicant deponed the affidavit under capacity as administrator of the estate of Joseph Thomas

there is no evidence proving that she was appointed in that capacity and thus she has no locus standi. That was opposed by Mr. Stolla on account that counsel for the Respondent is calling for evidence that the 1st administrator is an administratrix of the estate of the deceased thus not a pure point of law.

The 1st Applicant in this matter is not appearing in her personal capacity but as administrator of the estate of the late Joseph Thomas. In that regard, she became part to this application for purpose of protecting the interest of the deceased. In my view, the 1st Applicant was supposed to clear her legal status which gave her the capacity to claim interest in court. In other words, it was necessary to attach the letter of appointment to the affidavit in support of application for the court to be sure that the 1st Applicant had legal capacity to depone the affidavit in protecting the interest of deceased. That was so held in the case of **Ally Ahmed Bauda (Supra)** cited by the counsel for the Respondent. The decision in **Ally Ahmed Bauda** was also adopted by the Court of Appeal in Civil Application No. 173/12 of 2021, **Ramadhani Omary Mbuguni (a Legal Representative of the late Rukia Ndaro) Vs Ally Ramadhani and Asia Ramadhani**. In that case, like in the present matter, the Applicant represented himself as the

administrator of the estate of the deceased without attaching in his affidavit any letters of administration to that effect. The Court of Appeal held that which held that;

"Letters of administration being an instrument through which the Applicant traces his standing to commence the proceedings, was in our view an essential ingredient of the application in whose absence the Court cannot have any factual basis to imply the asserted representative capacity. It is now a settled law that, where, like the instant case, a party commences proceedings in representative capacity, the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceedings incompetent for want of the necessary standing."

I therefore agree with the counsel for the Respondent that the competency of the application goes together with the justification that the person standing in court had legal capacity in the sense of locus standi. In this case, by failure to attach the letters of administration proving that she was appointed administratrix of the deceased Joseph Thomas, the 1st Applicant failed to justify her representation capacity and for that matter, the affidavit deposed by her cannot stand to support the application. Since there is no affidavit in support of

application, the application become incompetent. The second point of objection is therefore found to have merit it is hereby sustained.

Regarding to the 3rd point of preliminary objection that the affidavit contained hearsay evidence in contravention of Order XIX Rule 3(1) of the CPC Cap 33 R. E 2019, it is my finding that much as the affidavit by 1st Applicant was found incompetent not supporting the application, it will be wastage of time to discuss the content of such an affidavit.

In the upshot and based on the 2nd point of objection, this court find that this application is incompetent for being supported by the affidavit of Leah Joseph who was unable to justify her representation capacity. The application is therefore struck out for being incompetent before the court with costs.

Order accordingly,

DATED at **ARUSHA** this 30th day of May, 2022.



A handwritten signature in black ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE