

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CIVIL APPLICATION NO. 317 OF 2017

**THE REGISTERED TRUSTEES OF SEVENTH
DAY ADVENTIST (SDA) APPLICANT**

VERSUS

- | | | |
|--|---|--------------------------|
| <ul style="list-style-type: none">1. MS. SALUM MBARUKU & 8 OTHERS2. MS. SUFIAN SALUM a.k.a Sufian Salim3. MS. SWALEHE SALUM4. MBARUKU SALIM5. MS. SAIMON LOMBWETI a.k.a Saimon Lombwetu6. MS. DAUDI SITABAU7. MS. SAIKODIE MBAVAI a.k.a Saikodie Mbavae8. MS. NAVARANA KISIONGONI9. THE OLASITI AREA LEADER | } | RESPONDENTS |
|--|---|--------------------------|

**(Application for Revision from the decision of the High
Court of Tanzania at Arusha)**

(Moshi J.)

**dated the 1st day of October, 2015
in
Civil Appeal No. 31 of 2015**

.....

RULING

9th March, 2018 & 15th August, 2019

MUSSA, J.A.:

By a Notice of Motion, the applicant seeks an extension of time within which to mount an application for revision with respect to the decision and

decree of the High Court (Moshi, J.) dated the 1st day of October, 2015 in Civil Appeal No. 31 of 2015.

The application is supported by an affidavit sworn by Mr. Jeremiah Kwaang'w Siay who happens to be the learned Advocate for the applicant. In addition, the applicant has lodged written submissions in support of her quest.

On their part, the respondents resist the application through an affidavit in reply sworn by their learned advocate, namely, Mr. Meinrad Menino D'souza. The respondents have just as well lodged written submissions in reply to the written submissions lodged by the applicant. In addition, the respondents have greeted the application with a Notice of preliminary points of objection to the following effect:-

- "1. That the application is incurably defective for adding the 9th respondent, **the olasiti area leader** who is not a party to the proceedings arising from Enaboishu Primary Court Civil Case Number 1/2003 without leave of the Court.*
- 2. That the Application is incurably defective for inserting wrong, names of the 1st to 8th Respondents."*

When the application was placed before me for hearing, the applicant was represented by Merris Elvaison Maro and Jeremiah Siay, learned Advocates, whereas the respondents had the services of the already mentioned Mr. Meinrad D'souza who was being assisted by Ms. Mariam Mrutu, also learned Advocates.

To appreciate the pith of the learned contending arguments either in support of or in opposition to the preliminary points of objection, I think a brief background of the factual setting giving rise to the application is necessary.

From the supporting affidavit of the applicant, it comes to light that this matter originates from a protracted dispute over ownership of a parcel of land located at Olasiti area within the City of Arusha. I propose to hereinafter refer to this parcel of land as "the suit land."

According to the applicant, the suit land which measures 230 meters in length and 110 meters in width was allocated to her way back on the 28th February 1989, by what used to be the Olasiti Village Council. A good deal later, in the year 1996, several persons allegedly encroached on the suit land without the applicant's permission. That prompted the applicant to institute Application No. 65 of 2005 in the Arusha District Land and

Housing Tribunal through which she sought a declaration that the suit land belongs to her and the eviction of the alleged encroachers. As it turned out, the application was instituted against ten persons, namely, Daudi Saitabau, Saimon Lombeni, Saniki Melaiyeki, Ramadhani Salim, Saikodie Mbavae, Mrs Salim Mbaruku Navarana, Kisiongoni Samoye Azizi, Mbaruku Salim and Lessian Kisiongoni. At the height of the proceeding, on the 5th December, 2012 the Tribunal chairperson pronounced judgment in favour of the applicant followed by an eviction order against the respondents there.

In the immediate aftermath, the respondents sought to impugn the decision of the Tribunal through the High Court Land Appeal No. 28 of 2013 but, on the 8th June 2014, the appeal was adjudged time barred and, accordingly, dismissed (Mwaimu, J.) They, again, lost in a further quest to obtain leave to appeal to this Court which was similarly dismissed on the 24th April, 2015 (Moshi, J.). The way it appears, thereafter, the matter was left to lie where it fell.

In the meantime and, allegedly, unknown to the applicant, earlier in the year 2003, the chairman of Olasiti Village had instituted Civil Case No. 1 of 2003 in the Primary Court of Enaboishu over ownership of the same

suit land. Incidentally, in that suit, the defendants were, respectively, the first to eighth respondents herein. It is, perhaps, pertinent to observe, at the very outset, that the applicant was not a party to this suit. At the end of the suit, on the 20th January, 2004 the trial court pronounced judgment in favour of the defendants who are the respondents herein. The plaintiff was aggrieved but on appeal to the District Court of Arusha the first appellate court found no cause to vary the verdict of the trial court.

In a further development, the respondents sought and obtained an ex parte execution order of the Primary Court of Enaboishu in an effort to enforce its judgment. It was whence Mr. Siay the learned counsel for the applicant got wind and was seized of the impending decision of the Primary Court. He took prompt action by writing a letter of complaint to the Resident Magistrate in-charge on the 1st July, 2015. The latter, similarly, promptly gave a revisional order on the 7th July, 2015 and, in the upshot, the proceedings comprised in the Enaboishu Primary Court Civil case No. 1 of 2003 were nullified for want of jurisdiction.

Dissatisfied with the revisional order of the District Court, on the 4th August, 2015 the respondent preferred Civil Appeal No. 31 of 2015 in which the applicant was not a party. As it were, the appeal was directed

against the chairman of Olasiti Village who, incidentally, was the claimant in the Enaboishu case. In their memorandum of appeal, the respondents herein who were appellants there sought to impugn the revisional order, *inter alia*, on account of not being afforded an opportunity of being heard and, additionally, for being misled by Mr. Siay's who, according to them, had no *locus standi* to apply for revisional orders. At the hearing of the appeal, the respondents herein (appellants) were represented by Ms. Mariam Mrutu, learned Advocate, whereas the respondent there entered appearance through Mr. Bruno Mbole who was a street chair at the material times. As regards what transpired in court, it is best if I fully extract from the proceedings:-

"Bruno Mbole: *I am surprised as we were not called to the hearing of Civil Revision No. 23/2015, Arusha District Court. Either I do not know Advocate Siay, I did not instruct him. We do not have objection to the Appeal.*

Ms. Mariam: *We pray that the appeal be granted as prayed"*

Having heard the representatives of either party, the court proceeded thus:-

" JUDGMENT ON ADMISSION:

The respondent has conceded the Appeal. I allow the Appeal as prayed in the Appellant's memorandum of Appeal. I enter judgment on admission and decree to the following effect:-

- 1. Orders made in Arusha District Court Civil Revision No. 23/ 2015 are quashed.*
- 2. The appellants are declared the lawful owners of the suit land.*
- 3. No orders as to costs are made*

*Signed
S.C. Moshi
JUDGE
01/10/2015"*

As I have already intimated, the applicant presently seeks an extension of time within which to mount an application for revision so as to impugn the foregoing decision of the High Court (Moshi, J.)

On their part and as I have, again hinted upon, the respondents resist the application and have additionally enjoined two preliminary points of objection which I have already particularized.

Addressing me on the first preliminary point of objection, Mr. D'Souza submitted that in the originating proceedings which were instituted at Enaboishu Primary Court, the claimant captioned himself as **"MWENYEKITI WA KIJIKI OLASITI"**. Indeed, he said, he retained the name in the appeal that was dismissed by the District Court as well as in the High Court Civil Appeal No. 31 of 2015 which gave rise to the application at hand. Surprisingly, the learned counsel for the respondents urged, in the application at hand, the referred **"MWENYEKITI WA KIJIKI OLASITI"** is not impleaded as such, rather, it is **"THE OLASITI AREA LEADER"** who is, instead, joined as the 9th respondent. In sum, Mr. D'Souza contended that the joinder of the 9th respondent, who was not a party to the proceedings of the three courts below, incurably vitiates the application. As regards the second preliminary point of objection, Mr. D'souza faulted the applicant for inserting the title **"MS"** ahead of the names of the respondents, save for the 9th respondents. The titles, he said, were not comprised in the respective pleadings of the three courts below and the changes were made without leave of the Court. To buttress his contentions, the learned counsel for the respondents' sought reliance on three decisions of the Court: **Felix Tumbo Kisima v. Tanzania**

Telecommunications Co. Ltd [1999] TLR 395; Civil Application No. 12 of 2007 – **K.S.F. Kisombe v. Tanzania Harbours Authority and Others** and; Criminal Appeal No. 359 of 2013 – **Denis Kasege v. The Republic** (both unreported).

In reply, Mr. Maro readily conceded the second preliminary point of objection but, he was quick to rejoin that the misnomer can be cured by striking out the offending titles "**MS**" against the names of the first to eighth respondents. The learned counsel for the applicant, nevertheless, resisted the first point of preliminary objection. He charged that the change in the title of the 9th respondent were necessitated by a restructuring which was explained by the Ward Executive Officer in a letter which is comprised at page 93 of the record of revision. Mr. Maro further referred to the Arusha City Establishment Order comprised in Government Notice No. 341 of 2011.

I have carefully considered the learned rival submissions from both sides. I should remark at once that both the raised preliminary points relate to changes in the particulars of the respondents which were not in the original pleadings. In particular, in the first point of objection, the issue of concern is on the abrupt captioning of the 9th respondent from the

original name of **"MWENYEKITI WA KIJJI OLASITI"** to **"THE OLASITI AREA LEADER."**

As regards the second point of objection, the concern is on addition of the prefix **"MS"** ahead of the names of the first to eighth respondents. If I may cull from the Oxford Advanced Learner's Dictionary, the prefix **MS** relates to:-

"A little that comes before a woman's' family name or before he first and family names together and that can be used when you do not want to state whether she is married or not"

Addressing both points of objection, it is noteworthy that amendments of documents comprised in applications are governed by rules 20 and 50 of the Tanzania Court of Appeal Rules, 2009 (the rules). To cull from the referred provisions, it seems to me that all applications whether formal or informal for amendments of documents have to obtain the prior leave of the Court.

To say the least, in the matter under my consideration, the impugned titles of the respondents were effected by the applicant single handedly without the prior leave of the Court. Thus, in fine, the preliminary points


of objection sail through and the application is, accordingly, struck out with costs.

DATED at DAR ES SALAAM this 1st day of August, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

The Ruling delivered this 15th day of August, 2019 in the presence of Mr. Jeremiah Siay counsel for the applicant and Ms. Anna Ngoti holding brief of Mr. Meinrad D'Souza for the Respondents is hereby certified as a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL