

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 186 OF 2017
(Arising from the Land Case NO. 103 OF 2017)

JONIA KENGELI MAKENE.....APPLICANT

VERSUS

SAID ABDALLAH MAHELA.....1ST RESPONDENT

CAPT. EDWIN MUJUMA.....2ND RESPONDENT

ERNEST MLINGI.....3RD RESPONDENT

Date of the last Order, 20th April 2018
Date of the Ruling 1st June 2018

RULING

SAMEJI, K. R. J.

The applicant herein has filed this Application under Sections 68 (c)(e); Order XXXVII Rule 1(a) and Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 [R.E 2002] seeking the Court to grant the orders for exparte and inter-parties:-

- (1) That, this honourable court be pleased to dispense with the mandatory requirement of the provisions of Order XXXVII Rule 4 of the Civil Procedure Code Cap. 33 R.E. 2002 to issue notice to the respondents in determining prayers (ii) and (iii) below;*

- (2) *That, the honourable Court be pleased to issue interim order restraining the respondents, their assigns, agents and/or representatives from trespassing into the suit premises comprised under the letter of offer of a Right of Occupancy with Ref. No. Ksw/1218/1/MSH (known as farm No. 360) dated 16th February 1991 issued by the Kisarawe District Council, the property of the applicant and the late Prof. William Josbert Makene;*
- (3) *That, this honourable Court be pleased to issue an interim order restraining the 1st respondent, his assigns, agents and/or representatives acting under the authority or power and/or command of the 1st respondent from disposing of a parcel of land of the suit premises comprised under the letter of offer of a Right of Occupancy with Ref. No. Ksw/1218/1/MSH and dated 16th February 1991 issued by the Kisarawe District Council, the property of the applicant and the late Prof. William Josbert Makene;*
- (4) *costs of this suit; and*
- (5) *any other relief the court may deem just to grant.*

On the other hand, the 1st and 3rd respondents have filed a Counter Affidavit accompanied with Preliminary Objection that the applicant *has no locus standi to file the Application*.

A brief background to the application as obtained from the record and submissions of the Counsel for the parties indicates that, the genesis of the matter is the administration of the estates of the late Prof. William Josbert Makene who died intestate on 31st December 1998. Pursuant to his death his wife, the plaintiff/applicant herein petitioned for letters of administration to administer the estate of her late husband and she was appointed an Administratrix of the estate of the late Prof. William Josbert Makene on 16th May 2002. However, on 19th September 2005 her appointment was revoked by the Court and instead the Administrator General was appointed to administer the said estate. After a long process of administering the said estate, on 12th December 2017, the said Administrator filed the Final Accounts in Court in respect of the said Estate stating that, had dully administered the said estate. Subsequently and after being satisfied with the duty performed thereto, on 14th December 2017, the Court discharged the Administrator General from administering the said estate and accordingly marked the estate of Prof. William Josbert Makene

where she was once appointed an Administratrix, but later her letters were revoked and Administrator General was appointed. He further referred to Order XXX Rule 1 of the Civil Procedure Code, CAP. 33 R.E.2002 and then argued that, since the Administrator General was the one administering the estate of the deceased, is the one with all rights and *locus standi* to sue and be sued on the estate. Mr. Msumi argued further that, the plaintiff/applicant herein has no right or locus standi in her own capacity to file the Suit or Application on the deceased's estate. To buttress his position, Mr. Msumi referred to the case of **Lujuna Shubi Ballonzi V Registered Trustees of Chama Cha Mapinduzi**, Civil Case No. 214 of 1992 reported in [1996] TLR 203 (HC); where it was held that:-

*"...in this country, **locus standi** is governed by common law. According to that law, in order to maintain proceedings successfully, **a plaintiff or an applicant must show not only that the court has power to determine the issue, but also that he is entitled to bring the matter before the court**". [Emphasis added].*

And argued that, since the plaintiff/applicant has no *locus standi* before the Court, even the plaint and the Chamber Application filed before this Court are incurably defective and should be dismissed with costs.

In response, Mr. Mshukuma argued that, the point of objection raised by Mr. Msumi is misconceived and do not qualify to be a point of preliminary objection per excellence, as it does not meet the tests enunciated in the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** [1969] EA 696. He further referred to the decision of the Court of Appeal in Sugar **Board of Tanzania V 21st Century Food & Packing and 2 Others**, Civil Application No. 49 of 2005 where it was held that:-

"...A preliminary objection is in the nature of a legal objection not based on the merit or facts of the case, but on stated legal, procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirement is that any alleged irregularity must be apparent on the face of the notice of motion so that the objector does not condescend to affidavits or other documents accompanying to support the objection".

He said the point of objection raised is mixed with facts which require evidence to be proved. Mr. Mshukuma admitted that, the Administrator General was appointed to administer the estate of the deceased on 19th September 2005 after the letters of administration for the plaintiff/applicant were revoked on 18th March 2003. He however noted that, the Administrator General did not take over that role immediately till 30th March 2017, when the High Court, charged her to carry out her duties in accordance with the law. He said, before assuming such duties, the applicant had informed the administrator the respondents' trespass into the suit land but the Administrator could not take up the matter and or take any action. He referred to paragraphs of the Affidavit and claimed that there is no doubt that the applicant has an interest in the disputed land and that under the **Lujuna Shubi Balanzi's** case she has the *locus standi* to bring the suit before the Court to protect her interest. He finally prayed the Court to overrule the point of the objection raised by the 1st and 3rd defendants/respondents as it is misconceived.

Having thorough perused the rival submissions by both sides and the Application herein, I am settled that the main issue for determination is *whether the preliminary objection raised by the respondents is meritorious.*

It is trite law that, for one to have capacity to bring suits under the estate of the deceased person, must be an Administrator/Administratrix or executor/executrix of the said estate. If one fails to demonstrate such capacity the suit or application thereto shall be rendered incompetent. See the case of **Tanzania Ports Authority v Ali Abdallah Mbelwa**, Misc. Civil Application No. 2 of 2015 at page 6-7, where the High Court at Tanga struck out the Application for the same reason.

It is on record that, the subject matter of the suit filed by the plaintiff/applicant herein is the suit property which is among the estates of the late Prof. William Josbert Makene. This is clearly indicated under paragraph 7 of the Complaint, paragraph 1 of the Affidavit in support of the applicant's Application and even prayers made under the complaint and the Application. The said issue is also admitted and indicated in the written submissions by the Counsel for the parties.

It is also on record that, the plaintiff/applicant herewith was once appointed an Administratrix for the said estate, but the same was revoked by the court, hence she had since ceased to be a legal representative of the estate of the late Prof. William Josbert Makene. Therefore, from 19th

September 2005, the duly appointed legal representative and administrator of the estate of the late Prof. William Josbert Makene is the Administrator General, who performed the said duty and duly executed her duties till 14th December 2017 when she was discharged from that duty and the same was marked closed. The plaintiff/applicant herein filed the *Land Case No. 103 of 2017* and *Misc. Land Application No. 186 of 2017* in her own individual capacity and not as an Administratrix or even executrix of the Estate of the late Prof. William Josbert Makene. It is trite law that, suits brought under the capacity of an administrator or executor of the estate, the applicant must indicate the capacity he/she is acting upon. See section 40 of the Probate and Administration Act, Cap 352 [R.E.2002] allows, upon application, the interested parties in the estate of the deceased to be joined and appointed administrator(s). Furthermore, Order VII Rule 4 of the Civil Procedure Code provides specifically that:-

*"Where the **plaintiff sues in a representative** character the **plaint shall show not only that he has an actual existing interest** in the subject matter, but that he has taken the **steps** (if any) necessary to enable him to institute a suit concerning it."*
[Emphasis added].

From the above provision, it is a position of the law that, a person bringing a matter to court should be able to show in which capacity he/she is suing and his or her interest therein, (*the locus standi*). For a person to have interest in a suit he must be either a registered owner of the property or an administrator/Administratrix and/or *executor/executrix*. See the case of **Costantino Haluka V. Pius Lupala**, (PC) Civil Appeal No. 1 of 1999 High Court at Mbeya [Unreported], **Lujuna Shubi Ballonzi's** case (supra); **Rahim Hassan V Board of Directors of the Agakhan Hospital** (2007) HC (Unreported) and **Ibrahim Rashidi Mohamed V Ernest Sembe** Land Case Appeal No. 28 of 2014, HC of Tanzania at Tanga (Unreported).

In the case at hand and as clearly submitted by Mr. Msumi, the applicant though claiming that, the suit land is among the estate of the late Prof. William Josbert Makene, but she has not indicated the capacity in which she is bringing the said matter.

I have as well noted that one of the document relied upon by the plaintiff/applicant in bringing the matter is *Annexure KA/2* attached to paragraph 8 of the plaint and *Exhibit KA/2* to paragraph 2 of the Affidavit in support of the Application. I have since perused the said Annexures, which are on the *Valuation Report* prepared for the Administrator. At page

2 of the said Report, it is clearly indicated that the plaintiff/applicant was registered for Farm No. 360, as the legal personal representative of the late Prof. William Josbert Makene. It is therefore clear that, the plaintiff/applicant has no capacity to bring the matter in her own capacity. The suit property being a property of the deceased, the plaintiff/applicant was supposed to show not only that she has actual existing interests on the suit premises, but also the steps she has taken necessary to enable her to institute the suit or proceedings concerning the suit premises. The appellant was expected to produce a certificate of title over the suit premise on her own name, if the property is hers (either customary or right of Occupancy), or letters of administration granted to her by the court or the WILL appointing her an executrix to execute the probate. I have perused the entire record of both the plaint and the application to find what gave the applicant the capacity to sue and prosecute this matter, but none was found.

It is also on record that, the said estate was already administered and the matter is now closed as the administrator has been discharged. Even this Court had since rendered *functus officio*, as there is no any estate to administered. The only remedy that was available to the plaintiff then was,

if not satisfied with the work performed by the administrator, could have taken the necessary steps as provided for by the law, but not to sue on her own name.

Since, the matter has already been determined and the estate of the late Prof. William Josbert Makene has been marked closed, the plaintiff/applicant has no *locus standi* to bring the suit/application on the deceased estate. The act of the plaintiff/applicant of not observing the requirement of the law legal procedures and the had since rendered the suit and the Application before me legally un-maintainable.

I am aware that in his submission Mr. Msumi had since argued that, the points of preliminary objection raised by the defendants/respondents is not purely point of law as per excellence and do not qualify the test of a preliminary objection indicated in the case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Company Ltd**, (supra). He argued that, in order for the Court to determine as whether the plaintiff has *locus standi* or not has to receive evidence from the parties or go through the plaint to detect the same. With due respect to Mr. Msumi, going through the plaint and its annexures to determine if the matter has been properly filed before the Court cannot be taken to

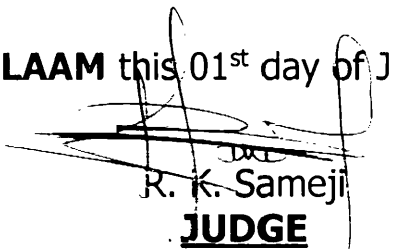
water down the point of preliminary objection raised. It is obvious that, the question whether a party has a *locus standi* to bring a matter before the Court as envisaged under Order VII of the Civil Procedure Code, (supra), is a legal matter, which can be determined upon perusal of the plaint itself together with annexures attached thereto, without requiring parties to adduce facts of the case as claimed by Mr. Msumi. I have further observed that, Mr. Msumi had since requested the Court in determining the rights between the parties to consider substantive justice and should not be tied up by technicalities and as such, prayed the Court to dismiss the preliminary points of objection.

I must emphasize that, while I do support the sentiment that, courts should not be tied up by technicalities when administering justice, but I should remind Mr. Mshukuma that, courts are creatures of statutes and are regulated by laws. Though, Article 107 A of the Constitution of the United Republic of Tanzania 1977 provides that courts should not be tied up with technicalities, there are mandatory principles and rules, which must be observed by courts in the process of administering justice. As clearly elaborated above and argued by Mr. Msumi, the issue of *locus standi* is a pure point of law and also one of those fundamental issues that cannot be

waived by any court of law. Again, with due respect, to Mr. Mshukuma a party cannot bring a matter to the case without having a necessary *locus standi* before the Court.

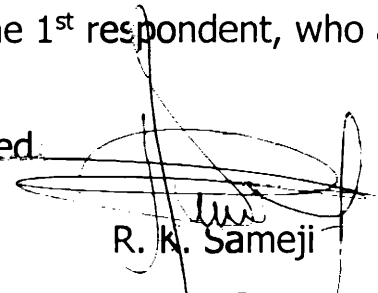
In the upshot, I uphold the preliminary objection raised by the 1st and 3rd defendants/respondents and I hereby declare that, the *Land Case No. 103 of 2017* and *Misc. Land Application No. 186 of 2017* are incompetent and are hereby struck out with costs.

DATED at **DAR ES SALAAM** this 01st day of June 2018.


R. K. Sameji
JUDGE
01/06/2018

COURT – Ruling delivered in Court Chambers in the presence of the presence of Mr. Octavian Mshukuma, the learned Counsel for the applicant and in the presence of the 1st respondent, who appeared in person.

A right of Appeal explained.


R. K. Sameji
JUDGE
01/06/2018

