

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**MISCL. CIVIL APPLICATION NO. 23 OF 2020**

*(Arising from the decisions of the District Court of Tarime at Tarime (Hon. V.L. Mugendi, RM)  
dated 23/11/2018 in Civil Application No. 13 of 2018 and (Hon R.S. Mushi, RM)  
dated 26/02/2019 in Misc. Case No. 13 of 2015)*

- 1. MJINI KATI VILLAGE COUNCIL  
(Formerly was part of Nyangoto Village Council).....1<sup>ST</sup> APPLICANT**
- 2. DISTRICT EXECUTIVE DIRECTOR-  
TARIME DISTRICT COUNCIL ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

- 1. JOSEPH WEGESA WANGUBO.....1<sup>ST</sup> RESPONDENT**
- 2. FORTUNATUS ROBI WANGUBO  
(ADMINISTRATOR OF THE ESTATE OF  
WANKYO WANGUBO ..... 2<sup>ND</sup> RESPONDENT**
- 3. LUCAS SILAS ISANGI T/A ISANGI  
COURT BROKERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 16th April, 2020*

*Date of Ruling: 11<sup>th</sup> May, 2020*

**KISANYA, J.:**

The applicants have, under certificate of urgency, moved this Court to grant leave to file an application for revision out of time against the decisions of the District Court of Tarime at Tarime (ruling by Hon. V.L. Mugendi, RM dated 23/11/2018) in Civil Application No. 13 of 2018 and (ruling by Hon R.S. Mushi, RM) dated 26/02/2019 in Misc. Civil Application No. 13 of 2015),

both originating from the Primary Court of Nyamwaga in Civil Case Nos. 32 of 1996 and 32 of 1997.

This application is made under section 14(1) of the Law of Limitation Act, Cap. 89, R.E. 2019 and sections 79 and 95 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) together with any other enabling provisions of the laws. It is supported by affidavit of Livai Nkororo Matiko, Village Executive Officer of the Mjini Kati Village (the 1<sup>st</sup> applicant).

Upon being served with the application, the 1<sup>st</sup> and 3<sup>rd</sup> respondents have filed the Counter- affidavit and notice of preliminary objection on the following points of law:

1. *That the application of the applicants is misconceived and offends the law for want of extension to make revision on non-existing order.*
2. *That the application is incompetent for failure to enjoin a proper party who is to be affected by the said decision that to be availed by the party.*
3. *That the application is incompetent for failure of being supported by an affidavit of the 2<sup>nd</sup> applicant.*
4. *The application is incompetent and misconceived for being un-procedural and Abuse of court process.*
5. *The affidavit is incompetent for defective affidavit for being verified by a stranger to an affidavit.*

It is necessary to depict, albeit brief, the background of this matter. The 1<sup>st</sup> respondent, Joseph Wegesa Wangubo filed Misc. Civil Application No. 16 of 2015 before the District Court of Tarime at Tarime. In the said application, the 1<sup>st</sup> respondent requested for “the Court to investigate objection claim on the

property attached in the execution of the Civil Case No. 32 of 1996 for such suit land is not liable for such attachment.” The Respondent to that application were Fortunatus Robi Wangubo (2<sup>nd</sup> respondent) and Nyangoto Village Council. After hearing both parties, the District Court (Hon. K.T. Mushi-SRM) held that, the first respondent had moved the Court to investigate objection claim on the property attached in the execution of Civil Case No. 32 of 1996. Consequently, an Extract Order to such effect was issued and signed by the Resident Magistrate on 25<sup>th</sup> January, 2016.

Thereafter, the 1<sup>st</sup> respondent filed Civil Application No. 13 of 2018 in the District Court praying for execution of order/ruling in Misc. Application No.16 of 2015. On 23/11/2018, the District Court (Hon. V.L. Mugendi, Resident Magistrate) declared the applicant as the lawful owner of the suit land. For four months later, on 26/2/2019, another ruling was issued by Hon. R.S. Mushi, RM who continued where his predecessor ended. The learned Resident Magistrate held that, the 2<sup>nd</sup> Respondent and Nyangoto Village Council had failed to compensate the 1<sup>st</sup> respondent. He therefore issued an order for demolition of a mortuary and any other properties (structures) inside the area of the 1<sup>st</sup> applicant including a fence (suit land).

Following that order, the 3<sup>rd</sup> applicant was engaged to execute the court’s order as per Execution Order dated 16<sup>th</sup> July, 2019. Therefore, Mjini Kati Village Council and the District Executive Director of Tarime District Council who were not party to the above proceedings have filed the present application which has been objected the 1<sup>st</sup> and 3<sup>rd</sup> respondents as shown above.

When this application came up for hearing on 16/4/2020, I ordered the preliminary objection to be disposed of by way written submission. The parties filed their respective submissions in accordance with the schedule fixed by the

Court. The respondents' submission in support of the objection was filed by Mr. Akram Adam, learned counsel. On the other hand, Mr. Manganiko Barnabas Msabi, learned advocate, filed submission on behalf of the applicants.

Submitting in support of the 1<sup>st</sup> point of the objection, counsel Akram argued that, the application has been misconceived and offends the law for intending to file revision on non-existing order. The learned counsel stated that, there is no ruling dated 26/02/2019 which was delivered by Hon. R.S. Mushi in Misc. Civil. Application No. 13 of 2015. Citing this Court's decision in *MIC Tanzania Limited vs Hamis Mwijuma and 3 Others*, Civil Appeal No. 64 of 2016, High Court of Tanzania at Dar Salaam (unreported), counsel Akram argued that the Court cannot grant prayer from non-existing ruling of the lower court and thus, the application is non- maintainable.

Regarding the 2<sup>nd</sup> point of objection, counsel Akram submitted that, failure to enjoin Nyangoto Village Council who was the respondent in Civil Application No. 13 of 2018 renders the application incompetent. The learned counsel argued that, it is Nyangoto Village Council which claimed to have a valid decree that led to attachment of the 1<sup>st</sup> Respondent's land. Therefore, he was of the view that, the application is fatal for failing to join Nyangoto Village Council who claimed to be the lawful of the disputed premises and that, the said Nyangoto Village Council will be affected by the decision to be granted by the Court. He amplified his argument by citing the case of *Abdullatif Mohamed Hamis vs Mehboob Yusuf Osman and Another*, Civil Revision No. 06 of 2017, Court of Appeal of Tanzania (unreported) on effect of non-joinder of the proper party.

The 3<sup>rd</sup> and 5<sup>th</sup> points of objection were argued jointly. The learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondent submitted that, the application is incompetent for lack of affidavit of the 2<sup>nd</sup> applicant. He argued further that, even the affidavit of the 1<sup>st</sup> applicant is defective for being verified by the stranger to the affidavit. This argument was based on the fact that, the deponent one, Livai Nkororo Matiko averred that, he is the Village Executive Officer. However, in the verification clause he refers himself as the Village Executive Director. For the aforesaid reasons, the learned counsel reasoned that, the application is not supported by affidavit as required by O.XLIII, r. 2 of the CPC. He also cited *Anatol Peter Rwebangira vs The Principal Secretary, Ministry of Defence and National Service and Another*, Civil Application No. 548/04 of 2018 (unreported) to support his position that, defective affidavit renders the application incompetent.

As to the 4<sup>th</sup> point of the objection, counsel Akram argued that, since the 1<sup>st</sup> applicants claims for ownership of the attached property in execution of the decree, she was required to apply for investigation of the title of the ownership under O. XXI, r. 57(i) of the Civil Procedure Code, Cap. 33, R.E. 2019. Therefore, the learned contended that, the present application for extension of time to file revision is abuse of court process. In view of the above, Mr. Akram prayed that, the application be dismissed with costs.

Responding to the preliminary objection, Mr. Maganiko prefaced by addressing on what constitute points of preliminary objection. He cited the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) E.A where the Court of Appeal for East Africa held that:

*...a preliminary object; consist of a point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point,*

*may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....*

*A preliminary objection is in the nature of what is used to be a demurrer. It raises a pure point of law, which if argued on the assumption that the facts pleaded by the other side are correct, it cannot be raised if any fact has been raised if any fact has been ascertained or if what is exercise of judicial discretion”*

The learned counsel cited further the case of *COTWO (T) OTTU Union and Another vs Honorable Idd Simba, Minister of Industries and Trade and Others* (2000) TLR 88 where the Court of Appeal held as follows on the preliminary objection:

*(i) A preliminary objection should raise a point of law which is based on some facts, not on facts which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing of the case.*

*(iii) the preliminary objection in this case is based on some facts which are not ascertained and even, if sustained, the objection cannot dispose of the matter, as such it fails to meet the laid down tests for preliminary objection.*

With that starter, Mr. Maganiko proceeded to submit against the preliminary objection as follows: On the first ground, the learned counsel stated that, paragraphs 4, 7, 11 and 14 of the affidavit in support of the application confirm that, the applicants are “seeking extension of orders including Civil Application No.13 of 2018”. Therefore, the learned counsel was of the view that, the decision of this Court in *MIC Tanzania Limited (supra)* referred to by the counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondent is misplaced and that, the objection has no legs to stand in law.

On the second objection, counsel Manganiko submitted that, the land, exhausted improvement and the health centre (suitland) are situated within the territorial jurisdiction of the 1<sup>st</sup> Applicant by virtue of GN. No. 301 OF 2014 and GN. No. 323 of 2014. This was following the division of Nyangoto Village to form Mjini Kati Village whereby the later acquired some of the properties of the former, including the health centre on the suitland. The learned counsel argued further that, upon incorporation and pursuant to section 26(1) and (2) of the Local Government (District Authorities) Cap. 287, R.E. 2019, Mjini Kati Village Council has the legal capacity to sue in its own name as the suitland is within its area of jurisdiction and not Nyangoto Village.

Regarding the 3<sup>rd</sup> and 5<sup>th</sup> points of objection, counsel Maganiko conceded that, the application was not supported by affidavit of the 2<sup>nd</sup> applicant. However, he argued that, the 2<sup>nd</sup> Respondent was joined as necessary party by virtue of his office, as required by section 30 (3) of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020. The learned counsel submitted further that, it was not necessary for the 2<sup>nd</sup> appellant to swear an affidavit because he is not conversant enough to facts of the matter at hand. Mr. Maganiko averred further that, the affidavit in support of the application was not verified by a stranger. He maintained that, it was sworn by Livai Nkororo Matiko, the Mjini Kati Village Executive Officer and not otherwise.

On the 4<sup>th</sup> point of objection, the learned counsel for the applicant replied as follows:

*“.. the 1<sup>st</sup> applicant could not file the objection proceedings as she become aware when the execution process had been almost finished as the 3<sup>rd</sup> Respondent was already in the process of executing decree or order. It is maintained that the 1<sup>st</sup>*

*Respondent had no any other option as to seek court's intervention under the application for revision hence this application.*

From the aforesaid, counsel Maganiko sealed his submission by arguing that, the objection raised by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents does raise any point of law and hence, incapable of disposing of the application. He therefore urged me to dismiss the preliminary objection with costs.

Mr. Akram had this to say in rejoinder submission. One, all of the points of preliminary objection qualify and meet the conditions set in the cases cited by the learned counsel for the applicant. Two, it is a settled law that prayer to be granted by the Court should be specified in the Chamber Summons and not the affidavit. Thus, he maintained that, the Court has been moved to grant an order extension of time to file revision against an order or ruling issued in Civil Application No. 13 of 2015 which does not exist in courts memorial; and hence, the relevance of decision of this court in *MICT Tanzania Limited (supra)*. Three, failure to join Nyangoto Village Council which was party to Civil Application No. 13 of 2018 to be revised will render some questions which cannot be easily resolved by the Court as the applicant have not shown demarcation of the said village or certificate of incorporation of Mjini Kati Village. Four, the learned counsel conceded that the 2<sup>nd</sup> Respondent was joined as necessary party. However, he argued that, the 2<sup>nd</sup> applicant was supposed to file an affidavit to support the application because he is the supervising authority of the 1<sup>st</sup> applicant thereby deemed to have knowledge over all issues related to the 1<sup>st</sup> applicant. Five, he insisted that the affidavit of the first applicant was verified by a stranger to the affidavit. Six, the execution has not ended yet and hence, the remedy available for the applicant was to apply for investigation under O. XXI, rule 57(1) of the CPC. Thus, the learned



counsel was of the view that failure to exercise the available remedy renders the present application as an abuse of court process and un-procedural.

I have read the rival submissions by both learned counsel. They are in agreement that, the preliminary objection should be capable of disposing of the matter as held in the case *Mukisa Biscuits Manufacturing Co. Ltd (supra)* and *COTWO (T) OTTU Union and Another (supra)*. The issue then is whether the preliminary objection herein has merit.

Starting with the fourth point objection, Mr. Akram argues that, the application at hand is abuse of court process on the ground that, the applicants were required to file an investigation proceedings under O. XXI, rule 57(1) of the CPC. I have read the provision referred to by Mr. Akram. It is my considered that view that, the said provision requires a person who claims ownership of the property attached in execution of the decree to apply for investigation as to ownership. For better understanding, the said provision is quoted hereunder:

*“Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:*

*Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.”(Emphasize supplied).*

In the case at hand, there is no decree issued by the District Court in favour of the 1<sup>st</sup> respondent. Pursuant to the Ruling in Misc. Civil Application No. 16 of 2015 (Annexure DEL-2 to the Counter Affidavit) which led to Civil

Application No. 13 of 2018, the District Court granted the application to investigate objection claim on the property attached in the execution of civil case No. 32 of 1996. Thereafter, the Court issued an **Extract Order** (also attached as Annexure DEL-2 to the Counter Affidavit) and not a **decree**. The said Extract Order reads “The application is hereby granted.” Since there is no decree issued by the District Court, I am of the considered opinion that, the applicants cannot apply for investigation that the suitland is not liable for attachment under O. XXI, rule 57(1) of the CPC. For that reason, I find no merit in the fourth ground of objection.

I now move to the first ground of objection which is to the effect that, the applicants seeks for extension of time to file revision against Civil Application No. 13 of 2015 which does not exist. On the other hand, Mr. Maganiko states that the case to be revised is Civil Application No. 13 of 2018 as indicated in paragraphs 4,7,11 and 14 of the affidavit in support of the application. As rightly argued by Counsel Akram, prayers are stated in the Chamber Summons and not the affidavit. It is trite law that, affidavit should not contain prayers. Pursuant to O. IX, r. 3 of the CPC, affidavit is confined to facts which the deponent is able to prove on his own knowledge or from the statement which he believes to be true.

With that position of law, I wish to reproduce the order sought by the applicants in their Chamber Summons.

*“THAT, this Honourable Court be pleased to grant the Applicant a leave to in which the Applicant can file an application for revision out of time relating to Civil Application No. 13/2018 ruling by VL Mugendi, RM dated 23/11/2018, and Misc. Civil Application No. 13/2015 ruling delivered on 26/02/2019 before Hon. R.S. Mushi, RM all from Tarime District Court.....”*

The issue is whether there is ruling delivered by R.S. Mushi, RM in Civil Application No. 13 of 2015. The counsel for the applicants did not address this issue at all. As shown herein, he replied that, they want to apply for revision of Civil Application No. 13 of 2018. It appears that, his argument is based on the fact that, the ruling delivered by Hon. R.S. Mushi in Civil Application No. 13 of 2018 has been mentioned in the affidavit in support of the application. With respect, parties are bound by their pleadings. It is the Chamber Summons and not the affidavit which states the order to be granted by the Court. Mr. Maganiko did not even pray to amend the Chamber Summons. I have also noted that even the certificate of urgency makes reference to “Ruling in Misc Case No 13 of 2015 before Hon. R.S. Mushi”. Therefore, unless the Chamber Summons and affidavit are corrected or amended and harmonized, the Court will not be in a position of understanding the proceedings to which the order for extension of time to file revision should be granted.

As to the second objection on failure to join the Nyangoto Village Council to the application at hand. The counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondent argues that, Nyangoto Village Council ought to have been made a party to this application because she was party to Application No. 13 of 2018 to be revised by the Court. It is true that, Nyangoto Village Council was party to Civil Application No. 13 of 2018. I have noted further that, Nyangoto Village Council was also party to Misc. Appeal No. 16 of 2015 which gave rise to Civil Application No. 13 of 2018. Mr. Maganiko argues that Nyangoto Village Council was not joined because the suitland is within the territorial jurisdiction of the 1<sup>st</sup> applicant since 2014.

On my part, I have noted that both Misc. Application No. 16 of 2015 and Civil Application No. 13 of 2018 were filed after publication of GN. No. 301 of

2014 and GN. No. 323 of 2014 which led for establishment of Mjini Kati Village Council. Now, if the proceedings to be revised were filed after the division of Nyangoto Village to form Mjini Kati Village, how did Nyangoto Village Council appear before the District Court? According to the ruling of V.L. Mugendi in Civil Application No. 13 of 2018, when Nyangoto Village Council appeared before the Court, she had no objection to the application. She did not tell the court as to where the health centre and mortuary on the suit land was not within its area of jurisdiction. In such a case therefore, I am in agreement with Mr. Akram that, there is a need of having Nyangoto Village Council, as party to the instant application. It is clear that the revision proceedings might involve issues related to boundaries between Mjini Kati Village and Nyangoto Village and proof of certificate of incorporation of Mjini Kati Village under section 26 of the Local Government (District Authorities) Act, Cap. 287. Therefore, I am of considered opinion that, the orders sought and issues arising thereto can be well addressed if Nyangoto Village Council is made party to the application for revision. She is entitled to be heard, whether as applicant or respondent, because she might be affected by the revisional proceedings.

I will now address the 3<sup>rd</sup> point of objection on the competence of the application at hand. According to OXLIII, r. 3 of the CPC, every application before the Court is made by way of Chamber Summons supported by affidavit. The application at hand has been filed two applicants. It is not disputed that, the application is supported by affidavit of the 1<sup>st</sup> applicant only. The affidavit of the 2<sup>nd</sup> applicant is wanting. Mr. Maganiko is of the view that, the said affidavit was not filed because the 2<sup>nd</sup> applicant has been joined as the necessary party and that, he is not conversant with the facts of the case. It is

true and I agree with Mr. Maganiko that, the District Executive Officer is a necessary party to cases involving villages as provided for under section 26(2) of the Local Government (District Authorities) Act, Cap. 287, R.E. 2002 as amended by section 30 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020. However, I am of the considered view that, necessary party is not exempted from filing affidavit to support his application. As stated herein, affidavit is also based on the statement of belief. Being the necessary party who also supervise the 1<sup>st</sup> applicant, the 2<sup>nd</sup> applicant had facts and statement of believe on the matter at hand. This include how Mjini Kati Village was established. Also, according to annexures DEL-1 and DEL-3 to the counter affidavit, it appears that the 2<sup>nd</sup> applicant was aware of the application to be revised. For instance, DEL-1 is the letter with Reference No. HWT/11/7/120 written by the 2<sup>nd</sup> Applicant on 26/10/2018 informing the State Attorney In-Charge, Attorney General Chambers, Musoma about Civil Application No. 13 of 2018. He stated, *inter alia*, as follows:


*“Nina habari kwamba kuna shauri la madai na 13 la 2018 kati ya Joseph Wagesa dhidi ya Fortunatus Robi Wangubo na Halmashauri ya Kijiji cha Nyangoto ..ambayo taarifa nilizonazo inahusu maombi ya kukaza hukumu....”*

The above fact was not challenged by the applicants in the reply to counter-affidavit. This contradicts Mr. Maganiko’s contention that, the 2<sup>nd</sup> applicant is not conversant with the facts of the present case. All in all, I find that, the application offends the provision of XLIII, r. 3 of the CPC as the affidavit of the 2<sup>nd</sup> applicant is missing.

To that end, I must conclude that, the defects which I have pointed out hereinabove render the application incompetent. Therefore, I uphold the preliminary objection on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> points of preliminary objection.

Consequently, the application is hereby struck out. For interest of justice, the applicants are granted leave to file a fresh application within 30 days from the date of this ruling. Costs to follow the event.

Dated at MUSOMA this 11<sup>st</sup> day of May, 2020.

  
E. S. Kisanya  
JUDGE  
11/5/2020

Court: Ruling is delivered this 11<sup>th</sup> day of May, 2020 in the absence of the applicants and in the presence of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and third applicant not in attendance.



  
E. S. Kisanya  
JUDGE  
11/5/2020