

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

MISC. CIVIL APPLICATION NO. 83 OF 2020

BETWEEN

**DOREEN MAIRA 1ST APPLICANT
MWIMA MAIRA 2ND APPLICANT
REDEMPTA MAIRA 3RD APPLICANT
KASIGWA MAIRA 4TH APPLICANT
ALBERT MAIRA 5TH APPLICANT
NEEMA MAIRA 6TH APPLICANT
JACQUELINE MAIRA 7TH APPLICANT**

VERSUS

**ALPHONCE KWILANGA (Sued as
Administrator of the estate of Late
David Alphonse Kwilanga) 1ST RESPONDENT
JOSHUA MWAITUKA T/A FOSTERS
AUCTIONEERS & GENERAL TRADERS 2ND RESPONDENT
ANITA MAIRA CHILUNDA (sued as the
Administrator of the estate of the
Late Moses Igga Gamba Maira) 3RD RESPONDENT**

Date of last Order: 03/12/2020

Date of Ruling: 08/12/2020

R U L I N G

MGONYA, J.

The Application before the court is for this court this Honorable' Court be pleased to issue an order for Temporary Injunction, restraining the Respondents their agents, workmen, assignees or any other person working on that behalf, from evicting the Applicants from the suit premises, to wit the premise located at **Plot No. 66, Block 'A' Sinza Area, Kinondoni Municipality** pending the final disposal of the main suit.

The Application is made under **Order XXXVII, rule (1) (a), (b) and (2), section 68 (e) sections 95 of the Civil Procedure Code Cap. 33.**

Before hearing of the said Application particularly at the pleadings stage, the 3rd Defendant raised five (5) points of preliminary objection against the Application, to wit:

- (i) That, the this Application has been filed and served upon the Respondents without having a duly filed Complaint hence does not have a suit to support;***
- (ii) That paragraphs 02, 06, 07, 08, 09, 12, 13 and 14 of the Applicants' Affidavit are defective as it contains prayers contrary to the requirements of***

Order XIX Rule 3 (1) of the Civil Procedure Code, Cap. 33 [R. E. 2002].

- (iii) That, the Chamber Summons is incurably defective in that it states that it is supported by the Affidavit of VICTOR MWAKIMI (The Advocate) who is not a party to the Application and contrary to the requirements of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 [R. E. 2002]***
- (iv) That the Affidavit has been signed by the Deponent, the 3rd Applicant; but has been verified by the same 3rd Applicant, REDEMPTA MAIRA i.e. the Deponent, not as a Deponent/Applicant but as the Advocate of the Applicants.***
- (v) That, the AFFIDAVIT supporting the purported application is incurably defective for violating the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 as amended.***

In submitting the above points of preliminary objection, the 3rd Respondent decided to withdraw the first point and that I will

determine the rest of the points. However, I have to state up front that in the cause of determining the instant Application, I had an opportunity of going both parties submission and in the writing this Ruling, I don't intend in any way to reproduce the said submissions but rather to straight determine the advanced points.

In determining the second point that paragraphs 02, 06, 07, 08, 09, 12, 13 and 14 contains prayers and opinions, I have to state that, surprisingly, after going through the entire affidavit, I have failed to come across those prayers and opinions as alleged by the 3rd Respondent. I am very much aware of the laws of pleadings and the legal procedures to be adhered thereto. Without taking much time, I don't neither intend to reproduce the said paragraphs, but rather order the 3rd Respondent to be kin in bringing such objection of which to my perception have been grossly misconceived. In the event therefore, this point is declared baseless hence overruled.

In the third and fourth points of preliminary objection, it is said that the Chamber Summons is incurably defective in that it states that it is supported by the Affidavit of **VICTOR MWAKIMI** (The Advocate) who is not a party to the Application and contrary to

the requirements of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 [R. E. 2002].

Again, I had an opportunity of going through the Applicants' Affidavit in support of the Chamber Summons which has been duly sworn by one of the Applicants, REDEMPTA MAIRA, who is really one of the parties herein. It is from the said fact which is clear in the record of this matter, I have failed to understand what is meant by the 3rd Respondent when saying that the said Chamber Summons is supported by the Affidavit of VICTOR MWAKIMI (The Advocate) who is not a party to the Application, while the above state is the position.

On the contrary, even if the said Chamber Summons was supported with the Affidavit sworn by the learned Advocate representing the Applicants. That is well recognized by law as far as the same could have been duly authorized by the Applicants themselves. The law on that is very clear. Without taking much time too, this point too is misconceived, hence **overruled**.

On the fifth ground that, the AFFIDAVIT supporting the purported application is incurably defective for violating the mandatory provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 as amended, I have to state that; since this pint together with some as seen above are

not going to the root of the matter and make the Application defective, I am of the view that the court together with the Counsel to this matter being officers of the court, let us focus to the substantial justice so that the Application be heard **ON MERIT** to reach to the ends of justice. I cannot hesitate stating that this kind of bringing up the points of preliminary objections with the intend not to hear the matters at hand on merit can be termed as

Unprofessional conduct. If the matter is really serious, let it be, but the flimsy points of objections, does not command any respect towards the serious matters as people' rights of which are supposed to be heard in the earliest possible time.

On this I would like to refer to the case of ***MBEYA RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA MWAKYOMA, COURT OF APPEAL OF TANZANIA AT MBEYA, Civil Appeal No. 101 of 1998, (9.8.2001) (Ramadhani, Lubuva and Lugakingira JJA) [2003] TLR 251 CA, (MRAPATA)***; that:

"It does not appear to us that the omission to cite the provision under which it was fatal. We say so because a notice of preliminary objection which, of course, falls under

Rule 100, is not an application. It is simply a notice and is given just before hearing of the appeal begins.

*Rule 100 is **procedural rather than substantive**. It does not confer any right upon litigants nor does it bestow any power on the Court, it merely regulates the conduct of the business of the Court. Omission to cite a procedural rule does not bring into question the jurisdiction of the Court to hear and determine the matter before it and is **therefore not fatal**."*

The same to me, the entire points of preliminary object in this Application were indeed **fatal**, and hence let me focus on substantial justice.

In the event therefore, **I proceed to overrule all points herein and proceed to order the matter proceed with the hearing of the same on merits.**

It is so ordered.




L. E. MGONYA
JUDGE
08/12/2020

Court: Ruling delivered in my chamber in the presence of Mr. Victor Mwakimwi, Advocate for the Applicant, Mrs. Makale, Advocate for the 3rd Respondent and Ms. Msuya Bench Clarke in my chamber today 08th December, 2020.




L. E. MGONYA
JUDGE
08/12/2020