

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**MISC. LAND APPLICATION NO. 51 OF 2021**

**REHEMA JOHN KIKOTI .....1<sup>ST</sup> APPLICANT**  
**MICHAEL DANIEL MTWEVE.....2<sup>ND</sup> APPLICANT**  
**DOROTHY MICHAEL MTWEVE..... 3<sup>RD</sup> APPLICANT**  
**JUDITH MICHAEL MTWEVE.....4<sup>TH</sup> APPLICANT**  
**KELVIN MICHAEL MTWEVE.....5<sup>TH</sup> APPLICANT**  
**EDITH MICHAEL MTWEVE.....6<sup>TH</sup> APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY MINISTRY**

**OF HOME AFFAIRS AND 2 OTHERS .....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER GENERAL OF PRISONS.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

20/09/2021 & 16/11/2021

**KAGOMBA, J**

REHEMA JOHN KIKOTI, MICHAEL DANIEL MTWEVE, DOROTHY MICHAEL MTWEVE, JUDITH MICHAEL MTWEVE, KELVIN MICHAEL MTWEVE and EDITH MICHAEL MTWEVE ("the applicants") filed in this Court Miscellaneous Land Application, under certificate of urgency, against the Principal Secretary Ministry of Home Affairs (sic), the Commissioner General of Prisons and the Honourable Attorney General ("the respondents") seeking both *ex parte* and inter parties' orders summarized as follows;

*EX PARTE:*

1. To dispense with the requirement of service of 90 days statutory notice prior to instituting the application against the respondents.
2. To grant an order of maintenance of *status quo* against the 1<sup>st</sup> and 2<sup>nd</sup> respondents restraining them, their agents assignees and all those who work under their instructions from continuing trespassing into applicants' landed properties namely, plots No. 844 Block C (1621 square metres) with Title No. 72708-DLR, Plot No. 845 Block C (1297 sq metres) with Title No. 72702- DLR, Plot No. 842 Block C(1608 sq metres) with Title No. 72706-DLR, Plot No. 843 Block C(1703 sq metres) with Title No. 72694-DLR, Plot No. 841 Block C(1993 sq metres) with Title No. 72704-DLR and Plot 846 C (1150 sq metres) with Title No. 726996-DLR, respectively, located at Msalato Area, Dodoma (herein after referred as the "suit land") and from using armed prison officers from illegally preventing the applicants from assessing the suit land, pending inter parties hearing of the chamber application.

*INTER PARTIES:*

3. To grant a temporary injunction order against the 1<sup>st</sup> and 2<sup>nd</sup> respondents restraining them, their agents' workers, assigns and/or any person working under her instructions from continuing with their illegal trespass and from construction activities on the suit land pending hearing and determination of the main suit to be instituted in

this Court against the respondents upon expiry of the 90 days statutory notice of intention to sue, served on the respondent.

4. To grant a temporary injunction order against 1<sup>st</sup> and 2<sup>nd</sup> respondents restraining them, their agents, workmen, assignees and/or any person working under their instructions from preventing the applicants to assess the suit land through the use of force or any other means, pending hearing and determination of main suit to be instituted against the respondents upon expiry of ninety (90) days statutory notice of intention to sue, served on the respondents.
5. Any other order and relief(s) the Court may deem fit and just to grant.
6. Costs of the application be borne by the 1<sup>st</sup> respondent.

The application is made under section 2(3) of the Judicature and Application of Laws Act [Cap 358 R. E 2019] read together with section 95 of the Civil Procedure Code [Cap 33 R. E 2019] and is supported by joint affidavit of the applicants. The applicants allege ownership of the suit land.

On their part, the respondents filed a counter affidavit sworn by Jafari Omari Nyenje, a principal officer of the 2<sup>nd</sup> respondent, who disputed the alleged ownership of the suit land by the applicants. The said counter affidavit was filed by the respondents alongside a notice of preliminary objection raising two (2) points of law, thus;

- 1. The chamber summons in this application is supported by a defective affidavit.*

*2. The application is incompetent for non-joinder of necessary parties.*

As required by the law, the Court has to determine the preliminary objection first.

On the day set for hearing, the respondents were represented by Mr. Camilius Ruhinda, learned Senior State Attorney, while the applicants were represented by Mr. John Kidando, learned Advocate.

Mr. Ruhinda started off by praying to drop the second ground of preliminary objection. The prayer having been granted, Mr. Ruhinda proceeded to submit on the first and the only ground of preliminary objection, namely, that the chamber summons in this application is supported by a defective affidavit. In his submission, he told the Court that the joint affidavit was vividly without a verification clause required by law, despite being signed by six applicants, because of the following two legal concerns: -

**One**, Kelvin Michael Mtweve who signed the verification clause, did not show which clause of the affidavit he was verifying. He argued that such an omission rendered the affidavit defective. He prayed the same be struck out.

**Two**; it is not shown who among the deponents verified the contents of paragraphs 11,12,13,14 and 15 of the joint affidavit to the best of their knowledge, so that the contents thereof could be used to support the application.

For those two reasons, Mr. Ruhinda prayed that the application be struck out for not being supported by a competent affidavit. To support his contention, he referred this Court to the decision of the Court of Appeal in the case of **Anatol Peter Rwebangira V. The Principal Secretary Ministry of Defence and National Service**, (Civil Application 548 of 2018) [2019] TZCA 106 (10 May 2019).

In his reply, Mr. Kidando, started by attacking the notice of preliminary objection filed by the respondents for lacking certainty as to what exactly they were intending to object. He referred this Court to the case of **James Burchard Rugemalira Vs The Republic And Mr. Harbinder Singh Sethi**, Criminal Application No. 59 /19 of 2017, CAT, Dar es salaam on the contention that a notice of preliminary objection is intended to let the opposite party aware of the nature and scope of the objection for preparation of his reply thereof.

Mr. Kidando further argued that since clarity in notices of preliminary objection is intended to do away with surprises to the Court as well as adverse party and thus promoting a fair hearing, it was his opinion that the rule in the above cited case was relevant and applicable to criminal and civil matters alike. To further elaborate his concerns, Mr. Kidando argued that the filed notice of Preliminary objection did not give further particulars as to where the defect in the affidavit actually was, which made it difficult for him to know exactly those defects, until when disclosed in Court. He also cited the case of Hon. **B. P Mramba Vs. Leons S. Sangalai & The Attorney General** [1986] TLR 182 for a contention that a trial must be fair and without surprises.

With regard to the point of objection that Kelvin Michael Mtweve (the 5<sup>th</sup> applicant) had signed the verification clause without showing which paragraphs he was verifying, and whether it was according to his own knowledge or on information he had received, Mr. Kidando conceded that the anomaly existed. He however urged the court to consider it as a slip of the pen, as Mtweve's name was inadvertently skipped during typing of the names.

Regarding the contents of paragraphs 11, 12, 13, 14 and 15 which the affidavit does not show how many applicants have verified, Mr. Kidando argued that, with the exception of Rehema John Kikoti, the joint affidavit shows that the persons who verified such contents are all the remaining applicants. He added that such an impression arises from the words "their own knowledge" which, according to him, included all other applicants. That, it was for the same reason the deponents stated that the remaining paragraphs were verified according to the information given to them by Rehema John Kikoti.

Having made the above submission, Mr. Kidando prayed this Court to dismiss the preliminary objection for being devoid of merit and for being argued in Court as a surprise to the applicants.

Still keen to rescue his clients' case, Mr. Kidando turned to the overriding objective principle provided for under the provision of section 3A and 3B of the Civil Procedure Code, [Cap 33 R.E 2019]. He prayed that in the interest of justice, the principle be invoked by the Court to order the applicants to amend the affidavit by inserting the name that has been

inadvertently skipped so that the Court could proceed to determine the matter on merit in the interest of time too. To convince the Court to move towards the proposed direction, Mr. Kidando submitted that if the Court were to closely look on the pleadings of both sides, it would discover that there were problems both ways.

Rejoining on the submission by Mr. Kidando, Mr. Ruhinda said that his learned brother, made contradictory prayers to the Court, by praying that the Preliminary objection be overruled as the observed mistakes resulted from a sleep of the pen, on one hand, but on the other hand he asks the Court to struck out the objection for being devoid of merit.

On the submission that the preliminary objection did not disclose particulars and thus came to the applicants as a surprise, Mr. Ruhinda rejoined that the cited case of **James Rugemalira Vs The Republic And Mr. Harbinder Singh Sethi** (Supra) was distinguishable as it was referring to the Court of Appeal Rules, particularly Rule 107, which does not apply in this Court. Mr. Ruhinda emphasized that the notice of preliminary objection had specified that there was a defective affidavit, underscoring that the Court cannot amend a defective affidavit.

Addressing the prayer for mercy under the overriding objective principle, raised by Mr. Kidando, Mr. Ruhinda rejoined that the overriding objective principle cannot not be used to overrule a mandatory provision of the law. He said that there existed a multitude of decisions of the Court of Appeal and this Court to that effect. He argued that since an affidavit is supposed to carry the evidence to support the application, once the affidavit

is found to be defective, the application cannot be determined for lacking the supporting evidence. He concluded by praying the Court to uphold the preliminary objection and strike out the application with costs.

Having heard the submissions for both parties, and after a keen scrutiny of the impugned joint affidavit filed by the applicants, the issue for determination is whether the preliminary objection has merit and is flawless.

In determining the issue stated above, I think, it merits to reproduce the impugned verification clause as it appears in the joint affidavit of Rehema John Kikoti, Micahel Daniel Mtweve, Dorothy Michael Mtweve, Judith Michael Mtweve, Kelvin Michael Mtweve, and Edith Michael Mweteve. It reads as follows:

#### "VERIFICATION

I, Rehema John Kikoti, DO hereby verify that **all what is stated under paragraphs 1,2,3,4,5,6,7,8,9 and 10 inclusive hereinabove is true to the best of my own knowledge**, whereas **the contents of paragraphs 11, 12, 13, 14, and 15 are true to the best of our own knowledge** and further that **we, Michael Daniel Mtweve, Dorothy Michael Mtweve, Judith Michael Mtweve and Edith Michael Mtweve DO hereby verify that the contents of paragraphs 1,2,3,4,5,6,7,8,9 and 10 inclusive are true in accordance with the information supplied to us by Rehema John Kikoti** which information we verily believe to be true.

Verified at Dar es Salaam this 27<sup>th</sup> day of July 2021

Sgd.

Rehema John Kikoti

Sgd.

Judith Michel Mtwewe

Sgd.

Michael Daniel Kikoti

Sgd.

Kelvin Michel Mtwewe

Sgd.

Dorothy Michael Kikoti

Sgd.

Edith Michel Mtwewe"

**[Emphasis supplied].**

The defects pointed out by Mr. Ruhinda in the above-quoted excerpt are twofold: that, Kelvin Michael Mtwewe who signed the verification clause, did not show which clause of the affidavit he was verifying, and that, it is not shown who among the deponents verified the contents of paragraphs 11,12,13,14 and 15 of the joint affidavit to the best of their knowledge. I agree with Mr. Ruhinda's observation of these defects, as the same can be vividly seen in the verification clause.

Whereas, Michael Daniel Mtwewe, Dorothy Michael Mtwewe, Judith Michael Mtwewe and Edith Michael Mtwewe are listed to have verified the truthfulness of the contents of paragraphs 1,2,3,4,5,6,7,8,9 and 10 according to the information they were supplied by Rehema John Kikoti, the name of Kelvin Michael Mtwewe is not listed, yet he signed. Under such circumstances, it is true, as correctly argued by Mr. Ruhinda, that Kelvin signed without showing which paragraphs of the joint affidavit he was verifying. This is a fatal omission.

Yet again, the verification clause in the above-quoted excerpt has particularized that the contents of paragraphs 1,2,3,4,5,6,7,8,9 and 10 were true to the best of own knowledge of Rehema John Kikoti, but in relation to the contents of paragraphs 11,12,13,14 and 15 the verification clause generalizes by stating the said contents were true to the best “our” knowledge, without specifying those whose knowledge was being referred to, among the six deponents. This again is a fatal omission.

Mr. Kidundo’s response to this point of objection has been rather confusing. Apart from relying on the decision of the Court of Appeal in **James Rugemalira Vs The Republic And Mr. Harbinder Singh Sethi** (Supra), he substantially conceded that there are, indeed, those defects whereby he urged this court to find the same as a mere slip of the pen curable by invoking the overriding objective principle. However, he has also shown some defiance by trying to argue that, with the exception of Rehema John Kikoti, all the remaining applicants verified contents of the paragraphs 11,12,13,14 and 15. According to him, that was the interpretation of the words “*our own knowledge*” obtained in the verification clause. With respect, I don’t agree with Mr. Kidando’s contention. I have reasons for my disagreement with his view, as narrated below.

Firstly, the defects are conspicuous on record, as can be vividly seen in the verification clause deliberated hereinabove. The position of the law in this aspect of verification of affidavit is fairly settled. In **Anatol Peter Rwebangira V. The Principal Secretary Ministry of Defence and National Service** (supra), the Court of Appeal, on page 8 to 9 of its typed judgement, reiterated the position it had taken in the case of **Director of**

**Public Prosecutions vs Dodoli Kapufi and Patson Tusalile**, Criminal Application No. 11 of 2008 (Unreported), where it stated thus;

*"...a verification clause is one of the essential ingredients of any valid affidavit and what amounts to verification clause simply shows the facts the deponent asserts to be true of his own knowledge and/ or those based on information or beliefs"*

Concretizing the above position, the Court of Appeal went on to state thus;

*"....A deponent in the verification clause of an affidavit is required to specify the paragraph(s) he/she has verified to be true to his knowledge or belief or information whereby its source must be disclosed".*

Going by the verification clause at hand, it is not disputed that Kelvin Michael Mtweve, the 5<sup>th</sup> deponent, did not show which clause of the affidavit he was verifying. Neither did he state whether he was verifying from his personal knowledge or from information he received, for which he ought to have mentioned the source. As if that is not enough, it is not possible to decipher who verified the contents of paragraphs 11,12,13,14 and 15.

Mr. Kidando relied on the potential flaws in the notice of preliminary objection itself citing the decision of the Court of Appeal in **James Rugemalira Vs The Republic And Mr. Harbinder Singh Sethi** (Supra). He has also attempted to seek refuge in the slip rule and the overriding

objective principle. Again, with due respect, I am not moved. As correctly submitted by Mr. Ruhinda, the decision in **James Rugemalira Vs The Republic And Mr. Harbinder Singh Sethi** (Supra) is distinguishable in that it was confined to interpreting the provision of Rule 107 of the Court of Appeal Rules, as amended by GN 362 published on 22/9/2017, which states under sub-rule (3) as follows:

*"A respondent raising a preliminary objection shall provide such necessary particulars to enable the Court and the other party to grasp the nature and scope of such objection".*

The requirements in the cited sub-rule (3) are among other requirements under Rule 107, which deal with notices of objection in civil matters filed in the Court of Appeal. Relevant and elaborative as it is, the fact remains that this decision is based on the Court of Appeal Rules, which exclusively apply to the Court of Appeal. (see the Ruling of the Court of Appeal in **Tanzania Electric Supply Company Limited v. Dowans Holdings SA (Costa Rica) & Another**, Civil Application No. 142 of 2012, CAT at DSM, on page 10).

In the case at hand, the preliminary point of objection is, as earlier stated, that *"the chamber summons in this application is supported by a defective affidavit"*. Mr. Kindundo submitted that this point was not clear and has taken the applicants by surprise. Again, I hold a contrary view. In legal parlance, legal defects in an affidavit are not as wide as an ocean for one to require geographical coordinates to locate them. There are a few items on the check-list for an affidavit to be adjudged defective. It is about

whether the affidavit has been executed by a competent person, witnessed and dated properly, containing facts with their source, which raise an important question of proper verification of the contents therein. I think, it was along these essential features of a good affidavit that defects could be traced.

In the above connection, I am of the opinion that senior counsel who delegates drafting duties to junior ones has a professional duty to spare some time to cross-check the most critical parts of documents intended for filing in courts or for some other businesses of their clients. Once fatal defects are brought to the attention of the Court, the consequences are always negative. Costs of litigation can be reduced by investing a bit more time in proofreading the legal documents, especially the essential parts, such as the verification clause of an affidavit.

As to whether the overriding objective principle can be invoked to correct the cited defects, I am of a firm opinion that it cannot. The position of the law is loud and clear that the overriding objective principle accepts no refugee once he or she has violated a mandatory provision, or an established principle of the law. I have in mind two decisions of the Court of Appeal to this effect. These are the case of **Martin D. Kumallija And Others Vs. Iron and Steel Ltd** (Civil Application No. 70/18 [2019] TZCA 542 (27 February 2019)], and **Jacob Bushiri v Mwanza City Council & Two Others**, Civil Appeal No. 36 of 2019, CAT at Mwanza (Unreported). In the latter case, the Court of Appeal had this to say:


*"The institution of an appeal within sixty days is a jurisdictional issue and a mandatory requirement which cannot be salvaged by the overriding objective principle which was not meant to allow parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go or have the effect of going to the foundation of the case".*

In this case, since it is a legal requirement that a party intending to move the court by a formal written application can only do that by filing his chamber application and the same must be supported by an affidavit or affidavits; the fatal defects observed in the affidavit simply means that the court has not been availed with a proper affidavit, in the legal sense, to support the application. The application is therefore rendered incompetent, in which case the court is not properly moved.

In the final analysis, the preliminary point of objection raised by counsel for the respondents is sustained for being meritorious and flawless. Accordingly, the incompetent application is struck out. No order as to costs.

**Dated at Dodoma** this 16<sup>th</sup> day of November, 2021.



  
**ABDI S. KAGOMBA**  
**JUDGE**