IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY AT ARUSHA

MISCELLANEOUS CIVIL CAUSE NO. 16 OF 2021
IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI
AND
IN THE MATTER OF THE LAW OF LIMITATION ACT

BETWEEN

EBENEZA KIMARO @ EBENEZER KIMARO ..... 1ST APPLICANT
ESAYA KIMARO ..... 2ND APPLICANT
GEORGE MASASI ..... 3RD APPLICANT
KASTO KISULA 4THAPPLICANT
RASHID ABUBAKAR KIHANGE ..... 5TH APPLICANT
MARTIN LIYANGA ..... 6TH APPLICANT
HARRISON SARAKIKYA ..... 7TH APPLICANT
RICHARD RINGO ..... 8TH APPLICANT
ERICK JOSEPH ..... 9TH APPLICANT
SULEIMAN SAID ..... 10TH APPLICANT
NAETAL NAETAL ..... 11TH APPLICANT
BAKARI JUMA ..... 12TH APPLICANT
KIPA JUMA ..... 13TH APPLICANT
ELIZABETH LUBUVA ..... 14TH APPLICANT
ZAITUNI MOHAMED ..... 15TH APPLICANT
DEO SAIDI ..... 16TH APPLICANT
JAMILA MUSHI ..... 17TH APPLICANT

AND

HAMISA WALII 1STRESPONDENT
AMINA WALII ..... 2ND RESPONDENT
ZAINABU WALII ..... 3RD RESPONDENT
HONOURABLE MINISTER FOR CONSTITUTIONAL
AND LEGAL AFFAIRS ..... 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

Date of last Order: 22-6-2022

Date of Ruling: 19-7-2022

B.K.PHILLIP,J

The applicants herein lodged this application under the provisions of sections 2(2) of the Judicature and Application of Laws Act, Cap. 358

[R.E 2002], section 17(2) and 19(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 [R.E 2002] and Rule 8(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014 (Hereinafter to be referred to as "G.N. No. 324 of 2014"), moving this Court to issue the following orders ;

i) That the prerogative orders of certiorari be issued against the 4th respondent to the effect that the order issued by him extending the period of limitation in which Hamisi Walii, Amina Walii and Zainabu Walii may wish to commence any suit for a claim based on the land which commenced in 1999 agaisnt the applicants is extended to 29th December 2025 on the ground that the said extension of time offends the provision of section 44 (1) read together with section 44 (2) of the Law of Limitation Act and therefore *ultra vires.*

ii) That the proceedings in Application No. 44 of 2019 at the District Land and Housing Tribunal for Arusha at Arusha whose jurisdiction is dependent on the order of the 4th respondent being challenged, be determined in accordance with the quashed decision of the 4th respondent.

iii) Costs of this application be borne by the first, second and third respondents.

The application is supported by a joint affidavit of the applicants. The 1st, 2nd and 3rd respondents filed a joint Counter affidavit in opposition to the application. The 4th and 5th respondents contested the application

too through a counter affidavit deponed by Mr. Peter J. Musetti, learned Senior State Attorney.

On 2/2/2022, Mr. Salehe B. Salehe, learned advocate for the 1st, 2nd and 3rd respondents filed a notice of preliminary objection containing two points of preliminary objections couched as follows;

a) *That the application is bad in law for contravening Rule 9(1) G.N. No. 324 of 2014.*
b) *That the application is hopelessly incompetent for being accompanied with a defective affidavit for want of proper jurat as per legal requirements.*

The applicants were represented by Mr. Nelson S. Merinyo, learned advocate whereas the 4th and 5th respondents were represented by Mr. Peter J. Musetti, learned Senior State Attorney. I ordered the preliminary objections to be disposed of by way of submissions.

Submitting in support of the first point of preliminary objection, Mr. Salehe contended that the application was filed on 27/12/2021, but the 1st, 2nd and 3rd respondents were served with the application on 11/02/2022. He argued that, the applicants contravened Regulation 9(1) of G.N No. 324 of 2014, which mandatorily requires the applicant to serve the respondent with the application within seven days from date of filing the application. According to Mr. Salehe, the provision of the law cited herein above is couched in mandatory terms, implying that non-compliance of the same is fatal.To reinforce his argument, he made reference to section 53 of the Interpretation of Laws Act, Cap. 1 [R.E 2019], which states that whenever the word "shall" is used in a particular provision, it implies mandatory compliance. Also he referred

this Court to the decision of the Court of Appeal in the case of **National Microfinance Bank Vs Muyedeso, Civil Appeal No. 289 of 2019** (unreported).

With regard to the second point of preliminary objection, Mr. Salehe submitted that the joint affidavit in support of the application is defective because the jurat of attestation indicates that all applicants were sworn and affirmed at the same time, instead of each one being either sworn or affirmed separately before a commissioner for oaths. In his considered opinion, that contravened section 10 of the Oaths and Statutory Declaration Act, Cap. 34 [R.E 2019] (hereinafter "Cap. 34") and the schedule thereto. He implored this Court to strike out this application with costs.

In rebuttal Mr. Merinyo submitted as follows; That the 1st point of preliminary objection was prematurely raised because according to Rule 9(3) of G.N. No. 324 of 2014, he was yet to file the affidavit to state reasons for delaying service to the respondents. He maintained that on 05/05/2022, the application was fixed for mention, and in terms of Rule 9(3) G.N No. 324 of 2014, the applicants were supposed to file an affidavit stating reasons for delay of service three days before hearing date.He contended that the respondents ought to have waited for the hearing date to be fixed, thereafter they could raise their point of preliminary objection if need be. Alternatively, Mr. Merinyo was of the view that there was no prejudice on the part of the 1st, 2nd and 3rdrespondents as they effectively filed their counter affidavit.

With Regard to the second point of preliminary objection, it was Mr. Merinyo's submission that the law governing institution of judicial review proceedings is Rule 8 of G.N. No. 324 of 2014.The same does provide

that a statutory declaration in the affidavit is one of the legal requirements for an application for judicial review. He added that the law the governing affidavits is section 8 of the Notary and Public Commissioner for Oaths Act, Cap. 12 [R.E 2019] , (Henceforth "Cap. 12") and Order XIX Rule 3(1) of the Civil Procedure Code, Cap. 33 [R.E 2019]. Mr. Merinyo also cited section 9 of Cap. 34 which takes into cognizance statutory declaration administered irrespective of any irregularity in the administration of that statutory declaration. He maintained that the applicant's affidavit is in order. The applicants who are Christians were sworn whereas Muslims affirmed, hence no provision of the law was contravened. He urged this Court to invoke Article 107(2)(e) of the Constitution of the United Republic of Tanzania, so as to deal with substantive justice and avoid being tied up with technicalities in dispensation of justice. To bolster his argument, he cited the case **Israel Malegesi and Another Vs Tanganyika Bus Service, Civil Application No. 172/08 of 2020** (unreported).

Moreover, Mr. Merinyo submitted that it is not always that whenever the word "shall" is used , it imposes mandatory duty. He argued that in some instances, the word "shall" can be used to connote discretion. To support his contention, he cited the reported case of **Fortunatus Masha Vs William Shija and Another [1997] TLR 41.** He was of the view that the point of preliminary objections have been raised as a delaying techniques .He cited the case of **Rajabu Hassan Mfaume (the administrator of the estate of the late Hija Omari Kipara) Vs Permanent Secretary, Ministry of Health, Community Development, Gender and Children and 2 Others, Civil Appeal No. 287 of 2019** (unreported), to underscore his argument. He prayed

that the preliminary objections be overruled with costs and the application be heard on merits.

In rejoinder, Mr. Salehe refuted Mr. Merinyo's arguments that the first point of preliminary objection has been made prematurely. He insisted that a preliminary objection ought to be raised at the earliest stage of the proceedings. According to him, Rule 9(3) of G.N No. 324 cited by Mr. Merinyo has nothing to do with time of service of application for judicial review unto the respondents stipulated in Rule 9(1) of G.N.No.324 of 2014 because that provision deals with filing of affidavit stating the name, address , place and date of service of the application unto the respondents. He maintained that Rule 9(1) and Rule 9(3) of G.N. No. 324 of 2014 provide two distinct legal requirements.

Mr. Salehe maintained that Mr. Merinyo did not dispute to have served the applicant with the application on 11/02/2022. The fact that the respondent filed counter affidavit, does not confer the applicants right to contravene Rule 9(1) of G.N. No. 324 of 2014 . The omission to serve the respondents within the time prescribed by law, cannot be cured by the principle of overriding objective. He cited the case of **Juma Busiya Vs Zonal Manager, South Tanzania Postal Corporation, Civil Appeal No. 273 of 2020** (unreported) to support his proposition. He reiterated the prayers made in submission in chief.

Having dispassionately analysed the submission made by learned advocates, I will begin dealing with the second point of preliminary objection for obvious reason, that is, the propriety of this application depends on the correctness of the affidavit in support of the application. As pointed out earlier, the applicants' affidavit in

support of this application is a joint affidavit. The applicants are seventeen in number professing different religions/faith. Among them there are Christians and Muslims. Let me pointing out that I have not come across any law which bars parties professing the same religion/faith from swearing or affirming a joint affidavit. To my understanding what prompted Mr. Salehe to raise the second point of preliminary objection is the fact the parties in this application profess different religions/faith. Their joint affidavit in support of this application does not indicate the parties who affirmed and those who swore. The provision of section 4 of the Oaths and Statutory Declarations Act, provides as follows;

"4. Subject to any provision to the contrary contained in any written law, an oath shall be made by- (a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court; (b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court: Provided that, where any person who is required to make an oath professes any faith other than the Christian faith or objects to being sworn, stating, as the ground of such objection, either that he has no religious belief or that the making of an oath is contrary to his religious belief, such person shall be permitted to make his solemn affirmation instead of making an oath and such affirmation shall be of the same effect as if he had made an oath."

It is noteworthy that according to the provision of the law quoted herein above, it is imperative to state categorically in the Jurat of attestation that the deponent swears or affirms depending on his /her religion/faith. In this application the Jurat of attestation in the applicant's joint affidavit reads as follows;

"SWORN and AFFIRMED at Arusha by the said ...", then names of the parties are list as they appear in the title of the case.

Now, looking at the Jurat of attestation of the applicants' joint affidavit , it does not indicate who among the deponents/applicants affirmed and those who swore. In my considered opinion you cannot have a joint affidavit and one jurat of attestation for deponents who profess different religion/faith because their affidavit are administered in different manners as provided in section 4 of Cap 34. Muslims affirm whereas Christians swear. Thus, swearing and affirming in an affidavit do not go together in a manner done by the applicants in their joint affidavit.

With due respect to Mr. Merinyo, there is no dispute that the provisions of section 8 of Notaries Public and Commissioner for oaths Act, requires a Notary Public and Commissioner for oaths to insert his/her name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.

However, the issue in this application is more than inserting the names of the commissioner for oaths, the place and date when the oath or affidavit is taken or made, but it is about the oath itself which depends on the deponent's religion/faith which gives the value of what is deponed. It is noteworthy that affidavit is evidence in written form. The deponent promises to say the truth according to his religion/faith. Therefore, it has to be made properly and given the weight it deserves. Doing otherwise is a serious contravention of the laws governing administration of oaths. The manner of making oath

or making any declaration is governed by the Oaths and Statutory declaration Act, (Cap 34).

From the foregoing, it is the finding of this Court that the first point of preliminary objection has merits. This point of preliminary objection is capable of disposing of this application since a defective affidavit cannot support a chamber summons.

However, notwithstanding my findings here in above, let me proceed with the determination of the first point of preliminary objection which is to the effect that the application is incompetent because the 1st 2nd and 3rdrespondents were served with the application outside of the time prescribed by the law.

I am in agreement with Mr. Salehe that Rule 9(1) of G.N No. 324 of 2014, provides for specific period of time within which the respondent is to be served with the application. The same reads sa follows;

> *"9.-(1) The applicant* ***shall within seven days after filing the application, serve a copy of the application on the respondent together with supporting documents*** *specified under rule 8."*
> (Emphasis added)

According to Mr. Salehe, the 1st, 2nd and 3rd respondents were served with the application on 11/02/2022 while the same was filed on 27/12/2021. Mr. Merinyo has not disputed the dates for filing the application and service of same to the respondents. The Court's records reveal that this application was filed on 27/12/2021.

Back to the law applicable in this application, the above quoted provision of the law states in clear terms that after filing the

application for judicial review, the respondent shall be served with the application together with the supporting documents within seven days from the date of filing the application. Therefore the respondents ought to have been served with the application on or before 03/01/2022, but they were served on 11/02/2022, more than a month later. The provision of Rule 9(3) of G.N. No. 324 of 2014, cited by Mr. Merinyo is inapplicable in the issue at hand since the same requires the applicant to file an affidavit stating the names, address, the place and date of service of the application to all persons who have been served with chamber summons and reasons why service has not been effected to persons who ought to have been served, if any, three days before the hearing date. For clarity let me reproduce the provision of Rule 9(3) of G.N. No. 324 of 2014;

Rule 9 (3) "The applicant shall within three days before the hearing date file in court an affidavit stating:

(a) the names, address of the place and date of service on all persons who have been served with chamber summons; and

(b) the fact and reasons why the service has not been effected to a person who ought to be served under the provision of the rule"

Rule 9(1) provides for the time for service of the application for judicial review and supporting documents unto the respondents. It is not about the proof of service to the respondent which is stipulated in Rule 9 (3) quoted herein above. I entirely agree with Mr. Salehe that Rule 9(1) is coached in mandatory terms and does not give a room for any other interpretation which can make it discretionary as argued by Mr. Merinyo. Therefore, its violation cannot be salvaged by the principle of overriding objective. It is a trite law that, the principle of overriding objective cannot be applied blindly in contravention of the mandatory

provisions on procedural legal requirements which goes to the very foundation of the case/application.[See the case of **Njake Enterprises Limited Vs Blue Rock Limited and another, Civil Appeal No.66 of 2017** (unreported) and **Juma Busiya** (supra)]

Since, there is no dispute that the applicant did not serve the application to the respondent within the time stipulated in Rule 9(1) of G.N. No. 234 of 2014, I hereby sustain the second point of preliminary objection.

From the foregoing, it is obvious that this application is incompetent. Thus, I hereby strike it out with costs for being incompetent.

Dated this 19th day of July 2022

B. K. PHILLIP

JUDGE