IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND APPLICATION NO. 9 OF 2022

(*Originating from Judgment and Decree of Land Case No 88 of 2017, Hon Ngwala J. dated 4th December 2019 and execution No. 29 of 2020 dated 19th March 2021, C. Kisongo DR.)*

1. **WINFRIDA MAGURE**
2. **NOVATIUS VICTORIAN MTEKETA**
3. **EXEVER LORAND MLAPONE**
4. **SELEMAN JUMA TUNUTU**
5. **IMAN WISTON**
6. **CHRISTOPHER JUHUDI**
7. **JEREMIA THABIT MWAMBUNGU**
8. **HAMZA ATHUMAN JELEZA**
9. **MURA CHACHA MWITA**
10. **ZULFA AMRI FADHILI**
11. **FARAJA AMBIKILE MASOUD**
12. **MASHA ALLY**
13. **WINFRIDA AYUBU**
14. **FATUMA MOHAMED TAMIMU**
15. **ABDUSALAM HASSAN TAMIMU**
16. **VIRTUS RANDELIN**
17. **PAUL RAYMOND**
18. **GRACE THADEY**
19. **BETTY A. MWASANILA**
20. **FRANCIC L. MSOPHE**
21. **JUSTINE GODWIN**
22. **ALLY MOHAMED KINJACHWILE**
23. **MOHAMED HICHA**

..... APPLICANTS

24. SALUM M. NASSORO
25. RICHARD MWAKATENYA
26. SAID MASUMPA
27. JOSEPH KAKWEZI
28. SABRINA ALLY SALUM
29. MUHID MOHAMED
30. EZEKIEL JUMA MAGOLE
31. WILSON WILSON
32. HUSSEIN AMIRI MANENO
33. RAJABU ALLY RAJABU
34. SAID HASSAN
35. JACOB MLUA
36. DANIEL JOSEPHAT MUHONO
37. CHUMBULI SHABANI TEGURE
38. THEOPISTA RUNYALI LIANDEL
39. ATHUMAN RAJABU
40. REONORA KAISE
41. KENNY MDEKE

.....APPLICANTS

42. ELEUNORA KAHISE
43. LEONADI THOMAS KIKOTI
44. MARKO SOLOMON MZYURY
45. GOODLUCK MBILINYI
46. ALFREDI CLEMENT CHAGGI
47. JESSE DAUD MAYOMBYA
48. AMOS JAMES AMOS
49. ABDALA JUMA HAMZA
50. MUHUSINI JUMA
51. ALEX MWITA KOHE
52. SEFU ALLY RASHID
53. NEEMA SAID THOMAS

54. JOSHUA JULIUS JAWA
55. RAMADHANI SEFU RUNGUMA
56. MACHUPA IDDI MAGUO
57. PAUL TTRAYMOND MLOKA
58. HARUNA RAMADHAN SAHA
59. MBWANA AMIRY
60. TATU SALUMU MKINGA
61. HUSNA MRISHO PAMBO
62. BONIFAS JOHN KANGA
63. BHOKE JOHN
64. YUSUPH KYANDO
65. JOSEPH KAKWENZI
66. RASHID ATHUMAN JUMA
67. FATUMA MVUNGI
68. NEEMA MARIKI
69. CLEOFAS MRAMBA
70. BAKARI YUSUPH JUMA
71. LUCY BONIFACE GASPAL
72. VEDASTUS TELAS LUGINYA
73. DEUS J. MAKEBANO
74. MLOKA JUMA
75. SHABAN HAMISI SUFIANI
76. GERRADI MARTIN UNGELE
77. SAID HASSAN FENTU
78. AGNETHA MAREBERE JONIDA
79. JUSTER ASIMWE RWABWISHO
80. BAHATI JAMES SIRIKA
81. ZUBERI MHANDO
82. JIMMY JULIUS
83. ABDALLAH MBWANA SIGI

.....APPLICANTS

84. SEFU SAIDI LUDEWA
85. MASHAKA J. ALLY
86. RAHMAN A. BAKARI
87. GODWIN CLEOPA
88. JIMMY J. LAWA
89. INNOCENT PETER
90. HAMIS WARIOBA
91. BAHATI SAMSON
92. HADIJA ROBERT KUSEKWA
93. YUNITHA PETRO MWITA
94. DAUDI MLUA PAUL NGITU
95. YAKOBO ENUS MARIBA
96. SUDI YUSUPH
97. ADNAN ATHUMAN
98. JAFARI SALUM
99. MSAIVILA ALLY MARATU
100. RAMADHAN ATHUMAN
101. KARIM NGAYUNGA
102. FREDRIC NESTOL MAGEMBE
103. MARRY ABRAHAM MUHENGA ..... APPLICANTS
104. MUNIRA JUMA HAMZA
105. PHILEMON EMILY NDYANABO
106. BURUHAN SALEHE ALLY
107. CORNELIO EDDY
108. EMMANUEL MBILINYI
109. RAMADHAN HASSAN KANKA
110. ALPHONCE MARKO
111. MAGRETH YOHANA
112. ABUBAKARI ALLY
113. MSINI JUMA

114. UPENDO MALEE
115. SAMSONI NYAMUNGI MSABI
116. MOHAMED ROBSON SHAURI
117. RAMADHAN YAHYA
118. MSHINDI KALINGA
119. ZAKARIA EDWARD ..... **APPLICANTS**
120. SIWAZUR RAJAB
121. ESTER MWAIFENDA
122. AWADHI ATHUMANNI YAGALA
123. REONORA KAISE

VERSUS

1. **MARTIN NASSONI OGWARI.....1ST RESPONDENT**
2. **LOICE ERASTO NASSON.....2ND RESPONDENT**
3. **YONO AUCTION MART& COMPANY LIMITED.....3RD RESPONDENT**

RULING

Date of last Order: 20/06/2022
Date of Ruling: 01/07/ 2022

E.E. KAKOLAKI J.

By way of Chamber summons preferred under certificate of urgency, the applicants in this application are moving the Court for the following orders:

(a) Temporary injunction restraining the first, 2nd and 3rd respondents from evicting and demolishing houses of the applicants located at Mbondole area near Njia nne Msongola ward, Ilala District, Dar es Salaam Region measuring approximately 100,000 square meters

pending investigation and determination of this objection proceedings

(b) The said intended eviction and demolition houses of the applicants located at Mbondole area near Njia nne Msongola ward, Ilala District, Dar es Salaam Region measuring approximately 100,000 square meters be investigated to establish who is the lawful owner.

(c) That should this Court finds that the disputed land belongs to the applicant, declare the applicants lawful owners of the disputed land and order the respondents to permanently stop trespassing into lands of the applicants.

(d) Costs of the application follow the event

(e) Any relief this Honourable Court may deem fit to grant.

The application is brought under Order XXI Rule 57 (1), section 68 (c) and (e) and 95 of the Civil Procedure Code, [Cap 33 R.E 2019] and any other enabling provisions of the law and supported by affidavit deponed by Nickson Ludovick, the applicants' advocate. The same is strenuously resisted by the respondents who filed their counter affidavits to that effect.

Before the hearing of the application on merit could take off, the Court *suo mottu* raised an issue of competence of the application for being an omnibus

one, hence parties were invited to address it on the same. At the hearing, applicants were represented by Mr. Nickson Ludovick learned counsel, while the 1st and 2nd respondent enjoyed the services of Mr. Sylvanus Mayenga and Ms. Hadija Kinyaka, both learned counsels, and the 3rd respondent had representation of Ms. Kapwani Mbegalo, learned counsel.

It was Mr. Ludovick who took the floor first, and convincingly echoed that, the application is competent before the Court as the applicants' main prayers in this application are only two. *One*, an order for temporary injunction to restrain 1st, 2nd and 3rd Respondent from evicting and demolishing their houses in the disputed land pending determination of objection proceedings and *two*, for Court's intervention to investigate and establish who is a lawful owner of the suit land between the parties and after so establishing, restrain the respondents permanently from trespassing into the said disputed land. As to the competence of the application he contended that, the law permits omnibus application like the instant one. According to him this court will find the application is competent upon consideration of the following factors:

Firstly, upon grant of the prayer for temporary injunction as prayed, the court will be justified to move on to consider the second prayer. *Secondly*, that, this court is not restrained from determining two prayers for injunctive

orders in one hand and investigation and declaration of the rightful owner of the disputed land (objection proceedings) on another hand within a single application when exercising it powers under section 95 of the CPC. *Thirdly*, the respondents will not be prejudiced anyhow if this application is to be determined on merits as their rights will still be guaranteed and determined conclusively. *Fourthly*, the omnibus application before the court saves time and costs of the court for determining both prayers at a time and should the court be pleased to consider and treat them separately may proceed issue two rulings in the same application. And in so doing the provisions of section 3A (1) and (2) and section 3B (1) (a) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and article 107A of the Constitution of the United Republic of Tanzania, 1977, be invoked to guide the court to do away from technicalities and allow the matter proceed with hearing on merit particularly when the other party is not prejudiced, like the situation in present matter. Finally, Mr. Ludivick invited this Court to exercise its inherent powers as provided under section 2 of JALA to entertain this matter as there is nothing limiting its powers from entertain any matter legally placed before it.

Mr. Mayenga, learned counsel for the 1st and 2nd respondent was adamantly persuaded by Mr. Ludovick's stance as he had a contrary position. It was his

submission from the outset that, this application is incompetent before the court thus, the same cannot be entertained on merit as it deserves to be struck out. He argued that, as per the chamber summons the applicants are seeking for injunctive orders and at the same time pressing for investigation and determination of the ownership of the suit premises, the prayers which are neither interrelated nor interconnected as their end results brings about different outcome. In his view, the prayer for temporary injunction is an independent one for restraining the execution of the decree of this court in land Case 88 of 2017. He insisted execution of the decree cannot be stayed by the prayer for injunction hence that prayer in itself is incompetent. Mr. Mahenga further argued, even the factual dispositions by the applicants in the affidavit support the prayer for injunctive order only and not objection proceedings. In further contended that, if this application is let to proceed on merit, there are chances of reproducing chaotic precedent. On the proper procedure to be adopted Mr. Mayenga submitted, had the applicants' advocate directed his mind to the provisions of Order XXI of the CPC which provides for proper procedure for seeking injunctive orders where the party is challenging the proceeding, he would not have preferred this omnibus application. Regarding the argument that, this court can issue a single ruling

on two prayers, Mr. Mayenga was in agreement with the stance. He however qualified it by arguing that, the same is subject to the sought prayers to be properly made before the court, unlike in the present case where the applicants' counsel agrees that, the application attracts two different rulings, meaning the prayers ought to be preferred and treated differently or separately. Regarding the damages likely to be suffered by the respondents, Mr. Mayenga was of the view that, 1st and 2nd respondents' counter affidavit is categorical that, the present application is meant to restrain execution of this court's decision as applicants came in court with dirty hands, therefore respondents stand a chance to suffer more if the defective application is to proceed to full hearing. With regard to application of oxygen principle under section 3A (1) and (2) and 3B (a) and (b) of the CPC and Article 107A of the Constitution, he countered that, both provisions of the law aim at making sure that justice is rendered equally to both parties, and that this Court and Court of Appeal have been insistent that, oxygen principle should be applied judiciously without interference of parties' rights or offending the rules of procedure. He finally submitted that, this application is aiming at obstructing the respondent from executing the decree of this court and nothing else. Hence, prayed the same to be dismissed with costs.

Next on the floor was Ms. Kinyaka for the 1st and 2nd Respondents too who in essence was adding to Mr. Mayenga's submission. She submitted that, in determining the issue as to whether this application is omnibus or not, this court should ask itself whether in the circumstances the first prayer is refused, it can proceed to hear and determine the second prayer. According to her, the answer is yes, it can because the prayers sought are not interrelated or interlinked. Thus this application cannot stand. To fortify her stance, she referred the Court to case of **Uwenacho Salum Vs. Moshi Salum Ntankwa**, Civil Application No 367 of 2021, decided by this court on 04/02/ 2022, at page 8, where this court held that, if the prayers are not interlinked, or interconnected the omnibus application cannot stand. It was her further submission that, the prayers in the present application are independent, incompatible, discordant thus, the same are to suffer the consequences of being struck out.

Regarding the application of the provisions of sections 68 (e) and 95 cited by applicants' counsel, it was Ms. Kinyaka's submission that, the same cannot be used to resolve all issues in the invent prayers sought to be granted are covered by other proper provisions of the law. In addition, she argued, the applicants ought to have invoked the provisions of Order XXXVII Rule 1 (a)

of the CPC to move the Court to entertain their prayers instead of the ones employed by the applicants. Commenting on the prayer by the applicants to invoke oxygen principle, Ms. Kinyaka resisted it while submitting that, the same is misplaced as the cited provisions enjoins the court to do justice to all parties and are applicable when the sought prayers are competently made and the court is seized with jurisdiction to entertain them. This is not the case in the present application, as the court is confused as to which one among the two prayers it should proceed with. She theefore maintained her stance that the application should be struck out with cost.

On behalf of the 3rd respondent was Ms. Mbegalo when arose to submit adopted the submissions by 1st and 2nd respondents' counsels that the application is incompetent. She therefore prayed the same to be struck out with cost.

Rejoining, Mr. Ludovick almost reiterated his submission in chief. Replying Mr. Mayenga's submission on the proposition that, execution cannot be stayed by injunction, Mr. Ludovick argued that, the application before the court is for objection proceedings, and once it is filed the applicant is not obstructed to bring an application for temporary injunction. He insisted that, execution proceedings are conducted by Deputy Registrars, therefore the

submission that this court cannot entertain this application to stay the execution proceeding is misplaced as this Court under section 68 (e) of the CPC has powers to issue injunctive orders.

Regarding the submission that, the affidavit does not disclose material facts in support of the second prayer, Mr. Ludovick argued, the same is also misplaced as paragraphs 3,4 and 6 of the applicants' affidavit contain some facts supporting the objection proceedings. Concerning the submission that, if the court allows the application to be determined on merit the decision will result into chaotic precedent, it was Mr. Ludovick submission that, Mr Mayenga did not point out which chaos will be caused by that ruling. He also rejoined on the submission against the application of oxygen principle in this matter putting it that, the serves prevention of technicalities only and not otherwise. Regarding issue of two rulings in a single application, Mr. Ludovick rejoined that, there is no harm to that as parties can be heard twice on merits of their prayers. Mr. Ludovick also attacked the case of **Uwenacho Salum** (supra) cited by Ms. Kinyaka on the reason that its facts are distinguished to the present matter, thus this Court should not follow it. Finally on the issue of cost, he submitted that, since the issue was raised by the Court *suo motu* costs should be waived. He lastly maintained his position

that, this application is competent therefore it should be entertained on merit.

I have dispassionately considered the fighting arguments from both parties. The central point for determination is whether this application is incompetent before the court. From the outset I wish to be read clearly that, I am at one with both counsels' argument that, the law in some incidences encourages omnibus application the main object being avoidance of multiplicity of proceedings. I also embrace Mr. Ludovick proposition that, there is no law that bars combination of more than one prayer in chamber summons. This position of the law was settled by this Court in the case of **Tanzania Knitwear Ltd Vs. Shamshu** (1989) TLR 48 (HC) where Mapigano, J (as he then was) where the following observation were made:

> *"In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."*

This Court's stance was recapitulated by the Court of Appeal in the **MIC Tanzania Limited Vs. Minister for Labour and Youths Development**, Civil Appeal No. 103 of 2004 (unreported) where the apex court of the land stated thus:

> ***"...unless there is specific law barring the combination of more than one prayer in one Chamber summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons.*** *We wish to emphasize, all that same, that each case must be decided on the basis of its own peculiar facts." (Emphasis added)*

Despite of the above position of the law and the fact that each case must be judged on its own facts, there are some factors to be considered when determining whether the combined prayers in a single application are competently prefered or not. This Court in the case of **Uwenacho Salum** (supra) when considering the tests to be applied while making reference to case of **Gervas Mwakafwala & 5 Others Vs. The Registered Trustees of Morovian Church in Southern Tanganyika**, Land Case No. 12 of 2013 (HC-unreported) concluded that, the same should be **One**, when the said prayers are interlinked or interdependent and **second**, when the same can be entertained by same court and not otherwise, and I would add **third**, when the prayers are not sought under two different provisions of the law. When the above tests are not met then the omnibus application is rendered irregular and incompetent hence cannot stand in the eyes of the law. In the case of **Rutagatina C.L Vs. The Advocates Committee & Another**, Civil

Appeal No 98 2010 CAT (Unreported) the Court of Appeal had this to say on the combination of two prayers with different provisions:

> "…*when two different prayers with different provisions of the law are sought in one application, then the said application becomes omnibus and cannot stand in the eyes of the law."*

In the present application, applicants' counsel maintains that this application is competent since the Court has been moved under proper enabling provisions. He requested the court to invoke its inherent powers under sections 95 and 68(e) of the CPC and apply the overriding principle under Section 3A (1) and (2) and section 3B of the CPC, to find the application is competent before the Court and proceed to determine it on merit. In their side respondents contends that, the application is incompetent as the prayers are not interrelated hence incompartible. Notably, it is not in dispute that, this application contains more than two prayers and not two prayer only as Mr. Ludovick would want this court to believe. The same are conspicuously seen from the orders sought in prayers (a), (b) and (c) in the chamber summons which are **one**, for temporary injunction to restraining the 1st, 2nd and 3rd respondents from evicting and demolishing the applicants' houses pending investigation and determination of the objection proceedings, and **second**, investigation establishment of lawful owner over

disputed area by the parties and **third**, for permanent order restraining the respondents from trespassing into applicants' land. The said application in my profound opinion constitutes three different prayers which are not only interrelated or interdependent but also incompatible or incongruous. The reasons am so holding are not far-fetched. **Firstly**, the prayers sought are preferred under different enabling provisions therefore the procedures for entertaining them are also different. The procedure for objection proceeding is provided for under Order XXI Rule 57 to 60 of the CPC, while the ones for temporary injunction is regulated under Order XXXVII Rule 1(a) and (2) of the CPC. As to the procedures to be adopted on the latter prayer Court has to consider the three tests as enunciated in the case of **Atilio Vs. Mbowe** [1969] HCD 284, after examining the presented pleadings while in the former in the course of conducting investigation as to who is the rightful owner of the disputed area, Court might be forced to order appearance of deponent for cross-examination purposes. **Secondly**, the prayers in the present application serve different purposes different end results. A prayer for temporary injunction is an equitable relief for maintaining status quo between the parties pending hearing and determination of an action in court. It is a remedy in the nature of prohibitory order granted, addressing the

court carrying out execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of the proceedings, most certainly an appeal. See the case of **National Housing Cooperation Vs. Petter Kassidi and Others**, Civil Application No 243 of 2016. Objection proceeding on the other hand saves the purposes of helping a third party, who may be adversely affected by attachment arising from decree born out of proceedings in which, the objector was not party to, to access the court. It mandates the Court with the task of investigating the claim of the objector as it was stated by Court of Appeal in the case of **Sosthene Bruno and Another Vs. Flora Shauri,** Civil Appeal No 249 of 2020 (CAT Unreported) when Court observed that:

> *the rationale for inclusion, in the CPC, of the above rules in Order XXI, in our view, is to provide for a procedure on how to carry out investigation of claims and objections which may be presented to court by third parties who may be adversely affected by attachment arising from decrees born out of proceedings to which the objector were not parties*.

Further to that, the end results of objection proceedings is the determination of ownership of the disputed property or determination of parties' interest in the property. As to the third prayer for permanent order to stop the respondents from trespassing into the disputed land, the same is also a

permanent prohibition order which needs to be treated separately as it is impossible to grant both temporary injunction and permanent order prohibiting the respondents from trespassing into the disputed land nor is it possible for the court to issue two different ruling in same application as Mr. Ludovick is suggesting, for that will be strange practice and procedure in our jurisdiction.

With the above understanding, it is learnt and this Court is satisfied that, the three prayers in the applicant's application are not only not interrelated or interdependent for being founded on different provisions of the law and serving different and separate purposes but also are not intertwined or incongruous in other words. That aside, another test to be employed is that, if the court is to reject the first prayer, will the second prayer still survive? If the answer is yes then that omnibus application is not permissible as the two prayer are not intertwined. But if the second prayer collapses upon refusal of grant of the first prayer then omnibus application is permissible for being congruous. This Court in the case of **Uwenacho Salum** (supra) on the same subject had this to say and I quote:

> *"In this application the prayers for extension of time within which to file an application for certificate that a point of law is involved and for certification of point of law are interlinked and*

interdependent. ***I say so as the first application has to be considered first and be granted before the second one is entertained. And the second one cannot be entertained before the first one is determined thus the two are interlinked.****" (Emphasis added)*

With the above stance and considering the circumstances of this case, I hold that, the applicants' act of preferring this omnibus application containing three different prayers which are not interlinked and intertwined or incongruous is very much detested and discouraged for turning this Court to be a ground of game of chances for riding two or three horses at the same time, the practice which I find to be not only unhealth but also unaccepted in our jurisdiction for abusing court process. This sound position of law of restricting riding of two horses at the same time was also well adumbrated by the Court of Appeal in the case of **Hamisi Said Vs. Fatuma Ally**, Civil Appeal No 147 of 2017 (CAT-Unreported), where the Court held that:

The law does not allow riding two horses at the same time because it amounts to an abuse of courts process.

In view of the above position therefore, as a matter of law and practice the applicants were duty bound to file two or more separate applications basing on the nature of reliefs sought in which they failed to do.

With regard to Mr. Ludovick's invitation to invoke the provisions of Section 3 A (1) and (2), and section 3 B of the CPC (Overriding principle) and avoid technicalities hence proceed to determine the application on merit, I hasten to say that, I am not prepared to accept that call. I so react as the overriding principle is not meant to be applied blindly against the mandatory provisions of the procedural law as the object of introducing it was to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. It is a vehicle for the attainment of substantive justice, thus should not be applied blindly as a vehicle to aid the party circumvent the mandatory rules and procedures of the Court as Mr. Ludovick has been persistently convincing this Court to do. And I would add the principle is applicable in serving interest of justice with well established reasons and without offending the clear provision of the law particularly where the defect sought to be ignored is attributed to minor issues such as slip of the pen or typographical error or any other error which does not go into the root of the document or matter at contest. See the cases of **Mondorosi Village Council and 2others Vs. Tanzania Breweries Limited and 4 others**, Civil Appeal No. 66 of 2017, **Njake Enterprises Limited VS. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 and **Martin D. Kumalija & 117 Others Vs. Iron**

and Steel Ltd, Civil Application No. 70/18 of 2018 (all CAT-unreported). In all fours I find the application to be incurably defective and therefore incompetent before the Court.

In light of the above position of the law accepting Mr. Ludovick's invitation of invoking overriding principle in this application, in my opinion is equated to blessing the applicants to circumvent the well settled rules and procedures on preference of omnibus application. Regarding Mr. Ludovick submission that the court can have two decisions in the single ruling of the reason that parties can be heard twice on a single application, it is my finding that, that argument is neither in law nor is practice. Indeed, the same is unfounded and I disregard it as allowing such practice is tantamount to allowing abuse of courts process, the course which I am not prepared to take.

Finally on the prayer for cost as prayed by Mr. Mayenga and Ms. Kinyaka, respectively, I am not prepared to heed to their prayer for two reasons, **firstly**, the matter has not been determined on merit and **secondly**, the issue under determination was raised by the court *suo motu*. As a matter of practice when an issue is raised by court *suo motu*, an order for costs is waived. All said and done, the application is struck out for being incompetent before the court.

Each party should bear its own cost.

It is so ordered

DATED at Dar es Salaam this 01st day of July, 2022.

E. E. KAKOLAKI

JUDGE

01/07/2022.

The Ruling has been delivered at Dar es Salaam today 01st day of July, 2022 in the presence of Mr. Nickson Ludovick advocate for the applicants, Ms. Rosalia Ntiluhungwa advocate for the 1st and 2nd Respondents, Ms. Kapwani Mbegelo advocate for the 3rd Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
01/07/2022.