

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA**

MISC. LAND APPLICATION NO. 128 OF 2020

*(Originating from the Judgment of this Court in Land Case No. 5 of 2015
dated 30th September, 2019 (Hon. JHK. Utamwa, J.)*

1. LUWINZA DALUSHI
2. SANDU LUCHENGA
3. MALALE SHIMBAL
4. TOVE MTEMI
5. MAKELEGE KENGELE
6. SUSU LUHENDE
7. JILAO SAMIKE
8. NGWISA MTEMI
9. LAHA MWANYENGE
10. MAKWEGU MISAFU
11. MAWAZO MWAFU
12. ELIAS MWAFU
13. TANGA LIFA
14. MAPAMBANO JINANGA
15. BUNDALA GAMBA
16. FUBE LUGEDEJA
17. LUSANGIJA DALUSHI
18. SHINJE JELA
19. MASUZULU DALUSHI
20. JIAO SAMIKE
21. SANTU LUCHEGA

.....: APPLICANTS

VERSUS

O.C INDUSTRIAL HOLDING LTD.....1ST RESPONDENT

FAGIO BROKERS AND AUCTIONEERS CO. LTD.....2ND RESPONDENT

RULING

Date of Last Order: 06.07.2022

Date of Ruling: 05.08.2022

Ebrahim, J.

The applicants herein instituted the instant application seeking for this court to grant the following prayers:

- a) *That this Honourable Court be pleased to grant leave to the applicant to file an application for setting aside the Exparte Judgment delivered on 30.09.2019 out of time.*
- b) *That this Honourable Court be pleased to set aside the exparte judgment delivered on 30.09.2019.*
- c) *That the Land Case No. 5 of 2015 be heard inter partes and decide on merits.*
- d) *That this Honourable Court be pleased to order stay of execution of Land Case No. 5 of 2015 until final determination.*
- e) *Costs to be in the main suit.*
- f) *Any other relief(s) this Honourable Court may deem fit to grant.*

The application was supported by an affidavit sworn by one of the Applicants, i.e Luwinza Dalushi. He claimed to has sworn the same under authorization of the other applicants. The respondent protested the application by filling their respective counter affidavit. Alongside, the 1st Respondent vide her counsel, Mr.

Samson Suwi, raised five (5) limbs of preliminary objection (PO) as follows:

- 1. The Applicant's supporting affidavit is bad in law for being sworn by only one person on behalf of all others without locus standi to represent them.*
- 2. That, the Applicant's application is incompetent for non-citation of a proper enabling provision of law.*
- 3. That, the Applicant's application is defective for carrying with it omnibus prayers.*
- 4. That, the Applicant's affidavit in support of the application is bad in law for containing a defective verification clause.*
- 5. That, the Applicant's affidavit in support of the application is bad in law for containing argumentations, hearsay evidence and conclusions contrary to Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019.*

Learned counsel therefore, prayed for this court to strike out the application with cost.

The hearing of the preliminary objection was made by way of written submissions. The 1st Respondent was represented by advocate Samson Suwi, whereas the Applicants were represented by advocate Victor C.M. Mkumbe.

In arguing the points of preliminary objection, Mr. Suwi abandoned the 2nd and 4th limbs of objections. He opted to argue

the 1st, 3rd and 5th limbs. On the 1st limb, he submitted that the application filed by 21 persons but supported by an affidavit of one person is fatally defective. This is because, that person neither obtained leave of this court to do so nor presented any document proving that he was nominated or authorised to swear the affidavit on behalf of other applicants. Mr. Suwi cited the decision of this court in the case of **Joachim Nkwabi and others vs Nyarugusu Mine Company Ltd and others**, Misc. Civil Application No. 168 of 2019 at Mwanza (unreported), where it was held that representation is a permissible conduct that can only be exercised upon authorization by the court in writing.

As to the 3rd limb of preliminary objection, Mr. Suwi argued that the application is defective for combining two distinct prayers, to wit; an application for extension of time to file an application to set aside *ex parte* judgment out of time; and an application to set aside *ex parte* judgment. According to Mr. Suwi the rule against omnibus applications prohibits combining prayers originating from different laws. He stated that the former prayer is provided under **section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019**, whereas the latter is provided under **Order IX Rule 9 of Cap. 33 RE**

2019. To buttress his argument, he cited the decision by this court in the case of **Recho Joshua vs Meda Joseph**, Misc. Civil Application No. 10 of 2020, at Mwanza (unreported).

With regard to the 5th limb of PO Mr. Suwi submitted that the affidavit in support of the application is incurably defective as it contravenes the provisions of **Order XIX Rule 3 of Cap. 33 RE 2019** for containing arguments, hearsay evidence and conclusion. He gave examples of the paragraphs which are crafted in such manner. Those paragraphs are 14, 15(a,b,c), 16(b,c), 17 (a,c) and 18.

Mr. Suwi was of the view that the defective paragraphs are the ones which carry the substantive parts of the application and the remaining paragraphs merely explain the background of the case. Mr. Suwi therefore urged this court to strike out the application with costs.

In turn, Mr. Mkumbe for the Applicant readily conceded to the preliminary objection as raised and argued by Mr. Suwi. He however, prayed for this court to strike out the application with leave to refile a proper one without order as to costs.

The respondents did not file rejoinder submissions.

I have considered the preliminary objection and arguments made by Mr. Suwi. I have also gone through the chamber summons and the supporting affidavit. Indeed, this application is incurably defective. For instance, the prayers made in the chamber summons are vague. The applicants are praying for extension of time to make an application for setting aside *ex parte* judgment out of time and at the same time applies to set aside the said *ex parte* judgment. This is omnibus application since the latter prayer is subject to the granting of the former prayer by the court. Also, the reasons for extension of time are different from the reasons for setting aside an *ex parte* judgment. In fact a prayer for setting aside *ex parte* judgement has been brought prematurely.

In the case of **Rutagatina C.L vs The Advocate Committee and Another**, Civil Application No. 98 of 2010 Court of Appeal of Tanzania, at Dar es Salaam (unreported) struck out application for being incompetent when it was encountered with the situation akin to the application at hand. In the said single application

there was a prayer for extension of time and a prayer for leave to appeal. The Court of Appeal observed as follows:

"..... So, since the applications are provided for under different provisions it is clear that both cannot be "lumped" up together in one application, as is the case here"

In the circumstance and as also correctly argued by Mr. Suwi and conceded by Mr. Mkumbe, the instant application is incompetent before the court liable to be struck out. The above findings suffices to dispose of the application.

Thus, the application is hereby struck out with costs.

Ordered accordingly.



Mbeya

05.08.2022


R.A. Ebrahim
JUDGE