

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

MISC. CIVIL APPLICATION NO. 86 OF 2021

(Arising from the pending High Court Misc. Civil Application No. 69 of 2021 based on the High Court PC Civil Appeal No. 38 of 2005 arising from the District Court, Civil Appeal No. 24 of 2005, Originating from Arusha Urban primary court Civil Case No 45 of 2003)

JUDITH ISAYA GUNDAAPPLICANT

VERSUS

- 1. AMEDEUS R. MALEO**
- 2. HAMADI JOSHUA SHOMARI**
- 3. WOISY SHIFAYA MBOYA**
- 4. YOLANDA JOSEPH**
- 5. GLORY CHRISTOPHER MOSHI**
- 6. DEVOTA ALPHONCE PETER**
- 7. ONESMO FAUSTIN KIMARO**
- 8. JOHN YUDA MSURI**
- 9. SAMWEL WILSON**
- 10. VICTOR B KILEO**
- 11. SEVERINI T MICHAEL**
- 12. ZULY SAIDI**
- 13. GENES HUGHO SHIRIMA**
- 14. FRAZIER KAZIMOTO**
- 15. MESHACK PETER MADANGI**
- 16. ESHIWAKWE R. NKYA**
- 17. AMINA IDDY JUMA**
- 18. DEOGRATIUS MISANA**
- 19. SELINA MISANA**
- 20. KELVIN LOIVOT KISIRI**
- 21. ADVANCE CREDIT RECOVERY CO LTD.**

RESPONDENTS

RULING

19/07/2022 & 13/09/2022

KAMUZORA, J.

The Applicant has preferred this application under section 3A (1) & (2), 3B (1) (a) & (2) and Order XLIII Rule 2 of the Civil procedure Code Cap. 33 [R.E 2019] seeking to be joined as a Respondent in the Misc. Civil Application No. 69 of 2021 which is pending before this Court. The application is supported by the affidavit sworn by the Applicant herself. The 18th and 19th Respondents did not object the Applicant's application but the 1st to 17th Respondents and the 20th Respondent contested the application and raised a preliminary objection to the effect that,

"The Application is incompetent and bad in law for the Applicant's failure to move properly the court by citing the proper and enabling provision in the chamber summons."

For purpose of serving court's time and that of the parties, hearing of both the preliminary objection and the main application was allowed to proceed parrel by way of written submissions. This court will therefore start with the determination of the preliminary objection which will either finalise the application or lead the court to determine the merit of the application.

Submitting in support of the preliminary objection the counsel for the Respondents argued that the Applicant had quoted a wrong

provision of the law and that even if the Applicant would have cited the proper provision of the law which is Order 1 Rule (3) of the Civil Procedure Code Cap 33 R.E 2019 which is the provision of joining a party as Respondent still the same could not move the court to grant the application sought.

The Respondent went on and submitted that, at the stage of the execution of the decree the court has no any jurisdiction of joining any party but has jurisdiction to give effect of the judgment of the court. To buttress his submission, he cited the case of **Robert Stephano Vs. Vedastina Archard Msika**, Land Case No. 43 of 2018, **Said Ally Ismail Vs. Republic**, Criminal Application No. 3 of 2010, **Tanzania Electricity Supply Company (TANESCO) Vs. Independent Power Tanzania (LTD) IPTL and 2 others** (2000) TLR No 324.

The counsel for Respondents further submitted that, this court cannot invoke the overriding objective as it does not have jurisdiction to grant the order sought. To cement on this the counsel cited Rule 9 of the Court of Appeal (Amendment) Rules G.N No, 345 of 2019, the case of **Alliance One Tobacco Tanzania Limited and another Vs Mwajuma Hamisi (As the Administratrix of the estate of Philemoni R Kilenyi) and another**, Misc. Application No 803 of

2018 HC at DSM, **Veronica Hassan Kishani vs Suzan Salum Malangai & 2 others**, Misc. Land Application No. 351 of 2021 HC at DSM and **Mondorosi Village Council and Others Vs Tanzania Breweries limited and others**, Civil Appeal No. 66 of 2017 CAT (Unreported).

Replying to the preliminary point of objection, the Applicants counsel argued that, the counsel for the Respondents has failed to state or mention the provision of law ought to have been cited by the Applicant as a proper enabling provision in the chamber summons hence the Preliminary objection is not on pure point of law but rather on argument hence, it does not qualify to be termed as a preliminary objection. To support his argument, he cited the case of **Alliance Insurance corporation Limited Vs. Arusha Art Ltd**, Civil Appeal No 297 of 2017 CAT at Arusha (Unreported).

The Applicant went further and stated that, the cited case by the Respondent is distinguishable from the facts to the present application and that the Respondent failed to appreciate the overriding objective principle. He supported his submission with the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 CAT, **Veronica Hassan Kishai Vs Suzan Salum Malangai and 2 others**, Misc. Land Application No 361 of 2021 HC at DSM, **Amani**

Girls Home Vs. Isack Charles Kanela, Civil Application No 325/08 of 2018 CAT at Mwanza (Unreported).

I have analysed the submissions made by both parties for and against the preliminary objection, the question that follows is whether the preliminary objection is of merit. In determining this issue, I will be guided with the holding made in the famous case of **Mukisa Biscuit Manufacturers Ltd Vs. West End Distributors Ltd** [1969] EA 696, where it was held that,

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."

In the same case, at page 700 the court had this to say: -

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."

The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily. In the

instance application it is the submission by the counsel for the Respondents that the application is incompetent before this courts for failure of the Applicant to cite the proper provision of the law.

I agree with the counsel for the Respondent that section 3A (1) & (2), 3B (1) (a) & (2) and Order XLIII Rule 2 of the Civil procedure Code cited by the Applicant are not specific provision dealing with joining the party to the case. Section 3A (1) & (2) are the provision on overriding objectives and thus cannot be considered as specific enabling provision for an application to join a party to the case.

Similarly, section 3B (1) (a) & (2) is the provision intending for furtherance of overriding objective thus it cannot in anyway be considered as specific provision to be invoked to move the court to grant application for leave to be joined as a party to the case. Coming to Order XLIII Rule 2, it is a general provision how an application should be brought in court and dealt with. The same is not a specific provision for an application to be joined as a party to the case.

In that regard, the provisions cited by the Applicant cannot be considered as wrong provision as they are relevant provision but the Applicant skipped referring the specific provision moving the court for the Applicant. In this matter I agree with the counsel for the respoont

that the proper specific provision would have been Order I Rule 3 which reads: -

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise."

In my view, the parties referred in the provision as plaintiff and defendant may also include Applicant and Respondent as the case may be. I agree that, what was raised by the Respondent is a pure point of law as there was non-citation of the specific enabling provision of the law moving the court to grant the application. Now, the question is what is the consequence of non-citation of the specific enabling provision of the law?

Subscribing to the position of this court in **Alliance One Tobacco** (supra) and **Veronica Hassan Kishai** (supra), I am inclined to say that, where the Applicant has omitted only to cite any specific provision of the law, such defect can be cured under the overriding objective by allowing the insertion of that provision which I so assume. That will be different from the wrong citation of the law moving the court to grant

the sought prayers. The preliminary objection is therefore overruled without costs.

Reverting to the merit of the application, the Applicant is seeking for an order of this court to be joined as a party to the pending application she has interest to protect in respect of property intended to be executed on account that she is the registered owner of the said property. The counsel for the Applicant argued that, the Applicant is a necessary party in the pending Misc. Civil Application No. 69 of 2021 in which the parties pray for order of the court to postpone an execution order for eviction from the suit land pending the investigation by this honourable court to see if the land is liable for attachment to satisfy the decree in Civil Appeal No. 48 of 2005 between the 1st, 2nd and 3rd Respondents. He therefore prays for the court to grant the application by allowing the Applicant to be joined as one of the Respondents in Misc. Civil Application No. 69 of 2021 which is pending before this court.

The 1st to 17th Respondents as well as the 20th Respondent contested the application on account that, the Applicant was not a party to the original proceedings and is not mentioned in the decree sought to be executed. That, the Applicant cannot be joined in the pending application before this court as the court cannot alter the decree to incorporate the interest of the Applicant and the only duty of this court

is to give effect to the decree of the court. It was argued by the counsel for the Respondent that, even if there was proper citation of the enabling provision, still this court lacks jurisdiction to entertain an application intending to join a party at execution stage.

It was argued by the counsel for the Applicant that, with the coming up of the overriding objective principle, it is very inconceivable to argue that this court have no jurisdiction to hear the Applicant's application to be joined as a party to the application. He insisted that, if the court have jurisdiction to hear Application No. 69 of 2021, filed by the 1st to 17th Respondent, it has equally the same jurisdiction to hear the application by the Applicant to be joined in the same application. That, the Applicant prays to be joined as a party to the application so that she can protect her interests and that of her sisters. He insisted that, Order XLIII Rule 2 of the CPC should be given prominence to cut back on over-reliance on procedural technicalities.

There is no doubt that the source of the application to which the Applicant intends to be joined emanates from execution proceedings. It is in record that, the 1st to 17th Respondents herein instituted Misc. Civil Application No. 69 of 2021 which is pending before this court aiming at objecting the execution of this court in PC Civil Appeal No. 38 of 2005. There is no dispute that the 1st to 17th Respondents and the Applicant

were never parties to the original proceedings in PC Civil Case No. 23 of 2003 which resulted into DC Civil Appeal No. 24 of 2005 which also went to High Court in PC Civil Appeal No. 38 of 2005 to which, its execution proceedings are contested in Application No. 69 of 2021 before this court and the Applicant craves leave to be joined as one of the Respondents. The pertinent issue for consideration is whether the Applicant qualifies to be joined as a party in Misc. Civil Application No. 69 of 2021.

The joinder of a necessary party in a suit is procedural in nature and accordingly, the person seeking to be joined has to demonstrate his/her interest to the extent that his/her presence in the suit is necessary to enable the court to effectually and completely adjudicate upon matter and settle all questions involved in the suit. It is important to consider whether joining of a party in a suit will enable the court to adjudicate the matter prudently and settle all the issues involved.

Reading the parties submissions, it is with no doubt that the 1st to 17th Respondents instituted Misc. Civil Application No. 69 of 2021 praying for postponement of order for eviction from the suit land pending the investigation by this Honourable court to see if the land is liable for attachment and eviction of the Applicants in satisfying the decree of the court in Civil Appeal No. 38 of 2005. The Applicant craves

to be joined in that application as she also claims to have interest over the property intended to be executed as she is the registered owner of the land in question.

By the look of it, Misc. Civil Application No. 69 of 2021 is an objection proceeding as it is brought under the provision of Order XXI Rule 57 which reads: -

"57.-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit: Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed."

Objection proceedings involve conducting a thorough investigation to see if the property mentioned in the execution is liable for attachment and execution of the court decree. A person who is not a party to the original suit can only challenge execution affecting his/her interest through objection proceedings. Since Misc. Civil Application No. 69 of 2021 is an objection proceeding, it is without doubt that the Applicant has right to be joined to defend her interest if any through that application. In considering also that the Applicant has indicated interest

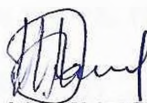
over the property mentioned in the execution, it is desirable and for avoidance of multiplicity of suits, to have the Applicant joined so that she can be bound by the decision of the court in that application.

In the upshot I find merit in this application and proceed to allow the same by ordering the Applicant to be joined as one of the Respondents in the pending Misc. Civil Application No. 69 of 2021. Let the pleadings be amended to comply to the court's order. No order for costs.

Order accordingly,

DATED at ARUSHA this 13th September 2022.




D.C. KAMUZORA
JUDGE