

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPLICATION NO. 3 OF 2022

(Arising from High Court Misc. Land Appeal No. 19/2018 C/O from DLHT for Rukwa
District Land appeal no. 21/2017 originating from Case No. 30/2016,
Kipeta Ward Tribunal)

EMMANUEL MLELA 1ST APPLICANT

ALPHONCE LUGUTU MASALU & 218 OTHERS APPLICANTS

VERSUS

MPANDA DISTRICT COUNCIL 1ST RESPONDENT

DISTRICT COMMISSIONER TANGANYIKA DISTRICT 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

Date: 23 & 23/03/2022

Nkwabi, J.:

The applicants are praying this court to issue orders as follows:

1. Interim declaratory order restraining the 2nd and 1st respondents and their agents from evicting residents as well as destroying their properties, interfering, embarrassing and disturbing applicants peaceful use and enjoyment of their land located at Visima viwili area in Kaseganyama village and at Musisi area in Kasekese village, Kasekese ward, Tanganyika District, Katavi region pending institution

of suit against the Respondents upon expire of 90 days set in the notice to sue.

2. Any other order/ reliefs this court may deem just and fit so to grant.
3. Costs of the application.

The application has been brought under section 2(1) and 2(3) (c) of the Judicature and Application of Laws Act Cap 358 R.E. 2019 and section 95 of Civil Procedure Code Cap 33 R.E. 2019.

The respondents have promptly filed a counter affidavit. This matter was brought under a certificate of utmost urgency. The respondents are being represented by Mr. Mjahidi Kamugisha, Mr. Fortunatus Mwandu, Ms. Kagemulo Mutagwaba learned State Attorneys and Ms. Neema Ringo, learned Principal State Attorney while the applicants are duly represented by Ms. Sekela Amulike, learned Advocate.

Mr. Kamugisha, raised a preliminary objection on point of law that the application is incompetent as it is supported by a defective affidavit because

the advocate who witnessed the affidavit has no valid practicing certificate/licence. They prayed the application be struck out with costs.

Ms. Amulike admits that the affidavit is defective for the reason explained by the State Counsel. She, however, prays this court to use its discretionary power and allow her to file a correct affidavit so that the matter proceeds and is determined on merits to save costs of both parties and time. She invoked the overriding objective principle and cited **Gasper Peter v Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 (CAT) (unreported).

The respondents stood to their guns and prayed the application be struck out with costs.

As Ms. Amulike concedes that the affidavit in support of the application is defective, the question now is whether the overriding objective can be invoked to serve the application either by way of amendment or bringing another affidavit. It should be noted that what befalls incompetent proceedings or an incompetent matter was stressed in the case of **MIC**

Tanzania Ltd v Minister for Labour and Youth Development and Attorney General, Civil Appeal No. 103/2004 (CAT) At SDM) where it was stated:

The nothingness of incompetent proceedings was underscored by this Court in the case LEONSI SILAYO NGALAI V HON. JUSTINE ALFRED SALAKAMA AND THE ATTORNEY GENERAL, CIVIL APPEAL NO 38 OF 1996 (unreported) This court said:

*... The second aspect is whether this Court may adjourn an appeal which is incompetent, in order to allow the appellant to take necessary steps to cure the incompetency. This court has said it before that **an incompetent appeal amounts to no appeal**. It follows therefore that the court cannot adjourn what it does not have. Under such circumstances, what the court does is to strike the purported appeal off the register (emphasis is ours).*

So as there was no application before the High Court, according to the ruling of the learned judge, it was an exercise in futility to purport to determine it on the merits. No valid and enforceable orders could be made in application which was not before the High Court.

Then, could the introduction of the Overriding Objective principle in our jurisdiction change the position and save the boat in a turbulent deep sea? The decision of the Court of Appeal of Tanzania in **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69/2017** CAT (unreported) precisely answers the question in its words where it was stated:

"The certificate of delay was based on a non-existent letter thus rendering it defective.

.....

Also the overriding objective principle cannot be applied blindly on mandatory provisions of the procedural law which goes to the very foundation of the case."

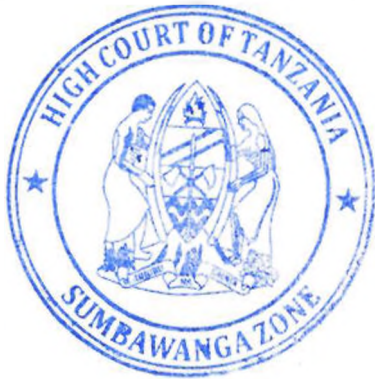
In this application, the affidavit in support of this application was witnessed by an advocate who has not renewed his practicing certificate. In the circumstances, the affidavit amounts to nothing. There is nothing in evidence to support the application. Since there is no evidence in court record which evidence is required by the law, then the defect on the affidavit goes to the


very foundation of the application hence the overriding objective principle cannot be called into play. Further to that, the case of **Gasper Peter** (supra) cited by Ms. Amulike is, with greatest respect to Ms. Amulike, not applicable in this case as the circumstances are glaringly different. That was an appeal while this is an application and the circumstances are too different.

The end result, I rule that this application is incompetent before this court for the reason that it is supported by a defective affidavit. I proceed to strike the application out with costs for that reason.

It is so ordered.

DATED at **SUMBAWANGA** this 23th day of March, 2022




J. F. NKWABI
JUDGE