

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**MISC. LAND APPLICATION NO. 19 OF 2022**

**AHAMADI MUSSA NJOPA.....1<sup>ST</sup> APPLICANT**

**ISSA BAKARI BUBA.....2<sup>ND</sup> APPLICANT**

**ABILAHI NASSORO CHAMPUNGA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**MTWARA DISTRICT COUNCIL.....1<sup>ST</sup> RESPONDENT**

**TANZANIA INVESTMENT CENTRE .....2<sup>ND</sup> RESPONDENT**

**DANGOTE INDUSTRY TANZANIA.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

*25.4.2023 & 23.5.2023*

**LALTAIKA, J.:**

The Applicants herein, **Ahamadi Musa Njopa, Issa Bakari Buba and Abilahi Nassoro Champunga** (hereinafter referred to as the first, second and third applicant, respectively) are seeking permission to act on behalf of 54 others to commence civil suit against the respondents. This application is supported by a joint affidavit affirmed by the applicants on 9/9/2022.

It is noteworthy that this application has been resisted by a joint counter affidavit of the first, second and fourth respondent, respectively

sworn by Ms. Getruda Songoi, learned State Attorney. While Mr. Hussein Mtembwa, learned advocate has affirmed a counter affidavit on behalf of the third respondent. However, on the same date of filing a counter affidavit (16/11/2022), the third respondent filed a notice of preliminary objection on point of law that the applicants' affidavit is incurably defective for including depositions of other persons who are not applicants. Furthermore, on 1/3/2023 the first, second and fourth respondents lodged a preliminary objection on point of law that the application is bad in law for being preferred out of time contrary to the law.

When this matter came up for hearing of the preliminary objection raised by the first Defendant; parties by consent agreed the preliminary objection to be disposed of by way of written submissions. The parties complied with the schedule seamlessly.

On the part of the third respondent her written submission was drawn and filed by Ms. Rose Ndemereje, learned advocate. The learned counsel contended that going through the affidavit one may reveal that:

*"We, AHMADI MUSA NJOPA, ISSA BAKARI BUBA and ABILAH NASSORO CHAMPUNGA, adult, Muslim and resident of Hiari and Mbuo Mtwara District in Mtwara Region do hereby AFFIRM and STATE as follows; 1. That we are the applicants in the application herein thus conversant with the facts we are about to depone hereunder."*

It was Ms. Ndemereje's contention that looking at the paragraph quoted above one may conclude that there are only three applicants named herein above who signed the verification and jurat of attestation. She went on and submitted that at paragraph 2 of the affidavit is very confusing since it

mentions the named applicants and 51 others who introduced themselves as applicants and owners of the suit land.

The learned counsel stressed that the language used conveys the meaning that they are also part of the applicants since the subject word use is "we" meaning "many". She went further and contended that paragraph 2 of the affidavit mention other 51 persons who are not applicants. However, Ms. Ndemereje submitted that the 51 others introduced themselves as applicants in the same affidavit. The learned counsel averred that the 51 persons did not even verify the affidavit or have signed as required by law.

To buttress her argument, the learned counsel cited the case of **Jerome Lingia & 3 Others v. Emayan Packaging**, High Court of Tanzania at Arusha, Revision No.107 of 2021(media neutral citation [2022] TZHC 10618) where this court encountered a more or less similar situation. The learned counsel contended that even the overriding objective principle expounded in the case of **Njake Enterprises Ltd. vs Blue Ltd and Rock Venture Company Ltd**, Civil Appeal No.69 of 2017 CAT (unreported) failed as the application was struck out.

The learned counsel submitted further that in the present case there are only three applicants but then other 51 who are strangers were mentioned. She insisted that the strangers were not afforded an opportunity to sign the said affidavit which makes the affidavit incurably defective. Ms. Ndemereje averred that the affidavit should have only mentioned the three applicants without mentioning the other 51 persons who are now construed to be applicants.

In conclusion, the learned counsel maintained that the effect of this defect is to strike out the application for being incurably defective. She stressed that it is a requirement of law that every application under the Civil Procedure Code should be by way of Chamber Summons supported by an affidavit in view of **Order XLIII Rule 2 of the Civil Procedure Code R.E. 2019**. To this end, Ms. Ndemereje contended that the application had no legs to stand on without an affidavit hence, she prayed this court to uphold the objection raised with costs.

In response **Mr. Emmanuel Ngongi** conceded that paragraph 2 of the applicants' affidavit mentioned other persons who are not applicants but are the parties to this application. The learned counsel submitted that the application is founded under Order 1 Rule 8 of the Civil Procedure Code [Cap.33 R.E. 2019] which the parties pray this court to grant a permission for the applicants herein to act on behalf of the 54 others in commencing a suit against the respondents.

The learned counsel submitted further that the present application is for the permission to act on behalf of others. Mr. Ngongi contended that it is a settled principle of law that if the court finds that the defects are inconsequential it can order the offensive paragraphs be expunged and proceed with the application if the affidavit has substance to the application. The learned counsel insisted that the offensive paragraphs can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs if the expunged paragraphs are inconsequential.

To fortify his argument, Mr. Ngongi cited the case of **Chandha & Company Advocates v. Arunaben Chaggan Chhita Mistry & 2 Others**, Civil Application No.25 of 2013 cited in the case of **Phantom Modern Transport (1985) Ltd v. Dobie (TZ) Ltd**, Civil Reference Nos.15 of 2001 and 3 of 2002 (unreported) in which the Court held that “where the offensive paragraph is inconsequential, they can be expunged leaving the substantive parts of the Affidavit remaining intact so that the court can proceed to act on it.”

In addition, the learned counsel cited another case of **Chandha & Company Advocates v. Arunaben Chaggan Chhita Mistry & 2 Others**, Civil Application No.25 of 2013 at page 9 where the Court expunged paragraph 7 of the applicant’s affidavit from the records for being inconsequential and continue determining the application based on the rest of the paragraphs. To this end, the learned counsel invited this court to expunge paragraph 2 of the affidavit and remain with the rest of paragraphs in determining the application on merit.

Having dispassionately gone through the submissions for and against the preliminary objection raised by the third respondent, I am inclined to determine the merit or otherwise of the preliminary objection. However, before I proceed with the determination of the preliminary objection by the third respondent, it is important to make the record clear that even the first, second and fourth respondents jointly raised a preliminary objection on point of law “that the application is bad in law for being preferred out of time contrary to the law.”

Earlier on this court ordered the parties to file their respective written submissions. Upon perusal of the court file, it has come to my attention that the first, second and fourth respondents did not file their written submission in support of their preliminary objection as it was scheduled by this court. Following this conduct, this court asked itself whether failure to file written submission is fatal. The answer is affirmative since what has been done by the first, second and fourth respondents tantamount to failure to prosecute a case or suit hence the remedy is to dismiss the matter. For instance, in **P 3525 LT Idahya Maganga Gregory Vs. The Judge Advocate General**, Court Martial Criminal Appeal No.2 of 2002 (unreported) the court held that;

*"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case maybe..."*

Likewise, in the case of **Haleko v. Harry Mwasaijala**, DC Civil Appeal No.16 of 2000, (unreported) this court elaborated on the consequences of failure to file written submission on the dates scheduled by the court without justifiable reasons is as good as non-appearing on the date fixed for hearing. Thus, the court ended dismissing the matter with costs. Following that position, I hereby dismiss the preliminary objection raised by the first, second and fourth respondents with no order as to costs.

Regarding the preliminary objection raised by the third respondent, it is clear that paragraph 2 of the affidavit of the applicants contains names of 54 other persons who have interests in the matter but are not applicants.

Indeed, these 54 other persons neither verified nor attested on the affidavit which supports this application. However, I agree with what Mr. Ngongi had submitted that paragraph 2 of the affidavit of the applicants is offensive but is inconsequential because it does not affect the contents of what the applicants have prayed in their Chamber Summons made under: **Order I Rule 8(1) of the Civil Procedure Code (Supra)**.

To decide on the way forward, I am guided and bound by the decision of the Court of Appeal of Tanzania in the case of **The Principal Secretary, Ministry of Defence and National Service** [1992] TLR 387. The Court stated:-

*"a notice of motion and the accompanying affidavit are in the very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that it is clear what relief is being sought then the court should proceed to consider and determine the matter regard being had to the objection if any, raised by the opposite party."*

In the light of the above decision, the issue for determination is whether the defect adversely impacts on the entire affidavit. I have looked at the contents of the affidavit and the applicants as a whole in conjunction with the reliefs sought by the applicants. As alluded to earlier, the substantive parts of the affidavit are adequately complimented by the prayer(s) stated in the Chamber Summons. Consequently, the inconsequential defect in the affidavit is safely overlooked or ignored or expunged because the intact substantive parts are adequately taken in conjunction with what is stated in the on.

grounds in the Chamber Summons. See, **Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited** (supra).

All said and done, the preliminary objection raised by the third respondent is overruled for being devoid of merit. Therefore, it is dismissed with no costs to the applicants. Consequently, the parties are argued to expedite the matter so that the suit is determined on merit.

It is so ordered.



**COURT:**

**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**  
**23.5.2023**

This Ruling is delivered under my hand and the seal of this Court on this 23<sup>rd</sup> day of May 2023 in the presence of Ms. Getruda Songoi, learned State Attorney and Mr. Emanuel Ngongi, learned advocate for the respondents and applicants respectively.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**  
**23.5.2023**