

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISC. LAND APPLICATION NO. 69 OF 2022

1. MANENO SAIDI MPANDA	}APPLICANTS
2. NOTI TANGASI		
3. AMIRI ATHUMANI SONGITO		
4. EDWARD EMMANUEL MALIGANA		
5. ANDASONI NGURUMO		
6. KEDIMONDI EZEKIA		

VERSUS

1. THE DISTRICT COUNCIL OF KONGWA	} RESPONDENTS
2. THE ATTORNEY GENERAL		

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RULING

24th April & 3rd July, 2023

HASSAN, J.:

The applicants herein preferred this application under Order 1 Rule 8, Order XLIII Rule 2 and section 95 of the Civil Procedure Code Cap.33 R. E 2019 seeking for the following orders:

- 1. That this honourable court be pleased to grant leave for the applicants to sue the respondents as*



*representatives of other seventy-two (72) persons
through a representative suit.*

2. Costs of this application to be provided for.

*3. That, this honourable court be pleased to grant any
other relief (s) as it deems fit to grant.*

This application is supported by the affidavit of one the Amiri Athumani Songito on behalf of other applicants. The respondents were duly served with chamber summons and they promptly filed a counter affidavit.

On 24th April, 2023, this application came for hearing whereby the applicants were represented by Ms. Catherine Wambura, learned Advocate, and on the other part Mr. Omari, Learned State Attorney appeared for the respondents.

Submitting in support of the application, Ms. Wambura pleaded to adopt the affidavit of the 3rd applicant as part of her submission. She averred that the 3rd applicant was instructed by the 1st, 2nd, 4th, 5th and 6th applicants to affirmed on their behalf.

Ms. Wambura told the court that, the applicants are seeking for leave of the court to file a representative suit on behalf of other seventy-

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two (72) applicants who own the land measured acre 1129, which is located in the village of **Mtanana, Ndurugumu** and **Kibaigwa** within Kongwa District in Dodoma Region.

She went on submitting that, the disputed land was attained by the applicants in different ways; like inheritance, clearing the bushes and other purchased, together with placement process through village operation. She pressed that the applicants and other 72 counter parts have been using that land for many years under customary ownership since 1960s.

She added that, during villagization, that land was recognized by the authority (village authority), but they were left to use the land for their personal uses. Surprisingly on January, 2022, the 1st respondent approached the applicants and their 72 counterparts and commanded them, either to vacate the said land or enter into lease agreement with the 1st respondent.

Learned advocate Wambura went on to submit that, the applicants disagreed with the proposal since it was illegal. She further submitted that, the applicants and their 72 counterparts who were living in that villages called on a meeting on 5th February, 2022 to discuss and decide about their fate. In that meeting among others, they have decided to file



the suit. More so, she supplemented that, in the application herewith, they have attached a copy of minutes coming from the said meeting which has listed all 78 peoples as reflected in para 6 of applicants' affidavit.

She also submitted that, in spite of the efforts made by the applicants to inform the 1st respondent that the disputed land is their land, the 1st respondent has persistently demanded the applicants to vacate the disputed land or conclude lease agreement with him.

The learned advocate Wambura argued more that, the applicants and their seventy-two (72) counter parts shares the common interest to the disputed land because they are altogether affected from the commands given by the 1st respondent.

Henceforth, she averred that since the applicants and their 72 counterparts have not been compensated, then, they are all aggrieved by the action of the 1st respondent. For that reason, they altogether intend to file a case against the 1st respondent and they have attached a copy of an intended plaint with their application as in paragraph 8 of the affidavit. To support her point, Ms. Wambura cited the case of **Nicholaus Samwel and 7 other v. National Ranching Company Ltd and 2 Others, Misc. Land application No. 47 of 2022 at Buboka (unreported)** where the court referred the case of **Abdalah Mohamed Msakandeo**

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and Others v. Dar es salaam and two Others (1998) TLR 439,

where the court observe that:

"Law require an applicant for leave to file a representative suit to establish that numerous persons are similarly interested in the intended suit and they are willing to join in it."

She added that, apart from having a shared interest, the applicants have also shown willingness to be united in the intended suit by appending their signature in the minute of 5th day of February, 2022 as in paragraph 6 of an affidavit in support of this application.

To her view, the applicants and their 72 counterparts have complied with the procedure, including to issue a 90 days' notice to the respondents. However, no one bother to respond the same. She adds that, the said notice is annexed as MPA-3 as paged under paragraph 10 of the affidavit.

Ms. Wambura cemented further that, since six applicants have complied with the procedure in terms of Order 1 Rule 8 of the Civil Procedure Code, she prayed this application to be granted with costs. Adding that, she averred that if the application will not be granted, the



applicants together with other 72 counterparts who live in that disputed land will be condemned their right.

In reply, Mr. Omary, learned State Attorney opposed this application and prayed that the counter affidavit deponed by Mr. Ben Kigoma, the Principal Officer of the 1st Respondent be adopted to form part of his submission.

Opening his submission, he stated that, since their affidavit is in the court record, he opted to stick to the arguments fronted by the applicants in order to show why they oppose this application. On that, he referred the court to the case of **Alex Ezekiel Kawe and 6 Others v. The Permanent Secretary of the Ministry of Defence and National Service, Misc. Land Application No. 89 of 2022 at Dodoma** (unreported), where it was held that: in order the applicants' application to be granted, the applicants should meet the following conditions:

- 1. The parties must be numerous;*
- 2. They must have same interest to the suit;*
- 3. The permission must have been granted or direction must have been given by the court; and*
- 4. Notice must have been issued to the parties whom it is proposed to represent in the suit.*



To his considered view, this application failed to comply with the procedures stipulated under the case of **Alex Ezekiel Kawe and 6 Others** (supra). Especially, that the parties must be numerous and that, parties must have same interest in the suit.

Mr. Omary started to argue by touching the first condition that parties must be numerous and be interested in the suit. According to the case of **Alex (supra)** at page 5, it was held that:

"One should bear in mind that in representative suit the first requirement for the application under Order 1 Rule 8 is that numerous persons (a group of persons) must be interested in the suit. It follows that the question as to whether parties can be said to be numerous must be decided by the court upon the facts of each case; taking into account the nature of controversy, the subject matter in dispute and so forth."

That said, the learned State Attorney contended that the applicants have failed to meet the requirements set forth in the case above. His reason is that, in the applicant's affidavit those 72 names were not listed.

As to the second condition, that the parties must have same interest in the suit. He submitted that the applicants and their 72



counterparts have failed to show what was their common interest, and how will they suffer the same interest from three different villages as shown in paragraph 3 of the applicants' affidavit. He pressed more that the applicants have also failed to show how these persons from three different villages do shares those interest in common to the effect that, if a villager residing at Kibaigwa is ordered by the 1st respondent to vacate his premises the other villager residing at Nturugumi or Mtanans village will be affected by such order. To cement his argument, learned State Attorney once again referred the case of **Alex (supra)** to insist on the point of common interest where it was held that:

"Similarly, the second legal requirement of maintainability of representative suit is that a person on whose behalf the suit is instituted must have the same interest. In other words, the interest must be common to them all or they must have the same aggrievances which they seek to get redressed. This means that community of interest is, therefore, essential and it is a condition precedent for bringing a representative suit."



Furthermore, learned State Attorney submitted that, applicants have flopped to comply with condition necessary for creation of an affidavit. He disputed that affidavit carries evidence. And, as evidence which need to be considered by the court, the applicants ought to prove what is contained in the affidavit.

He also contended that, looking at paragraph 3 and 4 of the applicant's affidavit, the applicants attested that these 78 persons are the owner of the disputed land. He adds that, the applicants and other 72 counterparts had acquired the disputed land through customary land acquisition process and later on, the same was villagized by the authority.

To the State Attorney's view, the applicants have botched to specify which authority was responsible for that task. The applicants have not submitted their documentary evidence to prove their ownership. Therefore, because the applicants failed to submit the documentary evidence, then, the 1st respondent is correct to demand to acquire the disputed land since he is working under government authority which has mandate to do so.

He also added that, the applicants should not be granted a leave to sue under representative suit for something which they do not have. In closing, he averred that this application lacks legal base as under Order

1 Rule 8 of the CPC, Cap. 33 R. E 2019. And for that reasons, he prayed this application be dismissed without cost.

In rejoinder, Ms. Wambura retained her submission in chief and further stated that, the argument dispatched by the respondents' counsel that the applicants and their 72 counterparts have failed to submit evidence of ownership is premature and it is misplaced since at this juncture the issue of ownership is not at stake. That is, there is no determination as who is the right owner of the disputed land, instead, the applicants are only asking for the leave to file a case under representative suit. He stressed that, the issue of ownership will be determined after the court has granted the said leave for applicants and other 72 persons to file a suit as attested under para 8 of the applicant's affidavit.

With regard to the **Alex** case (supra) which was referred by applicants' counsel, Ms. Wambura stated that, she agreed that the conditions stipulated in the case of **Alex** (supra) must be complied with. She insisted that they have met all those conditions.

Starting with the first condition, that parties must be numerous. She pointed out paragraph 6 of the applicants' affidavit where there is a list of all 78 persons including the applicants herein. cementing this point, she contended the argument raised by respondent's counsel that the



names of all 77 persons should have been mentioned in the application. For that, she argued that, the respondent's counsel did not say under which law this requirement is bleeped.

Also, as per the second condition, that the applicants must have same interest to the suit. Ms. Wambura referred to paragraph 8 of the affidavit where it is demonstrated that all 78 farmers of the area in dispute have common interest in the suit to be filed. For these reasons, she argued that points raised by the respondents' counsel are baseless and should be disregarded.

Moreover, she also protested the argument upstretched by the learned counsel for respondents at para 4 of the counter affidavit where he contended that, the 3rd applicant is incapable in law to swear affidavit on behalf of others. Here, learned counsel for applicants opposed the assertion and she averred that the 3rd applicant has acquiesced to take oath on behalf of other applicants as shown in para 2 of applicant's affidavit where he listed them.

Further to that, as for the 5th and 6th para of the counter affidavit, she submitted that, the respondents have acknowledged that there is a conflict linked to the suit land. Therefore, she pressed that the applicants



have complied with the condition required for granting of the leave to sue under representative suit.

In conclusion, she reiterated her earlier prayer that this application be granted with costs.

Now, having heard the submissions from the parties, the issue for determination of the court is whether or not the applicants have been able to satisfy the court to grant leave to file a case under representative suit.

This application is brought under Order 1 Rule 8, Order XLIII Rule 2 and section 95 of the CPC. Order 1 Rule 8 provides that;

"Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

As for section 95 of the CPC, it reads as here under:

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"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

It is mandatory requirement under Order 1 Rule 8 of the CPC that, leave of the court must be sought and obtained prior to the filing of a suit under the realm of representative suit. This was also the position cemented in **K. J Motors and 3 Others v. Richard Kishamba and Others, Civil Application No. 74 of 1999 at Dar es salaam** (unreported) and **Abdala Mohamed Msaka and 2 Others v. City Commissioner of Dar es salaam and two others (1998) TLR. 439**, it was held that:

"Provisions of Order 1 rule 8 of the Civil Procedure Code, 1966 Cap. 33 require an application for leave to file a representative suit to establish that numerous persons are similarly interested in the suit and they are willing to join it. These provisions do not admit where the applicant merely intends to invite others who may have interest in the case."



In the context, it is essential that before the court has decided to grant a leave to file representative suit, it must be established that: **One**, that the applicants herein and their 72 counterparts have common interest in the suit and they are all willing to join the suit. **Two**, that the applicants have the consent of all 72 persons sought to be represented.

Thus, looking the application at hand, starting from the first issue that whether or not the applicants herein and their 72 counterparts have common interest in the suit, and whether they are all willing to join the suit?

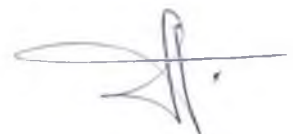
Ogling on the paragraphs 3 and 4 of the applicants' affidavit, it has been established that, all 78 persons are farmers who owned about 1129 acres of the valley within the villages of Mtanana, Ndurungumi and Kibaigwa in Kongwa District and Dodoma Region; and they all have common interest in the intended suit because each of them owns a piece of land which they have occupied peacefully since 1960s. But the 1st Respondent has only trespassed into their land. More so, para 6 of applicants' affidavit unveils an annexed copy of minutes and attendance list of all 78 persons who unanimously agreed to file a suit against 1st respondent.

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On the other part, in rebuttal, the respondents have not contested this issue, instead, the counsel for the respondents only concentrated in objecting that the applicants had not proved the ownership of the suit land. In my view, as it has been rightly submitted by the applicants' counsel that, the issue of ownership cannot detain the court to determine the application sought.

For this reason, since a list comprises of all 78 names of persons who intends to file a suit against the respondents has been unveiled in evidence, then, I have no doubt that the applicants have been able to discharged their duty as required under Order 1 Rule 8 of CPC. It is obvious that, since the applicant's affidavit bears the names of the purported numerous persons (78 farmers), and their signatures being clearly appended on, hence, this undertaking shows their willingness to join the suit.

With regard to the second condition, as to whether or not the applicants have acquired consent of all 72 persons sought to be represented in the suit? My looking at paragraph 9 of the applicants' affidavit shows that, all farmers occupying the suit land have once met and proposed the applicants herein to sue on their behalf. For clarity, para 9 states as follow:


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"That, all farmers occupying the suit land and who are affected by the act of the 1st respondent met and proposed the applicants to sue on their behalf. A copy of the minutes of the meeting held on 5th February, 2022 decided to lodge representative suit against the 1st respondent. The 2nd respondent is a legal adviser of the 1st respondent."

Additionally, the applicants have enclosed an annexure **MPA-1**, a minute of their meeting dated 5th February, 2022. That meeting was attended by the applicants and their 72 counterparts. Hence, among the main agenda were as hereunder:

- 1. Kukubaliana kuwa wakulima 78 tuna mashamba yetu kwenye mbuga ya Mtanana, Kibaigwa na Ndurugumi.*
- 2. Kuteuwa wakulima watakaofungua kesi ya msingi kwa niaba ya wakulima wote 78.*
- 3. Mwanasheria atakaesimamia kesi.*

After discussion as per minute, the following resolutions were arrived. **One**, unanimously, all 78 farmers agreed to file a suit against the respondents herein. **Two**, that 6 farmers should represent other 72



farmers to file a suit. That names include one, Maneno Said Mpanda, Noti Tangasi, Amiri Athumani Songito, Andason Ngurumu, Edward Emmanuel Maligana and Kedimundi Ezekia.

Now, basing from what was borne in the meeting, considering that all 78 farmers have listed and settled their hands in the meeting attendance list, then, I have no reason to doubt the free given consent as required by law. In their further step, the records show that the applicants had already served a ninety days' notice to the respondents regarding their claims of compensation for their lands or to take legal measure to condemn the 1st respondent's action. See paragraph 10 of the applicants' affidavit.

In my well-thought-out view, as to the second requirement, as herein above referred, I am settled in my mind that the applicants have again made their case.

Although, it can be needless to go into more details, but apart from two conditions above, the respondents' counsel has also raised two more urgings to reinforce his attacking.

Thus, the respondents' counsel raised the argument to the effect that, in law, the 3rd applicant is incapable to swear affidavit on behalf of other applicants. on her side, learned counsel for applicants opposed the

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assertion and she averred that, the 3rd applicant has acquiesced to affirm on behalf of other applicants as shown in para 2 of the applicant's affidavit where he listed their names.

In my viewpoint, the law regulating what the affidavit should be confined to, is Order XIX Rule 3 (1) of the Civil Procedure Code [Cap. 33 R E. 2019] which states:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted"

More so, in **Uganda v. Commissioner of Prisons Exparte Matovu (1966) EA 514**, it was observed that:

"As a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence, should only contain statements of facts and the circumstances to which the witness deposes either of his own knowledge ... such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion"



The rule governing the modus of verification was stated in the case of **Salima Vuai Foun v. Registrar of Cooperatives Societies & 3 Others. 1995 TLR. 75**, where the Court said:

"Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified."

Similarly, **C. K . Takwani** in his book titled **CIVIL PROCEDURE, Fifth Edition at page 21** commenting on the Indian Code which is similar to our CPC on the respective rule states that:

"Where an averment is not based on personal knowledge the source of information should be clearly disclosed."

Henceforth, in the light of the above position of the law, it is my view that the 3rd applicant deponed on facts which he has direct knowledge as shown in paragraph 1 of an affidavit in support of application. He also obtained an instruction to depone on behalf by other applicants for same facts as shown in para 2 of an affidavit in support of application.

Therefore, for these reasons I hold that, an affidavit is a statement of fact, and what is contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10



is based on the knowledge of the deponent in his capacity as one of the applicants as reflected in the verification clause which says it all regarding the contents in the said paragraphs. That said, I ruled the argument raised by respondents' counsel devoid of merit.

Therefore, In the upshot, find that the applicants have met all the conditions stipulated under Order 1 Rule 8 of the Civil Procedure Code Cap. 33 R. E 2019, and for that reasons the sought application is hereby allowed. The leave to file representative suit on behalf of 72 others is granted. Costs will follow the event.

It is ordered.

DATED at DODOMA this 03rd day of July, 2023



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S. H. HASSAN

JUDGE