

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**MISC. LAND APPLICATION NO. 31 OF 2022**

(Originating from Land Case No. 11 of 2022 at High Court of Tanzania at Sumbawanga)

1. **KABADAGU LIMBO KABADAGU**
2. **MAGEMBE .D. LUBAGA**
3. **ELIAS IGAGABALE**
4. **PASCHAL .P. DIMA**
5. **MALIMI KIMOMBO KAMATA**
6. **EMANNUWE BURABO LUCHAGULA**
7. **ZENO JOSAPHATH NAMWANDA**
8. **SHETELA NYANKALI**
9. **PASKAZIA SIMONI KAZILI**
10. **ALPHONCE LUGUTU MASALU**
11. **ALEX GODFREY YUNUS**
12. **MASANJA M. BUNDEKA**
13. **MALIMBO HUSSEIN**
14. **MSEVEN NGASA MALENYE**
15. **DAUDI DIONIZI GENJI**
16. **SADAM GUMALIJA SHEMAGI**
17. **PETINA BULENYA NDEGE**
18. **PASCHAL S. GUMALIJA**
19. **YAKOBO MFAUME KABANGALALA**
20. **HARUNA MFAUME KABANGALALA**
21. **SAYI ELIASI MASUNGA**
22. **TUMBO EMMANUEL MCHUNGA**
23. **VISENTI KACHEGELO SWAGILA**
24. **SAMWELI NDODI JILASA**
25. **YENGU NGASA NGEZI**
26. **ZENGO SUNGWA NDULILA**
27. **JIPONDYA SENDAMA KADAMA**
28. **JITUNGULU KAKULU SELELI**
29. **DOTO TITIJA MALAGO**
30. **CHARLES JISENA NTINGINYA**
31. **MHELA MIPAWA DATUSA**
32. **YUMBU MIPAWA DATUSA**
33. **JOHN NGASA MALALE**
34. **KASHINJE LUDUTILA NGASA**

35. MAYENGA KOMBOA SAKU
36. MACHENJA MUSA MACHEJA
37. BOYA MESU GUMA
38. AMOS TENGANJA MADUKA
39. NDEKANGI MHONOLI MALENDEJA
40. VICENT KACHEGELO SWAGILA
41. NGUSA KULUONE JILALA
42. KISINZA PAWA KINANGH'A
43. KULUONE JILALA NTALIJA
44. DAUD NDEJEMA MACHIYA
45. KISIMASI JISANDU KWANGU
46. SAMWELI NGUSA BULUBA
47. DANIEL KAPUGE MINZOI
48. MANANA MWELEMI MANANA
49. LUHENDE LUPUGA NGAMBA
50. LUHENDE MBUGA SENI
51. ELIZABETH KUZENZA MAKUNGU
52. ADIODATA K. KANYELE
53. MANENGO M. LOGANI
54. SOPHIA L. MLELEMA
55. SILASI K. MACHIBHULA
56. HAMISI S. UKOLO
57. MWAJUMA D. LUBINZA
58. DOI M. NGASA
59. ANASTAZIA J. SOLEA
60. KWIMBA M. MBUGA
61. NYAMIZI M. SHIWALA
62. SHIJA S. SHIJA
63. TUNGU KUBILU NKOLA
64. JOHN DUNDO KWIYEGA
65. RAJABU SOSOMA NHUNGO
66. ZAKARIA MSFILI SEIF
67. PAULO P. JIMISHA
68. ELIZABETH M. ELIAS
69. JINASA MAGU
70. BAO BULUGU
71. ESTAR MAIKO
72. BUKOMBE JILALA
73. BULUBA NSUSI
74. BUYAGA NKILJIWA
75. CHILO BUNZALI
76. PITA CHINGA
77. KALIWILI JUMA
78. DEO JUMA

79. DOTO CHARLES
80. ELI CHEHAN
81. ESTA ELIAS
82. AMOSI JITUNGULU
83. GAGALA JUMA
84. KWILASA GEZI
85. MBALU NJILE
86. HOTELI BULUYI
87. HUSENI JUMA
88. JUMA DOTO
89. JAKADI NKULI
90. ELIAS JUMA
91. KADAMA MHEKELA
92. ELIUS KANIKI
93. HAMISI MUYINGA KALUNGA
94. YASINI HAMISI MUYINGA
95. DOTTO SALUM MUYINGA
96. ISA SALUMU MUYINGA
97. ADAMU HAMISI MUYINGA
98. MOHAMED RASHIDI
99. MALIAM JOSEPH
100. MAGANGA YOHANA
101. MAGANGA MPINA
102. MTIGA BULUBA NGUSA
103. MWALU BULUBA NGUSA
104. MALAGO BULUBA NGUSA
105. NTEBA SHADURACK
106. MALEG BULENYA KIZA
107. ZILIPA MINDADA CHUMA
108. DOTO SAKU NGHABI
109. LUHEDE BULUBA NGUSA
110. SHIPEMBE MALISHA LIMBE
111. MATHIAS CHARLES MATHIAS
112. YOHANA NYUMA DELEPH
113. BORA SIMONI RUFUTA
114. EMMANUEL KABABA MDUNGE
115. PATRISIA N KINGA LUHANYA
116. HAMIS RAMADHANI
117. MASANJA BULUBA NGUSA
118. MILEMBE LUHENDE MPANYA
119. RENATUS NDALAHWA DALEFA
120. SIMONI MASANJA NGUSA
121. NYANZE BULUBA NGUSA
122. JOHN MASALU

123. **NEEMA MAKURU**
124. **DOTTO MASAUNGA LINGUSHA**
125. **MAIKO IBRAHIMU SIPEMBO**
126. **RASHIDI HAMISI MUYINGA**
127. **RAMADHANI HAMISI MUYINGA**
128. **NASORO SALUMU MUYINGA**
129. **JUMA HAMISI MUYINGA**
130. **JUMA MAGANGA LUHENDE**
131. **SHIJA NDOMA NKANDA**
132. **BUKWIMBA MADIYA BUKWIMBA**
133. **MASANJA NGELELA MAGASHI**
134. **NDITO CHINA SUNA**
135. **NZELA KAGOLE SOSOMA**
136. **TONDO BARIADI MAGUHA**
137. **MASELE CHALES SHISHI**
138. **ELIAS LUJATA GALUDUSHI**
139. **HAMISI BUSIGA DOFU**
140. **JILUGALA BULUGU LUKELESHA**
141. **JUMA AHMAD JUMA**
142. **KASHINJE MASESA NGASA**
143. **IBRAHIMU ISMAIL KAZIMOTO**
144. **EMANUEL NGHABI BAHATI**
145. **TOMAS M. NILA**
146. **MECTRIDA SAMWEL**
147. **JAMAICA MANZESE**
148. **NIA ISSA BANIKA**
149. **JIPONDYA SENDAMA KADAMA**
150. **MWANDU S. MAGAKA**
151. **JACKSON M. NDIMANGA**
152. **HAMIS SAID KILUNDA**
153. **KULWA LWIGI JOLO**
154. **LUHENDE MBOYEZE KAKINDILO**
155. **MIKAEL JOEL MAHULU**
156. **MUSSA ZAKARIA BUNDALA**
157. **SETI MZEE MBONYE**
158. **SAMSON KITULA GITU**
159. **MFAUME KABANGALALA MASANGU**
160. **MHANDE SULULUKA KILANGI**
161. **JOSEPH EDWARD LUGEZE**
162. **ENOCK MBOJE BAHIDA**
163. **RAMADHANI N. NZUMARI**
164. **GABOGABO N. MENYELA**
165. **MIDAHO HOHOTA TULULA**
166. **ISSA BAKARI MISAI**

167. ABEL PETRO CHOLE
168. RASHID HAMISI SAID
169. MICHAEL P. PELILUNDE
170. MWIGULU S. MAGASHI
171. YAYA NDALAHWA KINDO
172. JOSEPH SAWAKA MAGULU
173. PAULO P. JIMISHA
174. CHAUSIKU PANDISHA KAJUGI
175. ELIZABETH M. ELIAS
176. SHIBELA M. LUSEBYA
177. KIZA N. KIBOLEGWA
178. JUMA HAMISI MPANDASHALI
179. MSAFIRI L. KELEBE
180. EMANUEL SIMBA LUHEGA
181. RASHID A. MLUGALUGA
182. MWAGO RUFA
183. IDD M. MASOLA
184. LAZARO R. AMRI
185. SIMON B. KAMILI
186. LAMSO MASELE
187. DAMAS M. MASHEBA
188. CHINA J. NTALIJA
189. ANDREW MAZIKU KASHINDYE
190. SHANI YAHAYA ABEDI
191. MWAJUMA SAID MAHUYU
192. AMISA JUMA
193. MBESHIR BUNDALA
194. NTINGA BULUBA NGUSA
195. MALIA NGUKULU KULIKA
196. BUNDALA MBESHI
197. NYANZOBE NJILE MWANDU
198. MALEGI BUKELEZE DOTTO
199. KIJA MALEGI BUKELEBE
200. MAGEBE BUDALA BUKELEBE
201. JOSHIWA MALEGI BUKELEBE
202. SANDO MALIGI BUKELEDE
203. SAYI NGUSA BULUBA
204. NGUSA BUDEKA BULUBA
205. YUNGE BULUBA NGUSA
206. MAGAKA JOSEPH MASANJA
207. JOOLO MAGAKA JOSEPH
208. AMOSI MAGAKA JOSEPH
209. ABDUKIBA KAZULI
210. IMANI YOHANA KABADILI

211. MASHAKA M. MWENDAPOLE
212. AMANI JUMA SAID
213. ELIZABETH A. NDEJA
214. SHIJA LUHALALA WANGALA
215. TELEZA JOSEPH MACHEYEKI
216. NKAMBA SAMWELI NKILA
217. ABEL GASTO KANDEGE
218. JACKSON ELIAS KAHAMA
219. MAGRETH OMARY BRUNO
220. NG'WANGO LUFA MADUKA
221. TOMAS SOMAGA NKINURU
222. SAMSON LUNEGEJA JISUSI
223. MOLISI SYEKEYE BIFUMBE
224. CHRISTOPHER A. NGALAMA
225. MASHAKA M. KAKULU
226. MALEGI JEMSI IKOMBE
227. SAMWEL B. JISHON
228. EMANUEL BULABO LUCHAGULA
229. DANIEL M. BULUBA
230. JUMA C. DANIEL
231. SIMONI B. DANIEL
232. LAZARO M. DANIEL
233. MPILIMO M. BULUBA
234. NGOLO DOTO KUNGALUSHU
235. NCHAMBI JISENA
236. KULWA NG'HOLONGO
237. LAJABU SOSOMA
238. SAGI BUNDALA
239. JALAZA Z. KANONI
240. SHIGELA R. MAKOLO
241. SUNGA SHIGELA KISUNA
242. NDUSI LYANG'OMBE MANHE
243. AMO KINDAI KULWA
244. MINZA MASUNGA MCHEMBUKI
245. SHIMIYU NKUBA MPONEJA
246. MASANJA SHIMIYU NKUBA
247. SAYI MAHOYE KIJA
248. WILE SAMWELI GASOGA
249. ELIZA BULUBA NGUSA
250. MASAUDI NKUBA PONEJA
251. BALAKA BULUBA NGUSA
252. CHAMBI BULUBA NGUSA
253. KAMANI MATALU MBUNDA
254. GABRIELI Z. BENADULO

255. OBERD CHALES PAT
256. JOSEPH MARWA KESANTA
257. MERIKIO LUCAS MLELA
258. EMMANUEL MERIKIO MLELA
259. TECLA MERIKIO MLELA
260. MBOJE MALONGO NYAGA
261. CHAMBI LUTAMULA LYENI
262. MACHIBYA KANUNDA SITA
263. PAULO MACHIBYA KANUNDA
264. KABULA SAINDA
265. FOTUNATA LUNGUJU ALUFOSI
266. JOHN GUNDIJA MASALU
267. MASIGIJA SAYI BUNDEKA
268. WITINESI LUGAILA LUGUTU
269. MADAHA LUCKAS MASANJA
270. MALIAMU MASALU LUGAILA
271. NYANZOBA BULUBA NGUSA
272. JAFATI MASALU GUNDIJA
273. PILI KULWA MANHE
274. CHINA ISUNA TEMBADA
275. SHILINDE KELEMET MATIYA
276. ILANDALA BUKWIMBA ILANDOL
277. MADIYA CHITAFUMBWA MSAFILI
278. NHUHI MADIYA LUNGATA
279. MANGASHI GELELA MANGASHI
280. LUCKA SHINDANYA NTUNGA
281. MASHALA KIJA MASHALA
282. JINAMO SUMBUKA MADABA
283. EMANUEL MUKELEMO MSABIRA
284. MIHUMO JOHN KAMLI
285. NKAMBA JOSEPH KUZENZA
286. DITA EMANUEL MAKELEMO
287. MASHABA EMANUEL MAKELEMO
288. MWILAMILA MASANGU MWINANDA
289. ILUNDU MUSSA
290. MWAJUMA SAID MAHUYA
291. WALI MASELE MWILAMILA
292. MAGOBO NGUSA BULUBA
293. GUMALIJA SANDAMU GUMALIJA
294. DOTTO NGUSA NYAMA
295. MALANGO BULUBA NGUSA
296. MAHESA SAMWELI NGUSA
297. SENDE MASANJA
298. MASANJA JILALA

299. **SHIJA MAZULI**  
300. **KAPOLI UFUMBE**  
301. **ELIZABET MASANJA**  
302. **LUGALILA MAHONA**  
303. **LUHENDE MLANI**  
304. **LUKWAJA ELIAS**  
305. **LUSHINGE SHIJA**  
306. **MABALA ENOKA**  
307. **MAGANGA JELI**  
308. **MPINGA JOHN**  
309. **MASANJA JAOWA**  
310. **KASHINJE MASUNGA**  
311. **JUMA MBUGA**  
312. **MWANA MBULI**  
313. **GENI MBOLA**  
314. **MGANGA GENI**  
315. **MIHAMBO SUBILA**  
316. **KULWA HAMISI**  
317. **JUMA MAGEMBE**  
318. **MDANUKA JUMA**  
319. **JUMA GITU**  
320. **MISHUSHU JOSEPH..... APPLICANTS**

**VERSUS**

**TANGANYIKA DISTRICT COUNCIL (MPANDA DC) ..... 1<sup>ST</sup> RESPONDENT**  
**DISTRICT COMMISIONER OF TANGANYIKA DISTRICT ..... 2<sup>ND</sup> RESPONDENT**  
**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**MWENEMPAZI, J.**

The applicants filed an application in this Court under certificate of urgency seeking for one an ex parte order that this Honourable Court be pleased to issue an ex part declaratory order/interim order to restrain the 1<sup>st</sup> and 2<sup>nd</sup>



Respondent, their agents and workmen from evicting Applicants in the suitland, and demolishing Applicant's houses and farms at the suitland (Mabu, Visima Viwili, Mpolwe, Misisi, Kabulwanyere and Kagobole) at Tanganyika District Council (Mpanda DC) within Katavi Region pending the hearing of the application inter parties.

**Two inter parties;** that this Court be pleased to issue a declaratory order/interim order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondent, their agents and workmen from evicting Applicants in the suitland and demolishing the applicant's houses and farms at the suitland (Mabu, Visima Viwili, Mpolwe, Misisi, Kabulwanyere and Kagobole at Tanganyika District Council (Mpanda DC) within Katavi Region pending the determination of Land Case No 11 of 2022 which has been instituted by the applicants against the respondents. The applicants, in both cases prayed for an order granting any other relief this Court may deem it fit and necessary to grant.

An ex parte order was granted pending inter parties hearing. The same was on the 05/12/2022. When the application came for hearing on 12/12/2022, Mr. Fortunatus Mwandu, Learned State Attorney informed this Court that he has filed a notice of preliminary objection and hearing of the preliminary

objection was scheduled to be on the 14/12/2022. It could not take off and was rescheduled to be on 26/01/2023. On the date (14/12/2022) Mr. Laurence John, Advocate for the applicants informed this Court that they are engaged in a talk to settle the matter out of Court. Thus on the 26/01/2023, by consensus, parties prayed to conduct hearing of the preliminary objection by way of written submission. Leave was granted and a scheduled order was issued. Both parties complied to the scheduled.

At the hearing Mr. Fortunatus Mwandu, learned State Attorney was representing the Respondents and Mr. Laurence John, Advocate was representing the Applicants. It is the Respondents who raised a preliminary objection. Four points of objections were raised by the counsels for the Respondent. They are as follows: -

1. That, this application is in abuse of Court process for the Applicants deliberate failure to serve the Respondents with the summons, chamber summons and affidavit so as to avoid them to appear and hear the matter inter parties on 12/12/2022 at 11:00 am as ordered by the Court on the ex parte order dated 05/12/2022.

2. That, the Applicants have contravened Order V Rule 5(1) and Rule 8 of the Civil Procedure Code [Cap 33 R.E 2022] with the aim of depriving the Respondents the right to appear and defend against the ex parte order given to the Applicants on the inter parte hearing scheduled by the Court on 12/12/2022.
3. The application is bad in law for abuse of Court process for failure of the applicants to serve the respondents with the main suit, Land Case No. 11 of 2022 which is the base of this application the counsel for Respondents prays that this application be struck out with costs.

On the first point of preliminary objection the respondents allege that the applicants committed a serious abuse of Court process by not serving the respondent with the application, chamber summons and an affidavit on the 5<sup>th</sup> December, 2022, after the applicant had secured an ex-parte interim order restraining the respondents and their agents from evicting applicants in the suitland and demolishing their houses and farms at the suitland (Mabu. Visima Viwili, Mpelwe, Misisi, Kabulwanyere and Kagobole). That in the opinion of the respondent was contrary to Order V Rule 3 of the Civil Procedure Code, [Cap 33 R.E 2019] which requires the applicant to serve summons accompanying the attached documents attached to it so as to

enable the defendant to know the nature of the suit relating to the summons.

The plaintiff must produce enough copies for all defendants.

The counsel for the Respondents has submitted that the office of Solicitor General here at Sumbawanga is situated/located only 200 meters from the High Court premises but the applicants did not serve the documents and went 300km away at Mpanda. The applicants delayed for seven (7) days without serving the respondents despite of the fact that the application was taken to Court at their instance. However, their sense of urgency ceased once they had procured an order of the Court on an ex parte arm of their application. In the opinion of the counsel for the Respondent this is an abuse of Court process since the law requires them to serve the respondents with their application within the prescribed time before the date of hearing to enable the respondents prepare their defence.

In order to insist on the point, the counsel has cited the provisions of Order V Rule 2 of the Civil Procedure Code, [Cap 33 R.E 2019]:

*"Where summons to file a written statement defence has not been effected in consequence of the plaintiff's failure to pay service fees or to effect service within the time*

*provided under Rule 10 of this order, the Court shall strike out the suit”.*

The counsel has put emphasize on the words “shall strike out the suit and to buttress the same has also cited the case of **SAYONA DRINKS LIMITED VS. ELIAWON ELINAMU MACHANGE**, Misc. Civil Appeal No. 38 of 2020, High Court of Tanzania at Mwanza (unreported) where it was held:

*“The Court may strike out the plaint where service of the summons to the defendant is not issued due to failure by the plaintiff to pay service fees or effect the service himself”.*

On the second point of preliminary objection the counsel for the Respondents has submitted that the aim of not complying to Order V Rule 5(1) and Rule 8 of the Civil Procedure Code, [Cap 33 R.E 2022] is to deprive the Respondents the right to appear and defend against the application. That in their opinion is an abuse of Court process. That is using the legal process or Court procedures to accomplish an improper or unlawful purpose. It may also refer to use of legal process during legal proceedings to harass another party to the suit, that has the effect of adding unnecessary costs.

In this case the applicants have been abusing the legal process by filing several cases related to the same matter. In most of the suits, the applicants are praying for interim orders.

The counsel has mentioned such applications as Miscellaneous Land Application No. 13 of 2022, and also Land Case No. 11 of 2022. It is the argument of the Respondents that the multiplicity of cases cause unnecessary costs to the respondents; transport costs from Mpanda to Sumbawanga and incidental costs thereto.

The Respondent's counsel has cited the case of **Grovit Vs. Doctor [1997] 1 WLR 640** for the argument that the concept of abuse of process in Civil litigation is not engaged merely because there is delay in the prosecution of the litigation; there must be something more such that a fair trial is no longer possible or at least that there is a substantial risk that it is no longer possible. For example, if a party embarks on litigation intending never to conclude it or something of that kind.

On the third ground of objection that the Respondent have submitted that the application is bad in law and an abuse of Court process as the applicant have not served the respondent with the pleadings on the Land Case No. 11

of 2022. That has the effect of depriving the respondent with necessary information to know the nature of the applicant's claim. The Respondent has prayed that the application be struck out with costs.

The applicants were being represented by Mr. Laurent John, Learned Advocate. In his submission on the first point of preliminary objection he has submitted that the point that failure to serve the Respondent is an abuse of Court process does not qualify to be a point of objection. He has advanced two reasons for his averment. One, that respondents have to prove by evidence that they have not been served with chamber summons and affidavit. Two, there is a need to prove that it was the intention of the applicants to bar respondents from appearing before this Court for inter parte hearing on 12/12/2022. He has cited the case of **Jackline Hamson Ghikas versus Mlatie Richie Assey**, Civil Application No. 656/01 of 2021 Court of Appeal of Tanzania at Dar es Salaam (unreported) available at TanziLii [2022] TZCA 438, where it was held:

*"As a consequence therefore, we are of the respectful view that, inasmuch as proof of service on the respondent requires the parties to lead some evidence. Showing the*

*particular date on which the service was effected, the point raised by Mr. Msuya does not fall within the realm of the preliminary objection properly so called as to deserve our determination. It can only be rejected for the failure to attain, threshold prescribed by law”.*

The counsel for the applicants has submitted that given that the counsel filed a notice of objection on 08/12/2022 and that the entered appearance on 12/12/2022; that proves that they were served. There is no injustice occasioned.

The issue of distance from Court to the respondent's office is a point requiring proof and the case of **Sayona Drinks Limited Vs. Eliawon Elinamu Machege** (supra) is irrelevant to the circumstances of the present case on two reasons, one, it is the High Court case not binding to this Court; two the circumstances are not similar with this application.

The issue of delivery of summons is an issue which require proof, bearing in mind that the Respondents in this matter did attend to the Court on the scheduled date.



On the second point of objection that the applicants have contravened Order V Rule 5(1) and Rule 8 of the Civil Procedure Code [Cap 33 R.E 2022] with the aim of depriving the respondents the right to appear and defend against the applicant's application in an inter parte hearing scheduled by the Court on 12/12/2022.

The counsel has submitted on order V Rule 5(1) and Rule 8 of Civil Procedure Code, [Cap 33 R.E 2022]. As the amendment done by the respondent was not subject to the leave of the Court. It was done by themselves. The applicant will and, has opted to submit on what was in the notice filed in Court.

The counsel for applicant has submitted that Order V Rule 5(1) of Civil Procedure Code, [Cap 33 R.E 2019] is a non – existent law.

I have made a verification the by perusing Civil Procedure Code [Cap 33 R.E 2019] which is available at Tanzilii. It has the provisions of Order V Rule 5(1) and (2). Thus, it is wrong for the counsel for the applicant to submit that it is a non-existent law.

The counsel for the applicant deny that they abused Court process instead they argue that they went to Court to find a remedies suitable and available

under the law. The counsel has clarified what they filed and the kind of remedy. Misc. Land Application No. 13 of 2022 was about injunction (Mareva injunction) pending expiry of 90 day of intention to sue which was issued to the respondent. While Misc. Land Application No. 33 of 2023 was application for injunction pending determination of the main suit – land case No. 11 of 2022, the case is pending before this Court.

The counsel for the applicant has submitted that there was no abuse of Court process and the counsel for the respondent has failed to provide concrete evidence.

On the third point of objection that *the application is bad in law for failure of the applicants to serve the respondents with the main suit (Land Case No. 11 of 2022) which is the base of the application*, he has submitted that the argument is also misplaced and cannot qualify to be point preliminary objection. He has cited the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696** for the argument that the point need proof. The counsel for the applicant has submitted to clarify his argument that it is on record the respondents filed written statement of defence on Land Case No. 11/2022 on 14/12/2022. Surprisingly the

respondents drafted submission dated 02/02/2023 and filed the same on the same date to claim that until the aforementioned date they have not been served with the written statement of defence, but they have not indicated in the submission which document they used to reply the written statement of defence, that in the opinion of the counsel for the applicant has brought in a confession.

The counsel prayed that the point of objection be dismissed and the main application be heard on merit.

In rejoinder the respondent have argued that the counsel for the applicants has failed to grasp what they meant by their objection. They are of the view that it was the duty of the applicant to serve the respondents and prove that they served the respondents with the application. That position is exemplified by the applicants who produced a proof before the judge after they had effected service to the respondent. That is the affidavit sworn by the process server or any other person who served the summons to the adverse party. The respondents have therefore expressed discountenance to the submission by the counsel for the applicant and argued that the same is irrelevant and that even the cited case of **Jackline Hamson Ghikas Vs.**

**Mlatie Richie Assey, Civil Application No. 656/01 of 2021 TZCA 438 (18 July, 2022)** is also irrelevant to the facts and scenario of our case and therefore should not be relied upon.

In respect of the second ground of preliminary objection as well as the third ground of preliminary objection, the respondents have reiterated the submission in chief. They pray the preliminary objections be sustained and the application be struck out with costs.

I have read the submissions filed by the parties, in the context, I have no choice but first to assess if the objections raised pass the test of preliminary objection as pronounced in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] IEA 696 at 701** where in sir Charles Newbold P, observed on the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objections. He defined the nature of preliminary objection as follows:

*"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 if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and on occasion confuse issues”.*

In the case of **Jackline Hamson Ghikas Vs. Mllatie Richie Assay** (supra) as cited by the applicant’s counsel the Court of appeal referred to the position taken in the case of **Tanzania Telecommunications Company Limited Vs. Vedasto Ngashwa & 4 Others**, Civil Application No. 67 of 2009 (unreported) that:

*“a preliminary objection must satisfy three conditions:*

*One, the point of law raised must either be pleaded or must arise as a clear implication from the proceedings.*

*Two, that it must be a pure point of law which does not require close examination or scrutiny of the affidavit and counter affidavits, and*

*Three, the determination of such a point of law in issue must not depend on the Court's discretion".*

In the case of **Jackline Hamson Ghikas Vs. Mllatie Richie Assey** (supra) the issue was on the service of the notice of motion on the respondent pursuant to the provisions of Rule 55(1) of the Court of Appeal Rules 2009. In determination of the dispute the Court observed that:

*"Definitely the question as to whether the respondent was served or was not served with the notice of motion and supporting affidavit within the prescribed time by the law, cannot be determined without recourse to first and foremost ascertaining some facts".*

As the counsel for the respondent had raised a point of preliminary objection, that the application violates the provisions of Rule 55(1) of the Court of Appeal Rules 2009, the Court had the view that:

*"In as much as proof of service on the respondent requires the parties to lead some evidence showing the particular date on which the said service was effected, the point raised by Mr. Msuya does not fall within the realm of the*

*preliminary objection properly so called as to deserve our determination”.*

The present case has a similar situation but guided under different laws as was in the referred case above. The objections raised by the respondent cannot be determined, in my view, without first requiring evidence to substantiate that service was or was not effected and if proved that it was not effected then it was for the aim to deprive the respondent from defending their case. Generally, so to speak, all the three grounds lack the necessary qualification to be a preliminary objection on a point of law.

I am also of the opinion that complaint on the abuse of Court process is not a point worthy of baptism as preliminary objection on the point of law but it may be argued in the course of the hearing of the main application. It would be appreciated as it is in this case, the objections made have the effect of delaying the case as the time consumed would serve to dispose the main application. I urge counsels to assess the case as a whole before taking such frivolous steps which in effect they delay disposal of cases and therefore adding up to the cost and it is a misuse of precious time to resolve the dispute.

Under the circumstances, following the decision in the case of **Jackline Hamson Ghikas Vs. Mllatie Richie Assey** (Supra) the objections are dismissed with costs. The main application is scheduled for hearing on the 24/07/2023.

It is ordered accordingly.

Dated at **Sumbawanga** this 04<sup>th</sup> day of July, 2023.



  
**T.M. MWENEMPAZI**  
**JUDGE**