

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA

MISC. CIVIL PPLICATION NO.1 OF 2023

MUSSA HAJI CHINGUNGWA.....1ST APPLICANT
MOHAMEDI MNAPELA.....2ND APPLICANT
MOHAMEDI AMANI AMANI.....3RD APPLICANT
HAMISI ATHUMANI MAKANJILA.....4TH APPLICANT

VERSUS

MTWARA MIKINDANI MUNICIPAL COUNCIL.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

27/7/2023

LALTAIKA, J.

The applicants herein, **MUSSA HAJI CHINGUNGWA**, **MOHAMEDI MNAPELA** and **HAMISI ATHUMANI MAKANJILA** are moving this court under Order I Rule 8(1), Section 68(e) and 95 of the Civil Procedure Code Cap 33 R.E. 2019 and any other enabling provisions of the law. The application is supported by a joint affirmed affidavit by **MUSSA HAJI CHINGUNGWA**, **MOHAMEDI MNAPELA** and **HAMISI ATHUMANI**

MAKANJILA, who are lawful tenants of the market known as Sabasaba market and later on Soko bati/Magomeni B and appearing on behalf. The applicants are praying for this court to grant the following orders:-

- 1. That this Honourable Court be pleased to grant leave that the applicants do sue that above named respondents in a representative capacity of all the applicants whose names are attached to the schedule annexed herewith who are tenants of the market/premise known as Sabasaba market later on moved to Sokobati/Magomeni 'B' located at Magomeni 'B' street, Mtwara-Mikindani Municipal, Mtwara region.*
- 2. The above-named respondents do defend this suit in a representative capacity of all the Applicants whose names are attached to the schedule annexed herewith are the lawful tenants of the market/premise known as Sabasaba Market later moved to Sokobati/Magomeni 'B' located at Magomeni 'B' street, Mtwara Mikindani Municipal council, Mtwara region.*
- 3. That this Honourable Court be pleased to give direction to the applicants to give notice of the institutions of this suit to the respondents who are lawful tenants of the market/Magomeni 'B' located at Magomeni 'B' street, Mtwara-Mikindani Municipal Council, Mtwara region.*
- 4. The costs of this Application be provided for.*

Needless to say, the application has not been resisted by the counter affidavits of the respondents.

When this application came for hearing on 25/7/2023 the applicants were being represented by Mr. Alex Masaba, learned Advocate while the respondents enjoyed the services of Mr. Maroa Wambura, learned State Attorney.

Submitting in support of the application, Mr. Masaba submitted that the application is brought by the four applicants who have represented the other 274. He further stressed that it makes a total of 278 persons. Furthermore, the learned counsel contended that the application is brought under Order I Rule 8(1), sections 68(e) and 95 of the Civil Procedure Code Cap. 33 R.E. 2019. He insisted that the applicants have prayed for four reliefs which he

prayed to be adopted as well as the joint affirmed affidavit form part of his submission. Mr. Masaba submitted that as per orders cited, the applicants have met the requirements which included the requirement of a number of people who have the same interest. They have also listed down the names of all the applicants. The learned counsel submitted that the gist of the application is to be allowed to institute a case on behalf of the 274 plus the four applicants making them 278 in total.

Mr. Masaba went further and contended that to show that the applicants have the same interest; he referred to the fourth paragraph of the joint affidavit. He insisted that the rest of the applicants have faith in the four representatives. He submitted that since both respondents have not filed a counter affidavit, in practice it means they have no objection to our application. To this end, the learned counsel prayed to be allowed to bring a representative suit.

Having dispassionately gone through the application and submissions of both parties I am inclined to decide the merit or otherwise of the application. I am also aware that this application has not been contested by the respondents. In fact, this does not preclude this court to determine whether the conditions for the grant of the application have been met or otherwise.

This application was brought under Order I Rule 8(1), sections 68(e) and 95 of the Civil Procedure Code Cap. 33 R: E 2019 that provide as follows: -

"8(1) Where there are numerous persons having the same interest in one suit, one or more in 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

plaintiffs' 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 such the court in each case may direct."

Section 68(e) provides:-

*"68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-
(e) make such other interlocutory orders as may appear to the court to be just and convenient."*

Section 95 provides;

"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 trite that in application proceedings, affidavits constitute not only the pleadings but also the evidence. Again, the applicants must set out sufficient facts in their affirmed affidavit which will entitle them to the relief sought.

In the present application, paragraph 1 to 8 of the joint affidavit, the applicants deposed as follows:

- "1. THAT** we are Applicants full of knowledge and information concerning this suit and as such we are duly authorized to make this Affidavit on the Applicant's behalf who are 278.
- 2. THAT** we are the lawful tenants of the market known as Sabasaba market later on moved by the 1st Respondent to Sokobati/Magomeni B market located at Magomeni '13'street, Magomeni ward, Mtwara Mikindani Municipal Council, Mtwara region.
- 3. THAT** we are Applicants sued in this suit in representative capacity on their own behalf of other persons whose names appear on the schedule annexed hereto and marked 'MMC-01' craved to form part

and parcel of this affidavit.

4. **THAT** the applicants have the same interest and grievance in this suit for reason, inter alia, that;

- a) The applicants are and have at all material times, always been the right and lawful tenants of the suit premises since 1982.
- b) That since then, the said premise was used by the applicants for selling vegetables and fruits as market area, without any interference from any persons, institutions or government organs.
- c) That sometimes on 2020, the 1st respondent entered into agreement with the Applicants to invest and develop the premise (**Sabasaba**) for the sake of being a market area and paying taxes and tariff/duties to the government.
- d) That without a colour of light on the 02nd day of June 2021 the 1st respondent make announcement to close **Sabasaba market** and all activities thereon. On the same date at night 1st respondent together with his agents destroyed Applicants' goods, area of business (mabanda) and arrested the applicants and incriminated, threaten them not to enter into premise /Sabasaba market illegally/ un procedural without any justifiable cause. This action caused loss of goods and financial crisis.
- e) That by so doing the office of the 1st respondent directed the Applicants to shift to the Sokobati/Magomeni '13' to carry on their business. In which on the 03rd day of June, 2021 Applicants started to move to **Sokobati/Magomeni '13'** market with little goods and start their business peacefully without any interference or disturbance from any institutions or government.
- f) That without a colour of light on the 2nd day of August, 2022 during night at **Sokobati/Magomeni Bmarket**, 1st Respondent together with his agents demolished, destroyed all frame /mabanda, properties /goods therei and incriminated and threaten them not to do any business activities in the Sokobati market/Magomeni 'B' market. Hence made the Applicants to suffer irreparable loss and other inconveniences such as physiological tortures, financial embarrassment caused by the acts of 1st respondent.
- g) That following the said inhuman eviction, demolition of mabanda ya biashara (frame) and destruction of Applicant's goods thereon. The Applicants wrote a **Notice of Intention to Sue** to the 1st and 2nd respondent to ask for damages of **Tsh.599,485,100/=** as result of demolition, destruction of Applicant's properties and inconvenience caused by the 1st respondent; 1st respondent not disturbing /interfering the Applicants from enjoyment of **Sokobati market/Magomeni B market**. A copy of Notice of Intention to Sue is hereby attached and marked as annexure "**MMC-2**" is craved to form part and parcel of this Affidavit.

5. **THAT** we verily believe that for the sake of saving time and

expense it would be just, fair and reasonable to institute representative proceedings against the respondents in this suit because all Applicants have common grievances on the same suit premises.

6. THAT *in all the circumstances of this case and for the ends of justice in this case to be met, the orders sought in the application in support whereof we swear this affidavit, ought to be granted."*

At this juncture, it is imperative to note that Order I Rule 8(1) of the CPC is couched in mandatory terms that leave of the court must be sought and obtained prior to the filing of the representative suit. This position was stated by the Court of Appeal of Tanzania in the case of **K. J. Motors And 3 Others vs. Richard Kishamba and 7 Others**, Civil Application No. 74 of 1999, at Dar es Salaam, (unreported) stated that:-

"The rationale for this view (meaning the contents of Order 1 Rule 8 of The Code) is fairly apparent. Where for instance, a person comes forward and seeks to sue on behalf of other persons, those other persons might be dead, non-existent, or otherwise fictitious. Else he might purport to sue on behalf of persons who have not, in fact, authorized him to do so. If this is not checked it can lead to undesirable consequences. The court can exclude such possibilities only by granting leave to the representative to sue on behalf of the person whom he must satisfy the court that they do exist and that they have duly mandated him to sue on their behalf"

Furthermore, this court through the case of **Abdala Mohamed Msaka and 2 Others versus City Commissioner of Dar es Salaam and two others** [1998] TLR 440 stated:-

"The provisions of Order 1 Rule 8 of the Civil Procedure 1966 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."

Before granting leave to file a representative suit, it must be established that; **One**, there are numerous persons having a common interest in the suit and are willing to join the suit. **Two**, that the applicants have the consent of the other persons sought to be represent.

In order to prove the first condition, exist, the applicants vide paragraph 1, 2, 3, 4, 5 and 6 of their joint affidavit have established that they have brought the application on behalf of 274 persons whom they have common interest in the intended suit. They have also established that each of them was a lawful tenant of the first respondent since 1982 selling vegetables and fruits. That sometimes on 2020, the first respondent entered into agreement with the Applicants to invest and develop the premise(sabasaba Area) for the sake of being a market areas and paying taxes and tariffs/duties to the Government.

The applicants have shown that on 2nd day of June, 2021 the first respondent made announcement to close the Sabasaba market and all activities thereon. On the same date at night the first respondent together with her agents destroyed the applicants' goods, area of business (mabanda) and arrested the applicants and incriminated, threatened them not to enter into premise/ Sabasaba market illegally/unprocedural without any justifiable cause. They insisted that that action caused loss of goods and financial crisis. The applicants stated that the office of the first respondent directed the applicants to shift to Sokobati/Magomeni 'B' to carry on their business. In which on 3rd day of June, 2021 applicants started to move to Sokobati/Magomeni 'B' market with little goods and start their business

peacefully without any interference or disturbance from any institution or Government.

Furthermore the applicants have established that on 2nd day of August,2022 during the night at Sokobati/Magomeni 'B' market, the first respondent together with her agents demolished, destroyed all frame/mabanda, properties/goods therein and incriminated and threatened them not to do any business activities in the Sokobat/Magomeni 'B' market. Hence they made the applicants to suffer irreparable loss and other inconveniences such as physiological tortures, financial embarrassment caused by the acts of the first respondent.

More so, the applicants have shown that they have already issued a notice of intention to sue the first and second respondents and ask for damages of Tshs.599,485,100/= as a result of the demolition, destruction of applicants' properties and inconvenience caused by the first respondent.

I have gone through paragraph 3 of the joint affirmed affidavit and the annexure marked "MMC-01 collectively" which contains the names of the applicants and those whom they ask to represent. In fact reading the so called Muhtasali wa Mkutano Wajasiliamali wa Soko la Magomeni(B) Sokobati of 18/8/2022 and the list of names and signatures of the persons aggrieved by the acts of the first respondent have proved two things. **One**, it have proved that there are numerous persons with common interest. Their common interest is through lease agreement from Sabasaba Market to Sokobat/Magomeni 'B' Market since 1982. Another indicator of their common interest is that they were all tenants of the first respondent whose actions have affected all of them. **Two**, the evidence vide the joint affidavit has

proved that the present applicants were appointed by the rest tenants () to represent them in the intended suit against the respondents. For easy of reference and understanding the minutes of the meeting reads:-

"Kufungua uchaguzi ulifanyika na kupata majina manne (4) ya wawakilishi nao ni

- (1) Mussa Haji Chingungwa-Katibu wa soko*
- (2) Mohamedi Mnapela-Mjumbe*
- (3) Moahamedi Amani-Mjumbe*
- (4) Hamisi Athumani Makanjila-Mjumbe"*

This proves that applicants were blessed by their fellow tenants to bring the present application and pray for leave to suit in the representative capacity against the respondents.

In the light of the above observation, I am fortified that the applicants have common interests with 274 other persons they have sought to represent. To this end, leave to file a representative suit against the first and second respondent, respectively is hereby granted with no order to costs.

It is so ordered.



E.I. LALTAIKA
JUDGE
27.07.2023

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the judge's name and title.

Court: This ruling is delivered under my hand and the seal of this court on this 27th day of July 2023 in the presence of Mr. Maroa Wambura, State Attorney for the respondent and the applicants.



E.I. LALTAIKA
JUDGE
27.7.2023

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the judge's name and title.