

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI DISTRICT REGISTRY)
AT MOSHI**

MISCELLANEOUS CIVIL CAUSE NO.2 OF 2023

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARY AND
PROHIBITION**

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) ACT, CAP 310, AS AMENDED IN 2019**

AND

**IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DISPOSSESSION
OF THE INDIGENOUS VILLAGERS LAND (PURPORTED TANZANIA AIRPORTS
AUTHORITY LAND) (DECLARATION) ORDER OF THE 1ST RESPONDENT**

BETWEEN

**KERA KOMEYO MAKESENI1ST APPLICANT
SANING'O LESWANYA MOLLEL.....2ND APPLICANT
NGOTETO LESW ANY A MOLLEL..... 3RD APPLICANT
KISHILI SHAWISHI MOLLEL..... 4TH APPLICANT
MATHIAS LEKANGAI MAMASITA.....5TH APPLICANT
LOISHIYE PAULO MOLLEL (*As a legal person
representative of NDOOK KIMEJA MOLLEL*)6TH APPLICANT
ZAWADI PINIEL KIVUYO..... 7TH APPLICANT
ELIUPENDO SIRIA LOODO..... 8TH APPLICANT
LUCAS KILIMBEI SIRIA.....9TH APPLICANT**

VERSUS

**KILIMANJARO REGIONAL COMMISSIONER1STRESPONDENT
THE ATTORNEY GENERAL..... 2NDRESPONDENT**

RULING

17thAugust & 5th October, 2023.

A.P.KILIMI, J.:

The applicants filed an application for judicial review for an order for certiorari and prohibition against the respondents through a chamber summons supported by their affidavits. When this matter came for mention on 17th April, 2023, the respondents prayed for an extension of time to file counter affidavit and were granted by this court. The respondents filed their counter affidavit jointly. Upon that joint counter affidavit apprehended by the applicants, they filed one preliminary objection on point of law to the effect that;

1. The Respondents Joint Counter Affidavit filed on 27th April, 2023, out of time and no leave of the Court was sought for extension of time to file Counter Affidavit.

In disposing off this objection, it was agreed the same be argued by way of written submission, this was after the consensus between Mr. Jeremiah Mjema learned advocate for the applicants and Mr. Yohana Marco learned State Attorney for Respondents.

In supporting the objection, Mr. Mjema submitted that, according to Rule 13 of Law Reform (Fatal Accidents and Miscellaneous Provisions) (judicial Review Procedure and Fees) Rules 2014 GN No. 324 of 2014 “hereinafter rules” the counter affidavit was supposed to be filed within 14

days but the respondents failed to do so. Then on 17th April 2023 the respondents prayed for 7 days extension of time to file counter affidavit and they were granted, so they were supposed to file it on or before 23rd April 2023 but they filed their joint counter affidavit on 27th April 2023. Therefore, the counsel concluded that since respondents have filed the same out of the prescribed time without leave of the court, it is as good as failure to lodge the required document, and one filed should be expunged from the record. To bolster his argument invited me to refer cases of **Godfrey Shuma vs Al Outdoor (T) Limited**, Revision No. 303 OF 2021, High Court of Tanzania, Labour Division at page 6 and **Famari Investment T Ltd vs Abdallah Selemani Komba**, [2020] TZHC 386 (Tanzlii).

Mr. Mjema further submitted that the effect of failure to file counter affidavit, the respondents are precluded to challenge matters of fact and they are limited to matters of law, to substantiate this position the counsel invited me to consider the case of **Finn Von Waurden Petersen and Another vs Arusha District Council** [2020] TZCA 167 (Tanzlii). Also, the counsel added since there is no any point of law which was raised by the Respondents, therefore, had nothing to remain in the record to oppose the application on matters of fact. Has urged this court to determine this

application basing on judicious discretion in terms of rule 15(a) the Rules above and uphold this objection with costs.

Responding to above, Mr. Yohana Marco contended that, the preliminary objection raised is devoid of legality because it has been raised by the party who is precluded by the law to raise objection. Referring Order VIII Rule 2 of the Civil Procedure Code Cap.33 R.E.2019 which provides new facts and preliminary objections must be specifically pleaded, concluded this law allows only defendant or respondent to raise preliminary objection. Also, to fortify this stance referred the case of **Hezron M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers & Another**, Civil Appeal No. 79 of 2001, CAT at Dar es salaam.

Furthermore, the counsel for the respondent argued that the preliminary objection failed to meet the requirements set out in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] 1 EA 696. Because the time for extension to file counter affidavit was discretionary given by the court and failure to comply with the order shall bring the attention of the court to condone late filing or expunge the late filed document and further invite this court to consider the case of **Leila Selemani Yange vs Rahma Mohamed Mabrouck**, Probate Appela NO

11 of 2022, High Court at Morogoro because they are in pari material with this one.

Mr. Marco further argued that, the court has power to condone the impugned delay basing on the nature of matter at hand. Then he said the main application involves public interest versus the interest of the persons who claimed to be affected by the decision of government to demarcate the boundaries of Kilimanjaro International Airport. Either the delay of filing the document is done by the counsel mistake and it should be remembered that advocates are fallible human beings. He cited the case of **Zuberi Mussa vs Shinyanga Town Council**, Civil Application No. 3 of 2007, Court of Appeal at Tabora. The reason for late filing may be out of respondent's counsel control but this is a question of fact which cannot be entertained in this submission. From the said argument respondent counsel argued that respondents joint counter affidavit should be allowed in the interest of justice since the applicants shall not be jeopardized.

In brief rejoinder Mr. Mjema argued that the counsel for the respondent impliedly comply with the objection but decided to raise new issue technically to pre-empt applicants' objection of which it is untenable in practice. To support this, the counsel cited the case of **Meet Singh Bhach**

vs Gmit Singh Bhach, Civil Application No. 144/2 2018 CAT and **Method Kimomogoro vs Registered Trustees of Tanapa**, Civil Application No. 1of 2005 (Unreported).

Additionally, the counsel for the applicant submitted that, the law and case laws cited by the respondent counsel although right and helpful but does not relate to this case. The Court of Appeal rules does not apply to High court in proceedings of this nature, the same as Order VIII Rule 2 of Civil Procedure Code Cap 33 R.E 2022 is also irrelevant. The laws provide for how the defendant raise new facts and preliminary objections when filing WSD but they do not preclude the Applicant from raising preliminary objection.

Responding to the case of **Amos Fulgence Karungula vs Kagera Co-Operative Union (1990) Ltd**, Civil Application No. 435/04 of 2017 CAT at Bukoba cited by the respondent, the counsel for appellant said he support the arguments of the applicants but the counsel for the respondent decided to quote only part favourable to him, thus, he quoted the part in favour of the applicants.

Replying the issue raised by respondent's counsel in respect to court discretionary, Mr. Mjema contended that invitation on discretion is

dangerous as it undermines the order of the court. Since the orders are made in order to be implemented, obeyed and the same are binding. It is true that under Rule 17 of the Rules above, court may exercise its discretion but that right ceases to exist after preliminary objection is lodged, the counsel referred the case of **Jaluma General Supplies Ltd vs Stanbic Bank(T) Ltd**, Civil Appeal No 34 of 2010(unreported).

The counsel for the appellant therefore concluded that the court should not entertain submission of condoning the negligence of advocate in circumvent the act of undermining the court order under the umbrella of advocate negligence. Therefore, he invites the court to determine this application basing on Rule 15(a) as urged in submission in chief.

I have dispassionately considered the submissions above of both learned counsel, conveniently I see only one point is to be considered by this court, and that is nothing but whether the objection raised by the applicants is meritorious.

To start with the argument raised by the respondent counsel that applicants are precluded by the law to raise objection. As rightly pointed by the applicants' counsel, I am of the view that the nature of this matter is not

like a normal civil case were there must be plaintiff and defendant, and logically on the cited law by respondent in my opinion intended plaintiff to detriment his own case, while in this matter at hand the objection raised is for his benefit if it is allowed, and this is because if at all the counter affidavit is expunged, obvious it is for applicants' advantages. Therefore, in my view the case cited of **Hezron M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers & Another** (supra) is distinguishable, thus cannot apply on the circumstances of this case, therefore applicants are allowed to file the objection on above circumstance.

In respect to the arguments of the respondent's counsel that the objection failed to meet the standard of being termed as objection, because the extension made by the court was discretionary. I have considered reply from the applicants' counsel reply in such respect, I think the above should not labour me much, it suffices to say that this court is clothed with inherent power to control or regulate its own proceedings in order to prevent itself from being emasculated or rendered impotent. (See **Abdallah Kondo vs Republic** Criminal Appeal 322 of 2015 CAT at Dar es salaam). Therefore, it is my settled opinion court orders must be obeyed.

However, having perused the record of this court, I think the circumstances of this matter are different to what has been alleged by the applicants' counsel, for ease of reference let me reproduce the part of record when this court extended time to the respondent to file counter affidavit;

"Date: 17/4/2023

Coram: R. Olambo-Ag DR

Applicant: 1st to 9th present

For applicant: Jeremia Mjema & Mr Ole Shangay Adv present

Respondents:

For respondent: Yohana Marko- SA

B/C: Agatha

Mr. Jeremia: the matter comes for mention. We pray for another date before trial judge.

Mr. Marko: we are yet to file counter affidavit. This was due to the CAT sessions which we attended and thus failed to file the same within time. We pray for an extension of time so that we may file the counter affidavit.

Mr. Jeremia: No objection

Order: Mention on 12/6/2023

Respondent to file counter affidavit

Parties to appear.

***Signed.
Ag DR
17/4/2023"***

Before I proceed, I would like to highlight that, it is a trite law, court records are deemed authentic and cannot be easily impeached, since they accurately represent what happened. (See **Halfani Sudi vs Abieza Chichili** [1998] TLR 527 and **Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another** [2021] TZCA 669 (TANZLII)).

According to the above record, it is clearly that the order of the court does not specify the exact days granted to the respondent to file counter affidavit. The arguments of the counsels for both sides that there was seven days extension granted to the respondent is not seen in the record above.

As rightly argued by the respondent's counsel, this court invoked the provision of rule 17 above for extension of time, because the rules provide only statutory days of filling counter affidavit, in this matter the same was expired, therefore the extension ordered was purely discretion of this court. Nonetheless, in order to exercise judicial discretion, court must be guided by fairness basing on the circumstances of particular case, rules and principles of law. In the wording of the Court of Appeal in the case of **Mza RTC Trading Company Limited vs Export Trading Company Limited**, Civil

Application No.12 of 2015 [2016] TZCA 12, what amounts to judicious discretion was observed as follows;

"An application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion...judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law ..."

According to the circumstances of this matter at hand, which involves public competing interests, in my considered opinion, it was fair and equitable for this court to invoke its discretion power in law for the end of justice, to order extension of time so that the matter be heard substantively.

Be it as it may, my intuition directs me to ask myself whether the date the respondents filed joint counter affidavit was within reasonable time and did not prejudice the applicants.

The record shows that the same was filed by the respondent on 27th day of April 2023, this is ten (10) days from the last order of this court when extended unspecified time for the respondents to file their counter affidavit.

I have considered the circumstances of this matter as stated above, I am settled the above time is not inordinate, thus reasonable and also did not occasion any failure of justice nor prejudice the applicant, therefore, in upshot I hereby find the applicants' preliminary objection is devoid of merit and hereby dismissed forthwith. In the circumstances each party bear his/her costs.

It is so ordered.

DATED at MOSHI this 5th day of October, 2023



X

JUDGE

Signed by: A. P. KILIMI

Court: - Ruling delivered today on 5th day of October, 2023 in the presence of Mr. Yohana Marco learned State Attorney for Respondent and Mr. Jeremiah Mjema for all applicants, also all applicants present.

Sgd. A. P. KILIMI
JUDGE
5/10/2023