

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 103 OF 2023

(Arising From Land Case No. 50 of 2023)

VIMAL NAVIN PATEL.....1ST APPLICANT

JADE HOLDINGS LIMITED.....2ND APPLICANT

KAILASHBEN NAVIN PATEL.....3RD APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....1ST RESPONDENT

MABUNDA AUCTIONEER MART

COMPANY LIMITED.....2ND RESPONDENT

RULING

30/10/2023 & 7/11/2023

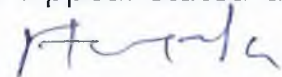
MWASEBA J.

This is a ruling in respect of a preliminary objection raised by the respondents that the application is incompetent in law as it contains multiple applicants supported by only one affidavit of the 1st applicant.

During the hearing of the Preliminary objection Mr. Kephas Mahenje learned counsel appeared for the respondents while Mr. Innocent Mwanga learned counsel appeared for the applicants.

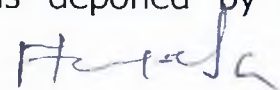


Submitting in support of the raised preliminary objection Mr. Mahenje averred that the application filed by the applicants on 7/9/2023 were brought by three applicants. However, the application is being supported by the affidavit of only the 1st applicant one Vimal Navin Patel. More so, there is no indication in the pleaded paragraphs stipulating that he deponed on behalf of the 2nd and 3rd defendant or rather, he obtained an authorisation from the 2nd and 3rd respondents. He referred this court to **Order XLIII Rule 2 of the CPC** which provides that every application to the court must be made by chamber summons supported by an affidavit. He clarified that this being a joint application of three applicants was supposed to be supported by the affidavit of three applicants or rather, if not by each of them, one of them on behalf of others. He stated that there are no affidavits for or on behalf of the 2nd and 3rd applicants. Therefore, the application is not supported by the affidavits of the 2nd and 3rd defendants the omission which renders the application incompetent. To bolster his argument he referred this court to the Court of Appeal decisions in the cases of **Mohamed Abdillah Nur and others v. Hamad Masaun and others**, Civil Application No. 436/16 of 2022 and **LRM Investment Company Limited and others v. Diamond Trust Bank of Tanzania Limited**, Civil Application No 418/16 of 2019 at page 13-14 in which the Court of Appeal stated that




where the application is brought by more than one applicants then each applicant should file an affidavit in support of the application. Short of that the application becomes incompetent. The same position was illustrated by the High Court in the case of **Cats Tanzania Limited and others v. International Commercial Bank of (Tanzania) Limited**, Misc. Commercial Application No. 116 of 2022. Finally, Mr. Mahenje prayed that this application for injunction be struck out with costs for being incompetent.

Responding to the raised Preliminary objection, Mr. Mwanga learned counsel for the applicants submitted that that the preliminary objection was raised out of context without reading the proviso provided under **Order XLIII Rule 2 of the CPC**. Also, the PO was raised without reading the affidavit in support of the application. He said the proviso of **Order XLIII rule 2 of the CPC** the last three sentences provides other appropriate mode with regard to the filing of an application before this hon. court. The word "or" is used as an alternative. That means not mandatorily that all applicants should file the affidavit. More so, the other mode is the one which was applied by the applicants in support of the application before this court. Mr. Mwanga submitted further that going through the entire affidavit which was deponed by the 1st



applicant, it misses the word "joint affidavit" but it refers to all applicants. He was of the view that missing the word "jointly" is not fatal.

He went on to refer this court to paragraphs 1, 2, 5, 6, 7,8,9,12,13 of the affidavit to support his arguments that they refer to the applicants. So, he was of the opinion that although the affidavit misses the words "joint affidavit" but the content reflects other applicants so it cannot be said it belongs to the 1st applicant alone. Therefore, the cited cases above are not applicable in this case as the affidavit before this court in support of the application covers all applicants. More to that, Mr. Mwanga was of the view that the content of the affidavit in support of the application has not prejudiced the respondents in any how as they managed to file their counter affidavit and they referred to all applicants. He referred this court to the case of **Yusuf Nyabunya Nyatururya v. Mega Speed Liner Ltd and another**, Civil Appeal No. 85 of 2019 at page 12, where the Court of Appeal said whenever there is no prejudice to any one then the court may do away with the anomalies. So even in the case at hand, the respondent is not prejudiced in any how. Finally, he prayed that the PO raised by the counsel for the respondent to be overruled with costs.



In his brief rejoinder, Mr. Mahenje apart from reiterating what he had submitted in his submission in chief, he added that the mode in which the application is brought is by way of chamber summons supported by an affidavit. So, if that is the mode he chose, the application ought to be supported by an affidavit of all applicants. Regarding the fact that the anomalies has not prejudiced the respondents in any how, Mr. Mahenje was of the view that in the case at hand they are dealing with the requirement of law which has to be complied with. He insisted that the application be struck out with costs.

After going through the submissions from both parties and the pleadings particularly the affidavit accompanying the application, the pertinent issue that calls for my determination is whether the raised preliminary objection has merit or not.

The law is clear that every application to the court shall be made by chamber summons supported by affidavit. See **Order XLIII Rule 2 of the CPC**. This legal requirement is not at issue in this matter and the applicants brought their application by chamber summons supported by affidavit. The issue is on the number of affidavits as there are three applicants but there is only one affidavit of the 1st applicant which does not refer to other applicants. Mr. Mahenje was of the view that the



anomalies are fatal irregularity which renders the application incompetent. Mr. Mwanga for the applicants was of the notion that the said affidavit missed the word "joint affidavit" but its content refers to all applicants. He referred this court to paragraphs 1, 2, 5, 6, 7, 8, 9, 12 and 13 of the affidavit. I have gone through the affidavit, and found that its title does not indicate to refer the affidavit of all applicants. At the beginning it clearly shows that it is deponed by Vimal Navin Patel who is the 1st applicant herein. Its content is all about the facts of the matter but does not indicate that the 1st applicant took oath on behalf of other applicants. Thus, I concur with Mr. Mahenje advocate for the respondent that the application is incompetent in the eyes of the law. As it was settled by the Court of Appeal in the cases of **Mohamed Abdillah Nur and others v. Hamad Masaun and others**(Supra) and **LRM Investment Company Limited and others v. Diamond Trust Bank of Tanzania Limited** (Supra).

Regarding the proviso to **Order XLIII Rule 2 of the CPC** as submitted by the learned counsel for the applicants, it gives room for the court to entertain oral application or in case parties to the suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates, or in such other mode as may be



appropriate. In the case at hand parties are not in agreement in any of the facts regarding this application. Thus, the right mode to bring this application is by way of chamber summons supported by affidavit. This case having three applicants ought to be supported with the affidavit of all applicants or one or their advocate take oath on behalf of all applicants as the case may be. This is a legal requirement and failure to comply with it, renders the application incompetent as it was held in the case of **Cats Tanzania Limited and others v. International Commercial Bank of (Tanzania) Limited**, (Supra).

In the circumstances, I sustain the preliminary objection raised by the counsel for the respondent for being meritorious. Hence the application is hereby struck out for being incompetent.

It is so ordered

DATED at ARUSHA this 7th day of November, 2023



N.R. Mwaseba
N.R. MWASEBA

JUDGE