

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**MISC. CIVIL APPLICATION NO. 1097 OF 2024**  
*(Originated from Land Case No. 32 of 2023)*

<b>MASELE MAGASHA</b>	<b>-----1<sup>st</sup> APPLICANT</b>
<b>SARAH MSUYA</b>	<b>-----2<sup>nd</sup> APPLICANT</b>
<b>BERNAD MAFURU</b>	<b>-----3<sup>rd</sup> APPLICANT</b>
<b>LUSELELE MADUHU SONGOI</b>	<b>-----4<sup>th</sup> APPLICANT</b>
<b>EDWARD MAKULIGA</b>	<b>-----5<sup>th</sup> APPLICANT</b>
<b>ELIZABETH MAGENI</b>	<b>-----6<sup>th</sup> APPLICANT</b>
<b>CONAS KOMBA</b>	<b>-----7<sup>th</sup> APPLICANT</b>
<b>EMMANUELI STEPHANO</b>	<b>-----8<sup>th</sup> APPLICANT</b>
<b>CHRISTINA MATONYA</b>	<b>-----9<sup>th</sup> APPLICANT</b>
<b>MAGRET JOHN</b>	<b>-----10<sup>th</sup> APPLICANT</b>
<b>GRACE FAUSTINE</b>	<b>-----11<sup>th</sup> APPLICANT</b>
<b>CONSTANTIN NGEREJA</b>	<b>-----12<sup>th</sup> APPLICANT</b>
<b>RENATUS MAGENI</b>	<b>-----13<sup>th</sup> APPLICANT</b>
<b>ALOYCE LIMBE</b>	<b>-----14<sup>th</sup> APPLICANT</b>
<b>MAGDALENA LUHEMBE</b>	<b>-----15<sup>th</sup> APPLICANT</b>
<b>MICHAEL MATORO</b>	<b>-----16<sup>th</sup> APPLICANT</b>
<b>ABBASI KYENGESHO</b>	<b>-----17<sup>th</sup> APPLICANT</b>
<b>HENRY R. KARUNGWA</b>	<b>-----18<sup>th</sup> APPLICANT</b>
<b>ROBERT MSOMI KABUTI</b>	<b>-----19<sup>th</sup> APPLICANT</b>
<b>JOSEPH KIYUNGU MAGENI</b>	<b>-----20<sup>th</sup> APPLICANT</b>
<b>MICHAELSAYI</b>	<b>-----21<sup>st</sup> APPLICANT</b>
<b>GILBERT SUBUWANKA</b>	<b>-----22<sup>nd</sup> APPLICANT</b>
<b>ALLY S. SINDANO</b>	<b>-----23<sup>rd</sup> APPLICANT</b>
<b>ANASTAZIA N. CHARLES</b>	<b>-----24<sup>th</sup> APPLICANT</b>
<b>ATHANAS MPUYA</b>	<b>-----25<sup>th</sup> APPLICANT</b>
<b>SELEMAN KALALA</b>	<b>-----26<sup>th</sup> APPLICANT</b>
<b>VERENCE MATOJA</b>	<b>-----27<sup>th</sup> APPLICANT</b>
<b>HIDAYA R. KWANDIKWA</b>	<b>-----28<sup>th</sup> APPLICANT</b>
<b>ANDERSON BAGESHI</b>	<b>-----29<sup>th</sup> APPLICANT</b>
<b>NJENO MANGE</b>	<b>-----30<sup>th</sup> APPLICANT</b>
<b>EMMANUEL KIDELA</b>	<b>-----31<sup>st</sup> APPLICANT</b>

**Versus**

**HAPPINESS MSANGA-----RESPONDENT**

**RULING**

*12<sup>nd</sup> & 18<sup>th</sup> March, 2024*

**ITEMBA, J.**

The applicants had preferred this application to the effect that the respondent to be detained a civil prisoner for disobeying the court order. When the application was scheduled for hearing the respondent raised a preliminary objection that;

- i. The application against the respondent who is a third party is incompetent for being premised under wrong provision of the law.*
- ii. The application is bad in law due to change of parties from those featured in the main suit and in the injunction order issued in September 2023.*

Arguing in support of the first preliminary objection, Mr. Salim Fundikira learned counsel stated that the respondent wrongly joined because she is the 3<sup>rd</sup> party who was not in the original application. He also stood guided by the case **of CRDB PLC (formerly CRDB 1996 LTD) v George Mathew Kilindu** Civil Appeal no. 110 of 2017 CAT where there was allegation of court contempt. And the court stated that the application was against the stranger because it had different parties from the former application.

The former application was against Kwimba District Council and Attorney General while in the present application the respondent is Hapiness Msangi who is not connected to the former respondents.

Secondly, he submitted about the applicable law that, the application was to be premised under section 124 of the Penal Code as it is against the 3<sup>rd</sup> party. **Yusuph Shaban Luhumba v Hapiness John and 3 others** Civil Application 304/14/2022, CAT DSM and **Habibu Juma & 3 Others v. R**, Criminal Appeal No. 314 of 2016 (unreported) where the court stated that if a party disobeys a court order has to be formally charged under section 124 of the Penal Code.

The respondent's counsel argued further that, in this case, the respondent is alleged to have violated **Article 13(6) a and b of the Constitution of the United Republic of Tanzania** which is violation of natural justice. That, the respondent has to be informed of the decision and order of the court before being arraigned. He added that, the application is incompetent as it violates the right to be heard and there is no justification for allegation against the respondent and it should be dismissed with costs.

In reply, Mr. Anton Nasimire learned counsel, stated that the respondent is not a 3<sup>rd</sup> party to these proceedings. That, she is the District Executive Director of Kwimba District Council. That, the complaint against her is that she has defiled an injunctive order issued against Kwimba District Council. That, the Kwimba District Council is a body corporate which

functions through its officers and the respondent is the CEO thereof having being appointed in terms of section 22 of the Local Government Act. He went on that, under section 34 of the same Act, she is liable for all those acts done by her, *mala fides*, in discharge of their duties. That, Kwimba District Council cannot be committed to prison but its' officers can therefore, the respondent is a proper party to the application. That, under Order XXXVII rule 6 of the CPC an injunction which is directed to a corporate body is binding on that body and on all members and officers whose personal actions it seeks to restrain. Therefore, the cited case of **Yusuph Shaban Luhumba** is distinguishable. Given the juridical nature of Kwimba District Council, the viable way to compel it to abode to injunctive order was through impleading Happiness Msanga to court.

With regard to the argument on the wrong provision of the law, he submitted that they have invoked the proper provision in the circumstance of the case which is order XXXVII Rule 2(2) of the CPC that the court may order such person to be detained as a civil prisoner for 6 months.

In the 2<sup>nd</sup> point of preliminary objection, he maintained that, they have not changed the name of the party appearing in the main suit because this is simply a miscellaneous civil application which should not necessarily be in the name of the party of the main suit and it is not a new practice. He

gave an example of execution proceedings where objection proceedings can be filed not necessarily on the names of the parties to the main suit. To him, the cited case of **CRDB PLC (formerly CRDB 1996 LTD) v George Mathew Kilindu** (supra) is distinguishable because in that case, the issue was whether the introduction of a new party from the original case was proper while the present issue is not appeal it is a miscellaneous application for breach of an order directed to an Institution in which the respondent is an executive officer. He prayed for both preliminary objections to be overruled with costs.

**Mr. Fundikira briefly rejoined that,** Kwimba District Council being the body corporate her directors are covered by a corporate veil, if the said directors have to be sued by their names, then the respondent could be sued after the corporate veil being lifted. That, in **Yusuph Manji v Edward Masanja** Civil appeal no.78 of 2002, the Court stated that if it is necessary to sue or execute any liability of a company against her director the veil should be lifted first. Therefore, if Happiness Msanga was sued in her official capacity which does not feature, a veil had to be lifted.

As regards the second ground, he agreed that this is a different application and it is totally different. That, any miscellaneous application is a subsequent application to the proceedings or judgement and in any case the

name of the party cannot be changed without leave of the court as explained in **of CRDB PLC (formerly CRDB 1996 LTD) v George Mathew Kilindu (supra)**. He stressed that the enabling provisions in the application are silent regarding suing the 3<sup>rd</sup> party and it is not easy to know that in the main application, the respondent was Kwimba District Council and the AG.

Having appraised the rival submissions from both parties, the issue is whether the application is properly brought before the court. The courts' observation are as follows: **One**; There is no dispute that in Application No. 85/2023 the applicant was Masele Magasha & 29 Others against Kwimba District Council and Hon. Attorney General while in the present application the applicants are the same and the respondent is one Happiness Msanga. For the reasons known best to the applicants, the former two respondents Kwimba District Council and the AG, are no longer parties in the present application. The affidavit is silent on how Happiness Msanga is related to the former application except for the fact that she disobeyed the court order by instructing officials of the Kwimba District Council, accompanied by police officers of Ngudu Police station to demand rent and close the applicant's stalls.

In other words, as per the records, there is no court order issued to the respondent Happiness Msanga. At paragraph 3 of the affidavit the applicant's counsel allege that the court order in App. No. 85/2023 was directed to the "Respondents", this is not supported by records because the respondent was not a party thereof.

**Two;** It is trite law that, parties to the case must remain the same as in previous proceedings unless there is a reason to change them. In **Salim Amour Diwani v the Vice Chancellor Nelson Mandela African Institution of Science and Technology v AG** Civil Application No. 116/01 OF 2021, CAT Mwanza, the Court found the application was incompetent because parties were not the same; in that application the second respondent was joined for the first time and without prior leave of the court. The Court held *inter alia* that;

*'Court records are considered authentic and should not be easily altered as parties would wish to. It bears reaffirming that, parties in the proceedings should at any given time appear as they did in the previous proceedings unless there is a reason for not observing that and only with the leave of the court.'*

The same position was stressed in **Hellena Adam Elisha @ Hellen Silas Masui v. Yahaya Shabani & Another**, Civil Application No. 118/01/2019 (unreported) in which the issue was that the names appearing in the notice

of appeal were different from those appearing in the application to strike out the notice of appeal.

**Three;** The fact that the respondent Happiness Msanga is the District Executive Director of Kwimba District, is introduced to the court for the first time through the applicant's counsel's submissions. Parties are bound by their pleadings; the relevancy of the respondent in the application should have featured in the affidavit and not in the submission. It was observed in **Barclays Bank (T) Ltd vs. Jacob Muro** Civil Appeal No. 357 of 2019 (unreported), that:

*"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored'.*

See also **National Insurance Corporation v Sekulu Construction Company** [1986] T.L.R. 157, See also **James Funke Ngwagilo v. Attorney General** [2004] T.L.R. 161.

It is also trite law that, a mere statement from the bar does not amount to evidence. Matters of facts need to be stated in the affidavit and not by the learned counsel in the course of submission. See for example the Ugandan case of **Trasfrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd (2002) E.A** cited with approval by the Court of Appeal in the case of **Tina**



**& Co. Limited and 2 Other v. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (unreported).

In the end result, the 1<sup>st</sup> point of preliminary objection is sustained.

This single point of objection suffices to dispose the application.

I find and hold that, the application before me is incompetent. It is hereby dismissed with costs.



**L.K. J. ITEMBA**  
**JUDGE**  
**18/3/2024**