

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

**SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**MISCELLANEOUS CIVIL APPLICATION NO. 68 OF 2023**

*(Arising from Miscellaneous Civil Cause No 28015 of 2023)*

**BETWEEN**

**REV. BENSON JOHN KITONKA ..... APPLICANT**

**AND**

**AMINA N. MAKILAGI @ THE DISTRICT**

**COMMISSIONER OF NYAMAGANA ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*26.01 & 5.02.2024*

**CHUMA, J.**

In the instant application, the applicant is seeking the Court's indulgence to make an order issuing a summons to the 1<sup>st</sup> respondent in person to appear and show cause as to why she should not be committed as a civil prisoner for not obeying the orders of the Court dated 20<sup>th</sup> December 2023. The applicant is also moving the Court to order the 1<sup>st</sup> respondent and her allies to adhere to the Court's order. The application is preferred under **section 95 and Order XXXVII Rule 2(2) of the Civil Procedure Code, Cap. 33 R.E.2019**. It is supported by an affidavit sworn

by the applicant, the anointed Reverend of the Assemblies of God Gospel Church International.

For a better appreciation of the issues raised herein, the facts are easily told. On 20<sup>th</sup> December, 2023 the Court issued an order maintaining the *status quo* between the parties in respect of Bugando Church Building situated on Plot No. 50, Block "2" Bugando North, Nyamagana Municipality, and its entire premises be maintained pending the hearing and final determination of the main application. Despite the order, the 1<sup>st</sup> respondent proceeded to evict the applicant's believers from the church building. According to the applicant, such an act ousts the power of the Court in the dispensation of justice and is detrimental for preventing the believers from accessing and realizing their constitutional rights of worshiping together as enshrined under the Constitution of the United Republic of Tanzania 1977 and other governing laws.

The respondents filed a counter affidavit through which they resisted the application that, was without merit. They stated that there was no disobedience or non-compliance with the court's order as after the pronouncement, the 1<sup>st</sup> respondent never prohibited the applicant and his believers of Assemblies of God Gospel Church International (AGOCI) from

entering into the church. The respondent brought to the attention of this court that the Evangelistic Assemblies of God Tanzania (EAGT) are the ones who are recognized by the Registrar of Societies to worship in the disputed church and not Assemblies of God Gospel Church International (AGCCI) which recently has been in process of being registered by the Registrar of the Societies as a new church.

Ahead of hearing the application, on 26<sup>th</sup> January 2024, the respondents lodged a notice of preliminary objections comprising three grounds:

1. The application is incompetent for being instituted against the first respondent who is unknown under the law.
2. The application is bad in law as the prayers sought in chamber summons are not supported by an averment in the affidavit.
3. The affidavit in support of the application is defective.

When the application came for hearing, the applicant was represented by Mr. Gibson Ishengoma, learned Advocate, and the respondents enjoyed the service of Mr. Lameck Merumbe Senior state attorney, and Mr. Mseti, state attorney. Aiming to expedite the hearing and timely disposal of the

matter, the Court ordered the preliminary objection and the substantive application to be jointly argued. Mindful of the settled practice that an objection on a point of law challenging the competence of the suit or jurisdiction of the court must be determined first, I am bound to follow it before proceeding to determine the application on merit.

At the outset, Mr. Lameck Merumbe Senior state attorney informed the Court of his option to submit on the first two grounds and abandon the third one. Concerning the first ground the learned State Attorney submitted that the application is incompetent for being preferred against an unknown creature before the law. To him, the applicant should have filed his application against the District Commissioner of Nyamagana and not Amina N. Makilagi @ District Commissioner of Nyamagana. The learned State Attorney reinforced his proposition by citing sections 13(1) and (2) of the Regional Administration Act No 19/1997 which provides for the office of District Commissioner and section 10 of the National Security Council Act No. 8 of 2010 which recognize District Commissioner as Chairman of the District Security Committee. Therefore the one who appears in this application is unknown before the law. The referred Amina N.Makilagi @The District Commissioner means she is also known as District Commissioner. He

further contended that, the word @ in Black Law Dictionary means to assume or additional name a person uses or known by, at the same time the term assumed otherwise known and defined as fictitious name which in law is not known.

In the second point of objection, Mr. Lameck Merumbe argued that the application is bad in law on the ground that the three prayers sought in the chamber summons were not all supported by averments in the affidavit. Relying on Order XLIII rule 2 of the CPC, the learned State Attorney amplified that the chamber summons contains three prayers, but the two prayers have not been reflected in the affidavit. Mr. Merumbe formed an opinion that the anomaly contravenes the common dictate that chamber summons have to be supported by affidavit. With that, he cited the case of **Bahati M. Ngowi V. Paul Aidan Ulungi** Misc Civil Application No.136/13 of 2020. Lastly, Mr. Merumbe asked the Court to dismiss the application.

Mr. Ishengoma began his reply by doubting the validity of the notice of preliminary objection that it came as a surprise and afterthought attempt because he believed that according to the law, after filing all necessary documents, the respondent had no room to file other documents except with leave of the Court. To bolster his position he cited the case of **Chaina**

**Chacha Marawa Vs. Kirumi Village Council & Seven Others**, land case No. 43 of 2014. That apart, regarding the competency of the 1<sup>st</sup> respondent, he argued that whether or not Amina Makilagi @ District Commissioner of Nyamagana is competent attracts assessment of evidence hence missing the threshold requirement of being a preliminary objection. Alternatively, should the Court sustain the infraction, Mr. Ishengoma sought leave to make good by way of amendment. The prayer was predicated under Article 107 A (2)(e) of the URT Constitution, which restricts technicalities in dispensing justice before the court of law.

As for the second ground, the learned advocate for the applicant submitted that chamber summons and affidavit are inseparable. He also contended that Order XXXVII rule 2(2) and section 95 of the CPC explain and indicate that they apply to the entire application. To be precise, the learned advocate stated further that under Order XXXVII of the CPC, the law is clear that in case of disobedience, the court has the power to act upon and commit such person as a civil prisoner.

Mr. Merumbe was brief in her rejoinder. Apart from reiterating the substance of her submission in chief, he added that the prayer to amend the pleading was belatedly made and the cases cited by Mr. Ishengoma are

distinguishable. He added that citing article 107A (2) of the United Republic Constitution is an indication that the learned advocate was admitting to the defect

I have given due consideration to the rival addresses by both parties. In the first point of objection, the issue is whether the first respondent was properly sued or whether it was appropriate to sue the 1<sup>st</sup> respondent in her own capacity. Before going to it, it is not insignificant to start my deliberation with the preliminary argument made by the counsel for the applicant that the ground of objection is not a legal argument. That proposition seems to have no basis because the indication and description of proper names to the suit is a legal requirement prior to the hearing of the case and the claimant must satisfy the court that he has a right of action against the person sued. The Court of Appeal of Tanzania made the same pronouncement in the case of **Malietha Gabo vs Adam Mtengu** (Civil Appeal No.485 of 2022) [2023] TZCA 17318 (8 June 2023) TanzLII, that suing a wrong party has serious consequences which include rendering the trial vitiated or subjecting execution to untold hurdles. Indeed, it is a matter which must be determined at the earliest.

At least in this application, the parties are in agreement on two things, the 1<sup>st</sup> respondent is a government official serving as the District Commissioner, thus being so the applicant should have filed his application against the District Commissioner of Nyamagana and not Amina N. Makilagi @ District Commissioner of Nyamagana who is unknown under the law as rightly submitted by Mr. Merumbe for respondent. This is because the referred @ means also known as.

Be that as it may, assuming the first respondent was properly named again whatever was alleged by the applicant did happen when the 1<sup>st</sup> respondent was executing her powers and authority on behalf of the Government and as Chairman of the District Security Committee. In that way, it is obvious that the 1<sup>st</sup> respondent was not required to be sued in her own capacity. The only reason that would lead the 1<sup>st</sup> respondent to be personally sued or liable is an abuse of the authority of her office as envisaged under section 15 (9) of the Regional Administration Act, 1997 which is not the case here. Suffices to say that since the District Commissioner of Nyamagana is a body corporate, its corporate name is capable of suing or being sued in terms of section 19 of the Local Government (District Authorities) Act, 1982.



An analogous situation was discussed in **Respicius Emilian Mwuage v. The Municipal Director, Ilala Municipal Council**, Land Case No. 27 of 2021, the plaintiff sued the Municipal Director of Ilala Municipal Council who is a mere employee like any other employee of the Council. Interpreting section 14 of the Local Government (Urban Authorities) Act which is in *pari materia* with section 19 of the Local Government (District Authorities) Act, the Court held the following:

*"From the hereinabove provision, the then Ilala Municipal has a legal entity which can sue and be sued in her own name. However, in the present suit the plaintiff has sued the Director, I find that the plaintiff sued the wrong party. I agree with the respondent's observations that the Director is a mere employee of the council and as that in his capacity he is just the representative of the council. Since the Director of Ilala Municipality is not a legal personality then he was not a proper party and in case a decree has to be preferred against him, it cannot be effective."*

Under the circumstances, the narrow but pertinent issue is whether the flaw is curable. Mr. Ishengoma urged the Court to invoke Article 107A (2)(e) of the Constitution and be allowed to rectify the omission to meet

substantive justice. Mr. Merumbe rejected the prayer stating that it was tardily made. No doubt the prayer to make an amendment is no longer feasible because it was made after the objection had been taken by the respondent and argued. Granting the prayer will have the effect of defeating the preliminary objection filed. The legal position was broadly explained in the case of **Standard Chartered Bank & Another v. Vip Engineering & Marketing Ltd & Others** (Civil Application 222 of 2016) [2021] TZCA 344 (2 August 2021) TanzLII, the Court of Appeal pronounced itself as follows:

*"It is trite principle that where a party has raised a preliminary objection in a case, the other party cannot be allowed to rectify the defect complained of by the party who raised the objection. This is because to do so would amount to pre-empting that preliminary objection. In the case of Method Kimomogoro v. Board of Trustees of TANAPA (supra) cited by Mr. Ngalo, the Court stated as follows: "This Court has said in several times that it will not tolerate the practice of an Advocate trying to pre-empt a preliminary objection either by raising another objection or trying to rectify the error complained of".*

For the foregoing legal position, I find and hold that there is merit in ground one of the preliminary objection. That suffices to dispose of the

matters but it is compelling though in passing to examine the second ground of objection.

It does not detain much of the Court's time. It is common knowledge that Order XLIII rule 2 of the CPC which was referred to by Mr. Merumbe governs the manner of filing an application that it must be made by a chamber summons supported by affidavit. However, the provision, unlike what Mr. Merumbe said, does not suggest that what is in the chamber summons must also be reflected in the affidavit. The function of the affidavit is to support the application by providing evidence or clarifying what is in the chamber summons otherwise it will be considered that the claim has not been proven. In the case of **Charles Tito Nzegenuka & Others v. Minister for Works & Another** (Civil Application No 255 of 2021) [2022] TZCA 32 (17 February 2022) TanzLII, the Court stated the following on distinction between affidavit and notice of motion (chamber summons):

*"As rightly pointed out by Mr. Kakwaya an affidavit is just a supporting document and for purposes of effectiveness, each (Notice of Motion and affidavit) stands on its own".*

Mr. Ishengoma rightly submitted that the circumstances in the case of **Bahati M. Ngowi v. Paul Aidan Ulungi** (Misc. Civil Application No.490/13

of 2020) [2023] TZCA 17503 (16 August 2023) TanzLII cited by Mr. Merumbe are indeed distinguishable to the present application. In that case, the matter before the Court of Appeal was an extension of time and the applicant in her affidavit failed to state any personal efforts made to follow up on the progress of her appeal.

From what I have demonstrated above, I sustain the 1<sup>st</sup> point of preliminary objection that the 1<sup>st</sup> respondent was wrongly sued by the applicant. Discussion of the main application has been rendered redundant. In the upshot then the application is hereby struck out. Parties to bear their own cost.

**DATED at Mwanza** this 05 day of February 2024.



**W. M. CHUMA**  
**JUDGE**

Ruling delivered under my hand and seal this 5<sup>th</sup> Day of February, 2024 in the presence of Mr. Ishengoma advocate for Applicant and Mr. Merumbe State Attorney for the Second Respondent.



**W. M. CHUMA**  
**JUDGE**