

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND CASE APPLICATION NO.191 OF 2021

(Arising from Land Case No. 130 of 2018 before Hon. Opiyo, J)

**MARGARET NGIANAELI LYATUU (Administratrix of the Estate of
the late Justine Lyatuu).....APPLICANT**

VERSUS

MWANAHAMISI HABIBU.....1ST RESPONDENT

WILHELM S. URIO.....2ND RESPONDENT

OMARY SHABANI.....3RD RESPONDENT

MOHAMED MBONDE.....4TH RESPONDENT

CHARLES JOSEPH.....5TH RESPONDENT

MAIMUNA MAGOTI.....6TH RESPONDENT

GREYSON KAJUNA.....7TH RESPONDENT

ATHUMANI MNUBI.....8TH RESPONDENT

RULING

Date of Last Order: 03. 06.2021

Date of Ruling: 16.07.2021

OPIYO, J.

In this application, the applicant was seeking for an order of temporary injunction to restrain the respondent and any person working under their

authority or instructions from selling and constructing on the suit premises located at Farm No. 1418, 3258, 3259 and 3260, located at Kwa Kibosho, Mapinga, Bagamoyo District and Coastal Region. The same was brought under Order XXXVII Rule 1(a), section 68(e) and section 95 of the Civil Procedure, Cap 33 R.E 2019 and supported by the affidavit of the applicant herself. The respondents on their side jointly objected the application on point of law that, the affidavit in support of the application is defective and goes against Order VI Rule 15 (2) of the Civil Procedure Code, Cap 33 R.E 2019 as well as section 39 (1) (b) of the Advocates Act, cap 341 R.E 2019. Hearing of the objection was done through written submissions. Advocate Abdul Aziz appeared for the respondents while the applicant was represented by the learned Advocate G.N Said.

Mr. Aziz submitting for the respondents on the preliminary objections maintained that, the applicant affidavit contravenes Order VI Rule 15 (2) of the Civil Procedure Code, Cap 33 R.E 2019 which insists that.....

"The person verifying shall specify, by reference to the numbered paragraph of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true".

He contended that, the applicant's affidavit has 10 paragraphs, the applicant did verify only paragraph 1-7 and left paragraphs 8-10. This makes the whole affidavit defective and the application has to be dismissed.

He went on to argue further that, the affidavit on the jurat of attestation has been signed by Saada Nassoro (Advocate, Notary Public and Commissioner for Oaths. The jurat was signed on the 23rd day of April 2021, but the said person at the time of signing had no valid practicing license. This is contrary to section 39(1) (b) of the Advocates Act, Cap 341 R.E 2019 which provides that..

"Subject to the provisions of section 3, no person shall be qualified to act as an Advocate unless- he has in force a practicing certificate".

In reply, Advocate Said argued that, the defects associated by the applicant's affidavit are curable by invoking the overriding objective principle as stated in the case of **Yakobo Magoiga Gichere versus Peninah Yusuph, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania at Mwanza (unreported)**, where the court stated that:-

"With the advent of the principle of the overriding objective brought by the Written Laws (Miscellaneous Amendments) No. 3 of 2018...which now requires the Court to deal with cases justly and have regard to substantive justice, section 45 of the Land Disputes Act should be given more prominence to cut back on over-reliance on procedural technicalities"

The applicant's counsel insisted that, the defect is curable under Order VI Rule 17 which allows alterations or amendment of pleadings for the purpose of determining the real question between the parties. As for the jurat of attestation to have been signed by the a person with no valid practicing certificate, he submitted that, the same need proof under section 112 of the law of Evidence Act, Cap 6 R.E 2019. That, the

respondent's counsel has failed to discharge the burden of proof with regard to the existence of a valid practicing certificate of Advocate Saada Nasoro at the time she attested the affidavit. He prayed for the preliminary objection to be overruled with costs.

In his rejoinder, the respondents counsel maintained that the said Advocate has no valid practicing license and attached printout of the status of the said advocate from the website, tams.judiciary.go.tz.

Having gone through the submissions of both parties for and against the objection at hand the issue for determination is whether the objection has merit or not. The respondents' counsel has insisted that the affidavit is defective for some of its paragraphs not being verified. I went through the affidavit in question and proved the fact. It is true, the applicant's affidavit from paragraph 8-10 was not verified. Since they were not included in the verification clause, they deserve to be expunged from the records. We remain with the 1st to 7th paragraphs in the affidavit. The question that remains unanswered is, whether the remaining paragraphs are capable of supporting the application as stated in **Rustamali Shivji Karim Merani versus Kamal Bhushan Joshi, Civil Application No. 80 of 2009 Court of Appeal of Tanzania, (unreported)**. The contents of the remaining paragraphs 1 and 7 contain the description and the history of how the landed property in question came into ownership of the late Justin Lyatuu and what happened after his death. The said paragraphs do not show any dispute if left alone and do not support the statements contained in the chamber summons. In absence of the other paragraphs (8-10) this application will be left hanging and therefore it is

of no use to assume it can continue supporting the application. It is the position that was insisted in **Rustamali Shivji Karim Merani case, supra**. This fact alone is enough to end the matter at hand without discussing the other part of the objection on the defect on the jurat of attestation.

In the event the application at hand is struck out with costs.



A handwritten signature in blue ink, appearing to be "M.P. OPIYO", written over a horizontal line.

**M.P. OPIYO,
JUDGE
16/07/2021**