

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC.LAND APPLICATION No. 42 OF 2021**

**ADINANI MOHAMED ALMASI AND 5 OTHERS.....APPLICANTS
VERSUS
MWAJABU ABDALLAH JONGOA & 4 OTHERS RESPONDENTS**

RULING

**Date of last Order: 6/9/2021
Date of Ruling: 29/10/2021**

T.N. MWENEGOHA, J.

In this application, the applicants herein above are seeking leave to file a representative suit to sue for and on behalf of 159 other applicants. The application has been filed under the provision of Order I Rule 8 and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019 (**Herein after the C.P.C**). The applicants have also prayed for costs and any other orders the Court may deem fit and just to grant. This application is supported by the affidavit of the applicant's, advocate Walter Godluck dated 21st January, 2021.

Both parties were represented, while the applicants were represented by Mr. Walter Godluck, Advocate, the 1st and the 2nd respondents were represented by Mr. Frank Chacha, Advocate.

On the 5th March 2020 the respondents raised two preliminary objections that;

a) The application is incompetent in law for lack of authenticity and consent of numerous persons contrary to Order I Rule 8 of the C.P.C.

b) The application is incompetent for want of proper verification clause.

By the order of the Court the hearing of the preliminary objections proceeded by way of written submissions.

Supporting the 1st preliminary objection Mr. Godluck submitted that, the legal position to representative suit is provided under Order I Rule 8 of the C.P.C. Mr. Godluck cited the provision as follows;

"Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiffs expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct".

He continued to submit that for the applicants to be granted leave to sue under representative capacity by the Court three factors must be ascertained.

a) The intended parties to be represented must have the common or the same interest to the subject matter,

b) With the permission of the Court the representative parties must be suing or defending a suit for on behalf of others or interested person

including themselves.

- c) Notice of institution of the suit must be given to the represented persons.

That, it is a trite law for the Court to grant leave to the applicants in order to sue under representative capacity, it must satisfy itself that the purported persons to be represented carry the common or the same interest in the subject matter. To support this argument, he the cited the case of **KJ Motors and 3 Others Ltd Versus Richard Kishimba and Others, Civil Appeal No. 74 of 1999 (Unreported)** where the Court held that;

"The rationale for this view is fairly apparent where, for instance, a person comes forward and seeks to sue on behalf of other persons, those other persons might be dead, non - existent or either fictitious. Else he might purport to sue on behalf of persons who have not, in fact, authorized him to do so. If this is not checked it can lead to undesirable consequences. The Court can exclude such possibilities only by granting leave to the representative to sue on behalf of persons whom he must satisfy the Court they do exist and that they have duly mandated him to sue on their behalf."

That, the Court must satisfy before granting leave to the applicants in order to properly check whether this application is genuine, Mr. Godluck further submitted that this application is a fictitious one with malicious intention to cause hurdle to the respondents, and the long-listed persons are just coined by a single person who signed at larger in the list while others are non-existent persons. That this Court should dig further to find the reality behind this application.

That in the affidavit and annexure there are numerous numbers of persons listed but did not appear anywhere from No. 1-159. That, those persons in the list given from No 1-159 did not consent on this application at hand. He cited the case of **Mselem Ally Ng'ondya and Alex Godfrey Dalali Versus National Social Security Fund Misc. Land Application No. 102 of 2018** where the Court while dismissing the application quoted with approval at page 3 the decision of this court in the celebrated case of **Lujuna Shubi Balonzi Senior versus the Registered Trustees of Chama cha Mapinduzi [1996] TLR 203** whereby **Samatta J**, (as he then was) held that;

"The foundation of Order I rule 8 of C.P.C is to be found in a principle which transcends the personal or parochial natural of the combatants who are arrayed as parties to the suit....it affects the rights of other persons not present before the court. Hence the duty is set on the court itself to follow meticulously the procedure prescribed by Order I rule 8 in view that of the far-reaching consequences of a decree passed in what is described in law as a representative suit, it is necessary that the relevant must be treated as presentory and mandatory".

It was respondent's further submission that, the duty which cast on the side of the Court to ascertain the the respondent's further submission that genuineness of the application for leave to file a representative suit is paramount and the Court must scrutinize the documents presented before it on face of records to find their authenticity to whether the persons intended to be represented, did willfully consent and if at all they are alive. The respondent contended that the applicants and all other persons in the list annexed in their affidavit have no common interests, and the said

annexure is at fully doubt as there is no authenticity in regarding to the signatures and consent of number 1-159 as **those** persons' signatures are missed.

On the 2nd preliminary objection, that the application is incompetent for want of proper verification clause, Mr. Godluck submitted, that it is evidently under Order VI Rule 15(i) of the C.P.C that;

"Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case."

Therefore, failure to date the pleading is a tantamount as to failure to properly verify the pleading as required for by the law. This omission is fatal as the same remains incurably defective and bad in law.

Mr. Godluck finalized his submission by praying for this Court to dismiss this application with costs.

When replying, Mr. Chacha, advocate for the plaintiff, submitted that, preliminary objections should only be on the point of law which do not require any evidence to prove it. He argued that, the definition of a preliminary objection was well set out in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

The court further held that

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

Mr. Chacha submitted that the respondent's advocate utilized the first, second and half of third page to summarize the provision of Order 1 Rule 8 of the C.P.C instead of putting his energy on what specifically was his objections is all about according to law.

Mr. Chacha continued to submit that the respondents are aware that the applicants operate their daily activities in a market place. That, all people in that market area have similar interest, and also that the respondents are aware that they once have been in Court with the applicant but the Court did strike out the applicant's pleadings because the marketplace has not been registered henceforth the applicants decided to file this application seeking leave to file the representative suit, in the process of pursuing their rights.

Mr. Chacha continued to submit that, the point raised does not amount to a preliminary point of objection because the question as to consent, authenticity, investigations are questions of facts and the facts deposed through the affidavit are within the knowledge of the applicants and only

the applicants are capable to prove the same not the respondent nor his attorney. To support his argument, he cited the case of **Soitsambu Village Council vs. Tanzania Breweries Limited and another**, Civil Appeal no. 105 of 2011 (CAT unreported). The court observed that;

"Where a court is to investigate facts, such an issue cannot be raised as a preliminary objection on point of law...it will treat as a preliminary objection only those point that are pure law, unstained by facts or evidence..."

With regards to the second objection Mr. Chacha submitted that, the application has been properly verified. He submitted that the preliminary objections raised are baseless and should not be entertained. That in the case of **Ashmore vs. Corp, of Lloyds (1992) 2 All ER 486 (HL)** at page 493 the court held that;

"It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner."

Mr. Chacha further submitted that, on the alternative, even if all facts to these objections where correct, the remedy was not to dismiss the application rather to reject it. To support this argument, he cited the case of **John M. Byombalirwa vs. Agency Maritime Int. (Tz) Ltd** 1983 TLR 1.

Mr. Chacha, finalized his submission by praying for this Court to dismiss this application with cost for lack of merits.

Having gone through parties submissions, the main issue for determination is whether the preliminary objections raised are meritorious.

It is correctly submitted that, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. It must be on the point of law which do not require any evidence to prove the same. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra)**.

The respondents submitted on the 1st preliminary objection that the applicants and all other persons in the list annexed in their affidavit have no common interests and the said annexure is at full doubt as there is no authenticity in regarding to the signatures and consent of number 1-159 applicants. Up to this point, I am in agreement with Mr. Chacha that, this objection raised does not amount to a preliminary point of objection, because the question as to consent, authenticity, investigations are questions of facts and not of law, as it need to be proved by evidence.

Where a Court is to investigate facts, such an issue cannot be raised as a preliminary objection on point of law. See **Soitsambu Village Council vs. Tanzania Breweries Limited and another** (supra). Therefore, the 1st preliminary objection is hereby overruled.

Coming to the 2nd preliminary point, that the application is incompetent for want of proper verification clause.

It is a trite law that where an affidavit is made on an information it should not be acted upon by any Court unless the sources of the information are specified in the verification clause. That is, whether the information is from other sources (which must be specified) or it is from the deponent himself. In the case of **Colgate Palmolive Company v. Chemi Cotex Industries Ltd** Mlay, J. (as he then was) deciding on whether facts

deponed based on knowledge, information or belief he was of the view that:-

"The question whether any matter deponed in an affidavit is based on knowledge, information or belief can be answered by looking at the verification clause."

In the instant application the verification clause only stated as follow;

VERIFICATION

*I, Walter Godluck, verify that what is stated herein above under paragraphs 1, 2 and 3 are true to the best of **my own knowledge and based on the information supplied to me by the applicants.***

Dated at Dar es Salaam this 21st day of Jan 2021. (The emphasize is mine)

This verification clause is silent on which paragraphs were information from the applicants, and which were from the deponent's own knowledge. For that reason, I am in agreement with the respondents that the applicant's affidavit is incompetent and defective for want of proper verification clause. In the case of **Mantrac Tanzania Ltd. v. Raymond Costa, Civil Appeal No. 11 of 2010 (CAT Mwanza, unreported)**, which was cited with approval in the case of **Rhoda Mwasifiga Vs. The Manager NBC Bank and 3 Others MISC. LAND APPLICATION NO. 65 of 2017** the Court ruled that;

"An affidavit intended to be used in judicial proceedings should, among other things, be properly verified. It follows therefore that the requirement to properly verify the affidavit is set as a mandatory requirement under the law."

Owing to the above observations, the 2nd preliminary objection is meritorious. Henceforth, the instant application is hereby struck out with costs, for lack of competence.

It is so ordered.

Dated at Dar es salaam this 18th day of October, 2021.




T. N. MWENEGOHA.
JUDGE