

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 537 OF 2022

MUSTAFA SEIF NGANE.....1ST APPLICANT

ABUSHEKHE SEIF NGANE.....2ND APPLICANT

HUSNA ABDULRAHMAN HASSAN.....3RD APPLICANT

VERSUS

THE REGISTRAR OF TITLE.....1ST RESPONDENT

THE COMMISSIONER FOR LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

Date of last order: 21/9/2022

Date of ruling: 04/10/2022

RULING

A. MSAFIRI, J.

This is a ruling on preliminary objection raised by the respondents herein to the effect that;

The application is incompetent for not being accompanied with affidavit of the 2nd and 3^d applicants.

The respondents therefore prayed the preliminary objection be upheld and the application be struck out with costs.

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When the matter was called on for hearing of the above preliminary objection on 21.9.2022, Mr. Claud Msando learned advocate appeared for the applicants whereas Mr. Edwin Webiro learned State Attorney appeared for the respondents.

Mr. Webiro learned state attorney contended that the application is incompetent for not being accompanied with the affidavit of the 2nd and 3rd applicants. He contended further that according to Order XLIII Rule 2 of the Civil Procedure Code [CAP 33 R.E 2019] (hereinafter referred as the CPC), every application to this Court has to be made by chamber summons supported by an affidavit.

On further submission the leaned State Attorney contended that Order XIX Rule 3 of the CPC provides that the affidavit shall be confined to such facts which are within the knowledge of the deponent. In the instant application there are three applicants but there is only one affidavit of the 1st applicant and there are no facts showing that the 1st applicant has been authorized to swear an affidavit on behalf of other applicants.

To fortify his stance the learned state attorney cited the decision of the Court of Appeal in **Mohamed Abdillah Nur and others v Hamad Masauni & another**, Civil Application No. 436/16 of 2022 Court of Appeal of Tanzania at Dar es Salaam (unreported) in which a similar matter was struck out because other applicants did not swear an affidavit but only the 1st applicant and it was not indicated whether the 1st applicant was authorized to swear an affidavit on behalf of the other applicants. The

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learned state attorney therefore prayed the present application be struck out with costs.

On reply, Mr. Msando learned advocate for the respondent contended that the preliminary objection raised has no merits. He submitted further that in the present application the applicants have filed an affidavit of the 1st applicant so they have complied with the requirement of the law which requires an application be supported by an affidavit and not affidavits.

On further submission, Mr. Msando contended that since an affidavit is an evidence then the affidavit of the 1st applicant is enough to support the prayers in the chamber summons. On the case cited by the respondents, Mr. Msando was of the view that the decision is applicable to the Court of Appeal and the cited application was governed by the Court of Appeal Rules hence it does not suit the circumstance in the present matter as the CPC does not specify on the number of affidavits which the applicant must swear and file in court.

In alternative, Mr. Msando was of the view that if the court finds the preliminary objection raised has merits, he prayed for the court to allow the applicants to file supplementary affidavits.

On rejoinder Mr. Webiro essentially reiterated his submission in chief. He however added that the affidavit in support of the application at hand violates Order XIX of the CPC and not Court of Appeal Rules. He added that Rule 49 of the Court of Appeal Rules is in *pari materia* with Order XIX of the CPC. On invoking the principle of overriding objective as suggested

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by the learned advocate for the applicants, Mr. Webiro submitted that the overriding objective cannot cure the anomaly in the present application.

Having gone through the submission of the parties rival and in support of the preliminary objection together with the authorities referred, the sole issue for my determination is whether the preliminary objection raised by the respondents has merits.

In determining the preliminary objection raised, I have gone through the entire application. There is no dispute that there are three applicants in this application. From the outset it is indicated that the application has been taken at the instance of the applicants and it is supported by an affidavit of Mustafa Seif Ngane the applicants' advocate.

But on paragraph 1 of the affidavit in support of the application the said Mustafa Seif Ngane introduces himself as one of the "respondents". If that is not the end he further introduces himself as an administrator of the estate of the late Seif Ngane. It follows therefore that it has not been specifically indicated on which capacity Mr. Mustafa Seif Ngane is acting for. Whether he is acting as an advocate as stated earlier, or in capacity of the administrator of the estate of the late Seif Ngane or one of the applicants, or he is acting on behalf of the 2nd and 3rd applicants, it is not known.

So it is apparent that apart from the objection raised by the respondents that it is only the first applicant who has sworn an affidavit in the present application, there is a confusion on which capacity does the 1st applicant act.

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Assuming that there is a proper affidavit by the 1st applicant, it has not been indicated whether he is acting on behalf of other applicants. This is because reading the entire affidavit there is nowhere the 1st applicant is acting for the 2nd and 3rd applicants. Paragraph 28 of the said affidavit reads;

28. I depose this affidavit in support of the application moving this court to grant mareva injunction in favour of the applicant.

The verification clause of the said affidavit reads;

*I **MUSTAFA SEIF NGANE** do hereby verify that facts deposed in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 serve for paragraphs 4 and 5 are facts received from my late father while he was alive, the facts which I verily believe to be true to the best of my knowledge.*

I have deliberately reproduced paragraph 28 as well as the verification clause to indicate that the 2nd and 3rd applicants have been totally left out of the facts deposed on the affidavit in support of the application.

The case of **Mohamed Abdillah Nur and others v Hamad Masauni & another** [supra] supplied to me by Mr. Webiro learned state attorney, is very relevant to the matter at hand. On page 7-8 the Court was of the unanimous opinion that; *Adde.*

*"We must quickly observe that a person purporting to swear an affidavit on behalf of another person who is party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. We must also hasten here to emphasize that, **such instructions and authorization must be expressly reflected in the relevant affidavit.**" [Emphasis added]*

As I have indicated above the 2nd and 3rd applicants have been completely left out and nothing has been said on their behalf. On application like the present one where there is more than one applicant or respondent, each of them must swear affidavit or counter affidavit as the case may be. But where the said affidavit or counter affidavit is sworn on behalf of either party it must be expressly stated so in that affidavit. Failure of which renders the application incompetent.

The last issue is the prayer by Mr. Msando learned advocate to allow the applicants to file supplementary affidavit the prayer which has been vehemently opposed by the Mr. Webiro learned state attorney. Having gauged the prayer and the attendant affidavit I decline the prayer for the applicants to file supplementary affidavit because at first place there is no proper affidavit to be supported by supplementary affidavit.

According to Order XLIII Rule 2 of the CPC, an application to the Court has to be by chamber application supported by an affidavit. The said provision has been couched in mandatory terms. So the overriding

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objective cannot come into play because the same was not designed to blindly disregard the rules of procedure that are couched in mandatory terms.

In upshot and for the foregoing reason the preliminary objection raised by the respondents is hereby sustained and the application is hereby struck out with costs.

It is so ordered.



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A. MSAFIRI,
JUDGE
4/10/2022