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

MISC. LAND APPLICATION No. 472 OF 2022

IBRAHIM MALIK MBENA (As Administrator of the estate of the late MALIK ABDALLAH MBENA).....**APPLICANT**

VERSUS

DAR ES SALAAM PARKLAND INVESTMENTS CO. LTD.....1ST RESPONDENT
SALHA YAHAYA RUBAMA.....2ND RESPONDENT

Date of Last Order: 14.11.2022
Date of Ruling: 12.12.2022

RULING

V.L. MAKANI, J

This ruling is in respect of preliminary objection on points of law raised by the 1st respondent:

1. *That the summons to this application was wrongly served to Messrs. Dar es Salaam Parkland Holdings Limited instead of affecting service to the 1st respondent as is required by the law.*

2. *That the service of summons and forcing Messrs. Dar es Salaam Parkland Holding Limited to appear in court to defend its name is misconceived; malicious; frivolous; vexatious.*

Dar es Salaam Parkland Holding Limited prays for:

(a) *A declaration that the service of this court process to it is misconceived malicious frivolous vexatious*

(b) Costs be awarded to Dar es Salaam Parkland Holding Limited for instructing advocates to appear and defending it.

The objections were argued by way of written submissions. The submissions by the 1st respondent were by John Seka, Advocate; while the submissions by the respondents were drawn and filed by Mr. Mohamed Mkali, Advocate.

Mr. Seka argued the two points of objection jointly. He said the main issue is the wrong naming of the 1st respondent whereas the application is filed against Dar es Salaam Parkland Investment Limited instead of Dar es Salaam Parkland Holdings Limited the name of the party sued in the Temeke District Land and Housing Tribunal in Land Application No. 295 of 2017 the subject of this application. He said the application is misconceived and it is brought against a non-existing 1st respondent as the names are not consistent with the names referred in Annex MK-4 to the affidavit hence affects the competence of the application. He said since the applicant was well aware of the description of the parties through Annex MK-4 then this application ought to be dismissed. he relied on the case of **Christina Mrimi vs CocaCola Kwanza Bottlers Limited Civil Application No. 113 of 2011** and **CRDB Bank PLC Limited vs. George Mathew**

Kilindu, Civil Appeal No. 110 of 2017. Mr. Seka said the Court of Appeal abhors situations where parties change names of the parties without seeking for leave of the court and the 1st respondent also fell into the same trap. He further cited the cases of **Clemence J. Mwangoka vs. Andendekisye Mwakasyope & Another, Land Appeal No. 16 of 2021.** Mr. Seka pointed out that a company is usually recognised by its incorporated name and in the present case the name of the 1st respondent is not the correct name. he said the irregularity is not only fatal but also incurable. For the reasons stated Mr. Seka prayed for the court to strike out the application with costs.

In reply Mr. Mkali conceded to the defect in the citing of the name of the 1st respondent but stated that this omission is a minor irregularity. He said it is minor because the actual respondent Dar es Salaam Parkland Holdings Company Limited received the relevant summons, understood the case against it, instructed an advocate to defend and enter appearance on behalf and duly filed a counter-affidavit sworn by Kudura Salehe Kilingo as the Principal Officer. He said the 1st respondent has not been prejudiced by the defect. He said Order 1 Rule 9 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) a suit is not defeated by reason of misjoinder or non-joinder. Mr. Mkali said

he is aware of the cases of **Christina Mrimi vs. CocaCola Kwanza Bottlers & Others and Clemence J. Mwangoka** (supra), but all these cases are old positions before the introduction of sections 3A and 3B of the CPC which asserts that minor irregularities are curable by amendment or submissions. He concluded by stating that the preliminary objection is baseless and should be overruled with costs. He however pointed out that the court should either order amendment of the name or substitute thereof the party's proper name as the court may wish.

Mr. Seka in his rejoinder pointed out that since the 1st respondent has conceded to the objection then the application should be dismissed with costs. he said the 1st respondent has incurred expenses to hire a lawyer to defend the application and the costs are claimed under section 30(2) of the CPC and the cases of **Nasca Said vs. KCB Bank Tanzania Limited, Misc. Commercial Application No. 190 of 2016** and **Novoneca Construction Company Limited & Another vs. National Bank of Commerce Limited & Another, Commercial Case No. 8 of 2015.** He thus prayed for the application to be struck out with costs to compensate the 1st respondent for unnecessary costs incurred to defend a defective application.

I have gone through the rival submissions by the learned Counsel the main issue is whether the objections raised have merit.

According to the submissions it is not disputed that the 1st respondent is not the proper party in that she was not a party in Land Application No. 295 of 2017 which is the subject of this application. The party in the said application was **Dar Es Salaam Park Land Holding Limited** and Mr. Mkali has conceded to this that, indeed, **Dar Es Salaam Park Land Holding Limited** ought to have been the 1st respondent instead of **Dar Es Salaam Parkland Investment Company Limited** as appearing in the present application. In essence therefore and as conceded by Mr. Mkali the application is defective.

Now what is the remedy? Mr. Mkali suggested an amendment and or removal of the name of the party and substitution of the proper name of the party. He said the cited cases bears an old position whereas there is a new position by virtue of section 3A and 3B of the CPC that embodies the principle of overriding objective.

The suggestions by Mr. Mkali suggestions attractive but not tenable. Firstly, the overriding principle has not removed compliance of the law. As stated in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)** (unreported) the overriding principle should not be applied blindly against procedural law which go to the very foundation of the case. The defects in the present application, go to the root of the matter in that the 1st respondent was not a party in Land Application No. 295 of 2017 which is subject of this application. The irregularity is therefore not easily cured by a mere amendment or substitution because in essence these are two legal entities. I find comfort in the cases cited by Mr. Seka specifically in the case of **CRDB Bank PLC Limited vs. George Mathew Kilindu** (supra) where the court emphasized that the Issue of names of parties to a case is central for identification, and changing them without leave of the court is not a minor irregularity but goes to the foundation of the matter especially when the party is a corporate body as is in the present case.

Secondly, it is the law that names appearing in the pleadings must be used throughout the proceedings, judgment and even subsequent

pleadings for instance appeal, revision or execution (see **Clemence J. Mwangoka** (supra). This assists easy reference of the case or identification of the parties especially at times of execution. In that respect, the names from the initial proceedings have to be the same unless the change of the parties' name is by leave of the court. For these reasons, it is quite apparent that the application is incurably defective and the only remedy available is to strike it out to enable the applicant to identify, and sue, the proper party if he so wishes.

In view thereof, the application is incompetent, and it is hereby struck out with costs.

It is so ordered.

V.L. MAKANI
JUDGE
12/12/2022

THE HIGH COURT OF TANZANIA
LAND DIVISION