

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

**MISC. LAND APPLICATION NO. 674 OF 2021  
(Arising from Land Case No. 266 of 2021)**

**YUSUPH MAKAME ..... 1<sup>ST</sup> APPLICANT  
OTTO LINGISED I MUHANGO..... 2<sup>ND</sup> APPLICANT  
DEODATUS KAMUGISHA .....3<sup>RD</sup> APPLICANT  
MOHAMED I MWEMBE ..... 4<sup>TH</sup> APPLICANT  
YOHANA CHACHA MAHINDI ..... 5<sup>TH</sup> APPLICANT  
LOCUS PAUL ..... 6<sup>TH</sup> APPLICANT  
DISMUS KUWENAWENA ..... 7<sup>TH</sup> APPLICANT**

**VERSUS**

**AL HUSHOOM INVESTMENT (T) LTD ..... 1<sup>ST</sup> RESPONDENT  
BOKO ESTATE (1979) LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING.**

**I. ARUFANI, J**

The applicants filed in this court the instant application praying the court to grant the order to prevent the respondents and or their servants or agents from interfering, trespassing and eviction them from the disputed land located at Mwembetogwa (Boko area) Bunju Ward, Kinondoni Dar es Salaam until inter parties hearing and determination of the main suit pending in this court. The application is made under Order XXXVII Rule 1 (a), (b), & 2 (1), (2) and (4); section 68 (e) and 95 of Cap

33 R. E 2019. The application is supported by an affidavit sworn jointly by the applicants.

After the respondents being served with the chamber summons and the affidavit, the first respondent filed in the court her counter affidavit affirmed by Salmin Salmin which was accompanied by a notice of four points of preliminary objection. When the matter came for hearing the said points of preliminary objection on 22<sup>nd</sup> March, 2022 the applicants were represented by Mr. Vedastus Majura, learned advocate and the first respondent was represented by Mr. Ramadhani Karume, learned advocate and the second respondent was absent.

The counsel for the first respondent prayed to abandon the first and fourth points of preliminary objection and prayed to argue the remaining second and third points of preliminary objection which read as follows:-

- 1. The court is improperly moved for citing wrong provision of the law.*
- 2. The affidavit is defective for containing, arguments contrary to Order XIX Rule 3 (1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019.*

The counsel for the first respondent argued in relation to the first point of preliminary objection that, the court was improperly moved as the applicants have cited Order XXXVII Rule 2 (4) of the Civil Procedure

Code, Cap 33 R.E 2019 which is not in existence. He argued that, the issue of wrong citation of the law is not a new phenomenon as it has been traversed before within our jurisdiction and referred the court to the case of **China Henan International Cooperative Group V. Salvand K. A. Rwegasira**, [2006] TLR 220 where it was held that, wrong citation of law or rule renders the application incompetent. He submitted that, as the present application is suffering from wrong citation of enabling provision of the law there is only one remedy which is to strike out the application so that the proper application can be filed in the court.

He argued in relation to the second point of Preliminary objection that, the affidavit of the applicants is defective for containing arguments contrary to Order XIX Rule 3 (1) and (2) of the Civil Procedure Code. He stated that, the argumentative facts are contained in paragraph 6, 9 (b) and 10 of the Affidavit. To support his argument, he referred the court to the case of **Uganda V. Commissioner of Prisons Ex parte Matovu** [1966] E.A at page 520 where it was stated that, an affidavit should contain statements to which the witness deposes on his own knowledge and which is able to prove and such affidavit should not contain extraneous matters by way of objection or prayer or legal arguments or conclusion.

He also referred the court to the case of **Phantom Modern Transport (1985) Ltd V. D. T. Dobbie (Tanzania) Limited** Civil Reference No. 15 of 2001 and 3 of 2005 where the steps which can be taken where an affidavit is found it contains some defective paragraphs was stated is to expunge or overlook the offensive paragraphs and leave the substantive parts of it intact and the court proceed to act on it if it can support the application. He submitted that, the argumentative paragraphs contained in the applicants' affidavit goes to the root of the dispute as it touches the ownership of the suit premise and power or validity of transfer of ownership from the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent. He submitted that, to cure the stated legal defect of the affidavit supporting the application, the court has only one remedy which is to strike out the affidavit so that the proper one can be filed in the court.

In response to the first point of preliminary objection the counsel for the applicants stated the court has properly been moved. He stated that, the chamber summons has been made under Order XXXVII Rule 1 (a), (b), (2) and (4), Section 68 (e) and 95 of the Civil Procedure Code. He stated that, it is true that there is a typographical error in citing number 4 before inserting the word rule. He stated that, their intention was to cite Rule 4 and not number 4 alone. He stated further that, the essence of

Rule 4 is to show the requirement of serving the other part with the application for temporary injunction.

He went on arguing that, the omission to cite rule 4 in their application properly which the counsel for the first respondent has argued was wrongly cited cannot affect the whole application as the remaining provisions of the law cited in the application are sufficient enough to move the court to entertain the application. He referred the court to the case of **Yakobo Magoiga Gichere V. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT (unreported) where it was held that, with the advent of the Principle of Overriding Objective brought by the **Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018**, [Act No. 8 of 2018] which requires the court to deal with the case justly, and to have regard to substantive justice.

He argued in relation to the second point of preliminary objection that, the first respondent is trying to misdirect the court. He argued that, the first respondent has just mentioned paragraphs 6, 9 (b) and 10 and stated they contains arguments without pointing out the arguments contained therein or show how the said paragraphs contain the facts which are extraneous.

He submitted that the first respondent has ignored the position of the law provided under Order XIX Rule 3 (1) of the Civil Procedure Code which

requires an affidavit to be confined to statement of facts which can be proved by the deponent. He submitted that all facts deposed in the paragraphs alleged are containing arguments can be proved by the deponent. At the end he prays the points of preliminary objection raised by the first respondents be dismissed with costs.

After considering the rival submission made to the court by the counsel for the parties in relation to the raised points of preliminary objection, the court has found the issue to determine in this matter is whether the raised points of preliminary objection have merit. I will start with the first point of preliminary objection whereby the first respondent argued the application is made under Order XXXVII Rule 2 (4) of the Civil Procedure Code which is not in existence.

The court has found it is true that there is no such a provision of law in the Civil Procedure Code. The court has found even the counsel for the applicant admitted that, number 4 cited in the applicants' application was wrongly cited in the application. He argued that, citation of number 4 in the application without the word Rule before the said number is a typographical error as they wanted to cite Rule 4 and not rule 2 (4) of the Civil Procedure Code.

The question which may arise here is whether the said error or wrong citation of the said provision of the law in an application can make the

court to find it has not been moved properly. The court has found that, although it is true that the cited provision of the law is not in existence in the Civil Procedure Code but as rightly argued by the counsel for the applicant the application is not only made on the mentioned provision of the law. It is also made under Order XXXVII Rule 1 (a), (b), 2 (1), (2); sections 68 (e) and 95 of the Civil Procedure Code which have not been challenged by the counsel for the first respondent.

As the applicants are seeking for an order of preventing the first respondent and or his servants or agents from interfering, trespassing and or evicting them from the land in dispute until final determination of the suit pending before the court, the remaining provisions of the law which are section 68 (e) and Order XXXVII Rule 1 (a) and (b) together with Rule 2 (1) and (2) of the Civil Procedure Code are sufficient enough to move the court to entertain the present application.

The court has found that, although it is true that there is a wrong provision of law cited in the present application but as there are also relevant and correct provisions of law cited in the application which can move the court to entertain the application, the cited wrong provision cannot be a ground of making the court to find it has not been moved properly. The above finding of this court is getting support from the case of **Abdallah Hassani V. Jumanne Hamisi Sekiboko**, Civil Appeal No.

22 of 2007, CAT at Tanga and **Bitan International Enterprises Ltd V. Mished Kotak**, Civil Appeal No. 60 of 2012 (both unreported) where it was stated in the former case that: -

*"Although the court should not be made to swim in or pick and choose from a cocktail of sections of the law simply heaped up by a party in an application or action, in the present situation we are satisfied that citing subsection (a) as well was superfluous but that did not affect competency of the application for subsection (b) is clearly indicated."*

In the light of what was stated in the above quoted part of the cited cases and by being guided by the principle of overriding objective provided under section 3A (1) and (2) of the Civil Procedure Code which as stated in the case of **Alliance one Tobacco & Another V. Mwajuma Hamisi & Another** High Court Dar es Salaam 2019, the court is required to do away with unnecessary technicalities so as to abide with the need to archive substantive justice, the court has found the first point of preliminary objection cannot be sustained.

Coming to the second point of preliminary objection whereby the counsel for the first respondent argued the affidavit supporting the application is defective for containing arguments contrary to Order XIX Rule 3 (1) and (2) of the Civil Procedure Code, the court has found it is



proper to have a look on what is stated in the cited provision of the law.

It states as follows: -

*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that, the grounds thereof are stated."*

The court has also found it is true as argued by the counsel for the first respondent that it was held in the case of **Uganda V. Commissioner of Prisons Ex parte Matovu** cited in the submission of the counsel for the first respondent that: -

*"... as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statement of facts and circumstances to which the witness deposes either of his own knowledge or from information which he believes to be true. Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."*

While being guided by the position of the law stated hereinabove the court has found the question to ask here is whether paragraphs 6, 9 (b) and 10 of the affidavit of the applicant contain some argumentative facts as argued by the counsel for the first respondent. The court has found that, as rightly argued by the counsel for the applicants the counsel for

the first respondent did not state anything in his submission to show how what is contained in the mentioned paragraphs is argumentative facts. That being the position, the court has found it is proper to reproduce the impugned paragraphs of the affidavit of the applicants in this ruling for purpose of clarity. They read as follows:-

*6. That surprisingly over recent this year the 1<sup>st</sup> defendant (sic) has been unlawfully constantly trespassing into the plaintiff (sic) lands and particularly on 11<sup>th</sup> October 2021, the 1<sup>st</sup> defendant herein trespassed and invaded to the plaintiff's suit land, demolished, vandalized all the infrastructures and buildings and looted and confiscated plaintiff's belongings.*

*9. That the applicant still avers that;*

*(b) that it was revealed through the judgment of the Bunju Ward Tribunal on the Land Dispute No.20/2005 dated 14/06/2006, it was declared the 2<sup>nd</sup> respondent not the lawfully owner of the suit land hence had no title to pass to the 1<sup>st</sup> respondent.*

*10. That the applicant avers that, the action of the 1<sup>st</sup> respondent trespass and attempting to evict the applicant from the suit premise shall make the applicant to suffer more as the suit premise shall be wasted and or sold, which shall lead to loss of business hence the same cannot be compensated by way of monetary. That is to say the court interference is necessary to protect the applicants from the kind of injury which might be irreparable before their legal rights are established."*

Upon reading the above quoted paragraphs of the affidavit of the applicants the court has failed to see anything which constitute argument in paragraphs 6 and 9 (b) of the affidavit of the applicants. To the contrary the court has found what is deposed in the mentioned paragraphs are facts of the case which the deponents can prove on their own knowledge. There is nothing showing the deponents cannot prove what is deposed in the mentioned paragraphs.

However, the court is in agreement with the counsel for the first respondent that paragraph 10 of the affidavit of the applicants contain some argumentative facts which are prohibited by the law cited hereinabove to be contained in an affidavit. The court has found the averment in paragraph 10 of the applicants' affidavit that the attempt by the first respondent to evict the applicants from the suit premises shall make the applicants to suffer more as the suit premises shall be wasted or sold and further averment or prayer that interference of the court is necessary to protect the applicants from the kind of injury which might be irreparable are argumentative facts or prayer which were not supposed to be contained in the affidavit of the applicants.

The above stated view of this court is getting support from the case of **Mustapha Raphael V. East African Gold Mines Ltd**, Civil

Application No.04 of 1998, CAT At Dar es Salaam (unreported) where it was held that;

*"An affidavit is not a kind of superior evidence. It is simply a written statement on oath, it has to be factual and free from extraneous matters such as hearsay, legal arguments, objections prayers and conclusions."*

After finding paragraph 10 of the affidavit of the applicants contain some argumentative facts the court has found the remedy available is as stated in the case of **Phantom Modern Transport (1985) Ltd** cited in the submission of the counsel for the first respondent where it was stated that: -

*"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If, however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit."*

From what was stated in the above quoted case the court has found paragraph 10 of the affidavit of the applicant which has been found is defective for containing argumentative facts which is contrary to the law is supposed to be expunged from the affidavit or overlooked. As the

remaining paragraphs of the affidavit of the applicants are sufficient enough to support the application the court will continue to act on the remaining part of the affidavit of the applicant in determination of the application at hand.

In the final result the court has found the points of preliminary objection raised by the first respondent in the matter at hand deserve to be partly sustained and partly overruled. Consequently, the first point of preliminary objection is hereby overruled in toto for being devoid of merit. As for the second point of preliminary objection the same is partly upheld to the extent of expunging paragraph 10 of the affidavit of the applicant from the affidavit. The remaining part of the affidavit of the applicants is left intact and the court will continue to use the same in the determination of the present application. As the points of preliminary objection raised by the counsel for the first respondent have partly been overruled and partly sustained, each party will bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 27<sup>th</sup> day of May, 2022



I. Arufani

**JUDGE**

27/05/2022

**Court:**

Ruling delivered today 27<sup>th</sup> Day of May, 2022 in the presence of Mr. Majura Vedasto, advocate for the applicants and in the presence of Mr. Mathias George, Legal Officer from the Chamber of advocate Ramadhani Karume, advocate for the first respondent. right of appeal to the Court of Appeal if fully explained.



*I. Arufani*

I. Arufani

**JUDGE**

27/05/2022