

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 151 OF 2022

*(Arising from Land Appeal No. 107 of 2020)*

ADELINA JACKSON BASHUKU ..... 1<sup>ST</sup> APPLICANT

METE MKENDA ..... 2<sup>ND</sup> APPLICANT

VERSUS

GERVAS YOTHAM ..... RESPONDENT

RULING

*Date of Ruling 31.05.2022*

*Date of the last order 02.06.2022*

A.Z.MGEYEKWA

This is an Application for extension of time to appeal out of time against the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Application No. 107 of 2020 delivered on 26<sup>th</sup> November, 2021 before Hon. C.P. Kamugisha Chairman.

The Application was made under section 41 (2) of the Land Disputes Courts Act, Cap.216 [R.E. 2019], accompanied by the Chamber Summons of RACHEL MBWAMBO supported by the affidavit of Adelina Jackson Bashuku and Mete Mkenda. The respondent opposed the application

The application has encountered an impediment, the respondent has demonstrated his resistance by filing a counter affidavit deponed by Mr. Samuel Shadrack, counsel for the respondent and on 17<sup>th</sup> May, 2022 the respondent's counsel lodged a Notice of preliminary objection on the ground that: -

- 1. That the Application is defective for lack of affidavit sworn by Rachel Mbwambo pleaded in Chamber Summons.*

When the matter was called for hearing on 17<sup>th</sup> May, 2022 the 2<sup>nd</sup> applicant prayed to argue the preliminary objection by way of written submission. By the court consent, the applicant's Advocate prayer was granted whereas, the respondent's counsel filed written submission in chief on 29<sup>th</sup> May, 2022. The applicant filed his reply on 26<sup>th</sup> May, 2022 and the respondent's counsel lodges a rejoinder on 30<sup>th</sup> May, 2022.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application.

The submissions or otherwise was by way of written submission in which the Applicants were represented by Ms. Felister Deogratias Lugazia, learned Advocate from Legal and Human Right Centre, whereas the respondent was represented by Mr. Samuel Shadrack Ntabaliba, also learned Advocate.

Mr. Ntabaliba learned Advocate contended that the application by the Applicant is defective because it contains a chamber summons taken before Rachel Mbwambo, but the Affidavit contains names of Adelina Jackson Basheku and Mete Mkenda of which they are two different names which renders Application defective and incurable.

He further submitted that lack of affidavit sworn by Rachel Mbwambo renders the Application defective and incurable and therefore to be struck out. To bolster his submission, he cited the case of **Hashimu Jongo and 41 Others vs Attorney General and TRA**, Misc. Civil Appeal No.41 of 2004 where Mlay, J. at page 8 paragraph 2 had this to say;

*'In the final analysis, the preliminary objection is upheld. The Affidavit being incurably defective it is struck out. As the application remains without a supporting affidavit, the application is incompetent and it is accordingly struck out'*

He added that the law requires every Chamber Summons must be supported by an affidavit but that in this application at hand, there was no affidavit at all supporting the same.

The respondent's counsel invokes this Court's jurisprudence in the case of **Hashimu Jongu and 41 Others vs Attorney General and TRA**, Misc. Civil Appeal No.41 of 2004 Hon. Mlay J (as he then was) observed that:-

*'In the present case, there has been clear noncompliance with those mandatory provisions of the law. An affidavit being evidence on oath is not just a document and strict compliance with the law as to how an affidavit should be taken cannot be regarded as a mere procedural'*

On the strength of the above submission, the learned counsel for the respondent insisted that the application is incurably defected hence the same be struck out.

In reply to the respondent's counsel submission, Ms. Filister learned Advocate started by conceding against the preliminary objection, that the Chamber Summons contained the name of Rachel Mbwambo which is different from the name appearing in the affidavit.

She further stated that the error was an unintended slip of a pen as the content of the Chamber Summon such as the title of the Chamber

summons refers to Adelina Jackson Bashuku, the 1<sup>st</sup> applicant, and Mete Mkenda, the 2<sup>nd</sup> Applicant.

The learned counsel for the applicants further stated that such error in this application is minor, that can be rectified, and that there is no indication that such error renders chamber summons incurably defective and there is no injustice to the respondent. To buttress her position, she cited the case of **Mr. Manson Shaba & 6 Others v The Minister of Worker and Another**, Civil Application No. 244 of 2015, the Court held that:-

*'A notice of motion may be amended'*

It was his submission that a Notice of Appeal is equal to Chamber Summons its difference is as a matter of nomenclature, a Notice of Motion is used in the Court of Appeal, and Chamber Summon is used in High Court and subordinate court. She went on to submit that under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 the Court is obliged to disregard legal technicalities in the dispensation of justice. Supporting her position she referred this Court to the case of **Alliance One Tobacco & Another vs Mwajuma Khamisi and Another Misc. Civil Appeal 803 of 2018**, the Court was of the view that:-

*'It is the current law of the land that courts should uphold the overriding principle and disregard minor irregularities and*

*unnecessary technicalities so as to abide with the need to achieve substantive justice'*

In conclusion, the learned counsel for the applicant urged this court to apply the overriding objective principle to cure the anomaly and overrule the preliminary objection.

In his rejoinder, the respondent's counsel reiterated his submission in chief and added that the overriding objective applies where the errors committed do not go to the root of the matter, but that in this application the Chamber Summons is defective meaning that there is a grave error which cannot be cured by the principle of overriding objective.

I have subjected the rival arguments by the learned counsels to the serious scrutiny they deserve. Having so done, I think, the bone of contention is whether *the preliminary objection is meritorious*.

The applicants have brought their application by way of Chamber summons and the applicants have taken oaths on grounds and reasons set forth in the affidavit of Rachel Mbwambo which reads together with arguments that will be adduced during the hearing. I have scrutinized the application and noted that the attached affidavits are sworn by Adelina Jackson Bashuku and Mete Mkenda, the applicants. The affidavit sworn by Rachel Mbwambo is missing. Thus, the Chamber Summons is not supported

by a proper affidavit and failure to attach a proper affidavit renders the Chamber Summons incompetent.

The learned counsel for the applicant submitted that it was a slip of a pen. There are indeed circumstances where an accidental slip or omission by officers of the court in judgments, decrees, or orders can be corrected by the Court, either of its own motion or on the application of any interested person. However, in the situation at hand, I find that the "slip rule" under section 96 of the Civil Procedure Code to correct clerical mistakes and accidental slips or omissions is not applicable.

In the instant application, the Chamber Summons which moves the court to determine the applicants' application is not supported by a proper affidavit. Therefore, it is not appropriate to say that the same can be corrected. Even the overriding principles cannot rescue an incompetent application. See the case of **Stanely Ng'ethe Kinyanjui v Tony Ketter & 2 Others** [2015] eKLR. It is worth noting that the overriding objective principle was not introduced to disestablish well-settled judicial proceedings. Consequently, the defect cannot be cured by applying overriding principles as failure to attach a proper affidavit renders the application incompetent.

In the upshot, basing, I sustain the respondent's preliminary objection and proceed to struck out the applicant's application for being incompetent without costs.

Order accordingly.

Dated at Dar es Salaam on this date 2<sup>nd</sup> June, 2022.



  
A.Z. MGEYEKWA

**JUDGE**

02.06.2022

Ruling delivered on 2<sup>nd</sup> June, 2022 in the presence of the applicants and Mr. Goddluck Rwiza, learned counsel for the respondent.



  
A.Z. MGEYEKWA

**JUDGE**

02.06.2022