

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

**MISC. LAND APPLICATION NO.374 OF 2021**

(Arising from the proceedings, Judgment, and Decree in Misc. Land  
Application No. 8 of 2006 by Hon. Mbilinyi, CP at Temeke)

- 1. ALLY HABRESH SAID @ ALLY HABRESH ..... 1<sup>ST</sup> APPLICANT**
- 2. AMIR HABRESH SAID ..... 2<sup>ND</sup> APPLICANT**
- 3. SAID ALLY HABRESH ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**MTEMI NALUYAGA ..... RESPONDENT**

**RULING**

*Date of last order: 03.06.2022*

*Date of Ruling: 08.06.2022*

**A.Z.MGEYEKWA, J**

This application is brought under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019]. The applicant seeks an extension of time to lodge an application for review of the District Land and Housing Tribunal dated 13<sup>th</sup> June, 2013. The application is supported by a joint affidavit deposed by all applicants. The respondent has stoutly opposed the application by

filing a counter-affidavit deponed by Mtemi Naluyaga, the respondent challenged the Application on three points of preliminary objections as follows:-

- 1. That the Application for seeking extension of time within which to file Revision proceedings is misconceived and bad in law as the Applicants ought to have filed a suit under the provisions of Order 21 Rule 62 of Civil Procedure Code Cap. 33 and not a Revision sought subject to extension of time.*
- 2. That, the Application for extension of time is superfluous and overtaken by the event as execution of the subject matter involved has been heard and determined hence nothing to revise.*
- 3. That, the Application is bad in law as is supported with an incurably defective affidavit.*

When the matter was called for hearing before this court on 11<sup>th</sup> May, 2022. The applicants enjoyed the legal service of Mr. Bebitho Mandele, learned Advocate and the respondent had the legal service of Mr. Alex Balomi, learned Advocate. The court ordered the preliminary objections to be argued by way of written submissions, both parties complied with the court order. As the practice of the Court has it, we had to determine the

preliminary objection first before going into the merits or demerits of the appeal.

Mr. Alex started to narrate the genesis of the matter which I am not going to reproduce in this application. The respondent's counsel argued the first and second grounds together. He submitted that the applicants were not part to the original Land Application which means the applicants were required to file a revision subject to enlargement of time. He argued that in the said application parties were Olestic Ngulumi v Mtemi Naluyaga while in the instant application Olestic Ngulumi is omitted. It was his view that in absence of Orestic Ngulumi he will be condemned unheard.

The learned counsel went on to submit that the application is misconceived, superfluous, and overtaken by the event since execution has taken place and the respondent is in possession of the suit land. He claimed that the applicants have offended the provision of Order 21 Rule 62 of the Civil Procedure Code Cap.33 and section 44 of the Law of Limitation Act Cap. 89.

The learned counsel for the respondent went on to submit that the joint affidavit is defective in support of the application since the same does not meet the requirements of the affidavit. He stated that in the case of **Director of Public Prosecutions v Dodoli Kapufi & Another,**

Criminal Application No.11 of 2008, the application was struck out for having been supported with a defective affidavit. He also cited section 8 of the Notaries Public and Commissioner for Oaths Act, and section 10 of the Oaths and Statutory Declaration Act Cap. 34.

In conclusion, he urged this court to strike out the application with costs.

On his part, Mr. Mandele responded to the objections raised by the respondent's counsel. He started to narrate the background of the matter which I am not going to re-produce in this application. The learned counsel for the applicants opposed the contention that this application is misconceived, superfluous, and overtaken by event. He argued that the limb of objection is a total misconception of the facts and law since the application at hand is for an extension of time to file an application for Revision.

Mr. Mandele continued to submit that the rule of superfluous and overtaken by event do not apply in the matter at hand. To buttress his contention he referred this court to section 79 (1) (a), (b), and (c) of the Civil Procedure Code, Cap. 33 that the object of review is to enable the court to correct any irregularity which may be found in the impugned proceedings. Fortifying his submission he cited the case of **Patrick**

**Magologozi v The Board of Trustee of Public Service Social Security Fund**, Civil Application No. 343/18 of 2019 (unreported).

In regard to whether the application has offended the provision of Order XXXI Rule 62 of the Civil Procedure Code Cap.33. He argued that saying that the applicants ought to have filed a suit to recover their land is a misconception of the matter. Mr. Mandele contended that the law requires under Order XXI Rule 62 of the Code is not mandatory but rather optional. Since the word may is used and the same means is not compulsory. It was his submission that the cited Order XXI Rule of the Code does not exclude the applicants from filing the present application for an extension of time.

On the limb of objection whether the affidavit is defective, Mr. Mandele argued that the respondent's counsel has not pointed out the alleged defective rather he has referred to section 8 of the Notaries Public and Commissioner for Oaths Act, and section 10 of the Oaths and Statutory Declaration Act Cap. 34. It was his submission that the affidavit is well prepared in conformity with all legal requirements necessary for proper affidavits for use in court. The learned counsel for the applicant went on to submit that in case the affidavit is found to be containing any defect then they submitted that the law as stands now is to remedy any defects.

Supporting his submission he referred this court to the cases of **Sanyon Service Station v BP Tanzania Ltd**, Civil Application No. 185/17 of 2014 and **Alliance One Tobacco Tanzania Ltd & Another v Mwajuma Hamisi & Another**, Misc. Civil Application No. 803/2018.

On the contention that the applicant has erroneously join another party in the case, Mr. Mandele submitted that Olestic Ngulumi is not a necessary party to these proceedings as no order can negatively impact his interest at this stage or any later stage. He went on to submit that under Order 1 Rule 9 of the Civil Procedure Code cap.33 a suit shall not defect for non-joinder. He added that in Order I Rule 10 (2) of the Code the court on its own order any party to be joined if it finds such party to be a necessary party.

Mr. Mandele responded further to the argument made by the respondent's counsel to the effect that the application at hand is for enlargement of time the joining of the said Olestic Ngulumi is not necessary as no prejudice can occur to him in case of any order by this court. It was his submission that at this stage, this court will not fail to issue any effective without his presence. Fortifying his submission he cited the case of **Constantine Assenga v Elizabeth Peter and Others**, Civil Appeal No. 70 of 2019. He submitted that in the breath, if this court will

find that the said Olestic Ngulumi to be a necessary party at this stage, then we move the court to order the joinder of the said party.

In the upshot, it is our humble submission that the respondent's counsel points of objection are devoid of merits and the same be dismissed with costs.

Having heard the submission of both learned counsels for and against the preliminary objections, the issue for determination is *whether the preliminary objections are meritorious*.

I will combine and determine the first and second objections together because they are intertwined and the third objection will be argued separately.

On the first and second limb of objection. Their objections raised are not pure points of law since the application at hand is related to an application for an extension of time to file a revision. The issue of being overtaken by the event requires evidence to determine whether or not the matter was overtaken by the event. In the case of the **Soitsambu Village Council v Tanzania Breweries Limited and Tanzania Conservation Limited**, Civil Appeal No. 105 of 2011, CAT at Arusha (unreported) the Court of Appeal of Tanzania held that:-

*"A preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law."*

I have considered the settled position that there can be no pure point of law where there are facts that require proof by evidence. See also the cases of **Hezron M. Nyachiya v Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania Workers Union**, Civil Appeal No. 79 of 2001, Court of Appeal of Tanzania (unreported). Therefore the two points raised by the respondent's Advocate cannot be sustained for containing a blend of law and facts.

On the third limb of objection on defective affidavit, as rightly submitted by Mr. Mandele that the objection is not clear, the respondent's counsel has failed to move this court to find whether or not the affidavit is defective. As rightly pointed out by Mr. Mandele that the counsel for the respondent has failed to connect the relevance of section 8 of the Notaries Public and Commissioner for Oaths Act, and section 10 of the Oaths and Statutory Declaration Act Cap. 34 in the raised. Therefore, this preliminary objection is disregarded.



Concerning the issue of joining a necessary party, it is my view that as long as Orestic Ngulumi was a party in the impugned application then the applicants were required to join him as a party in the matter at hand. To afford him the right to argue the application.

I have heard the prayer made by Mr. Mandele to allow the applicants to amend their application to include Olestic Ngulumi, and I am in accord with Mr. Mandele that the court is in position to direct the applicants to amend the application even by inserting the missing name of Olestic Ngulumi. However, in the circumstances at hand the application is brought by chamber summons and affidavit. However, ordering amendment of the application will as well affect the chamber summons and affidavit. For that reason, this court cannot order the applicants to amend the chamber summons and affidavit to mirror the contents of the application. The in the circumstances at hand the chamber summons and affidavit cannot be amended to incorporate the said changes.

For the sake of clarity the cited case of **Constantine Assenga** (supra) this Court allowed a party to join as a necessary party in an appeal. Unlike, in the instant application the matter is related to an application that is supported by a chamber summons and affidavit. In my considered view, **Constantine's** decision does not apply in the matter at hand. In the

matter at hand, the chamber summons and affidavit are wanting. In my view, such defects cannot be cured by amending the affidavit. Therefore, the proper recourse is to strike out the application.


In the upshot, I find merit in the above objection, therefore, the objection is sustained and I proceed to strike out the application without costs.

Order accordingly.

Dated at Dar es Salaam this date 8<sup>th</sup> June, 2022.

A.Z. MGEYEKWA  
**JUDGE**  
08.06.2022

Ruling delivered on 8<sup>th</sup> June, 2022 in the presence of Mr. Bebitho Mandele, learned Advocate for the applicants and Mr. Alex Balomi, learned Advocate for the respondent.

A.Z. MGEYEKWA  
**JUDGE**  
08.06.2022