

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

**MISC. LAND CASE APPLICATION NO. 459 OF 2020**

(Arising from Land Case No. 205 of 2017)

**MWASSA JEREMIAH JINGI.....1<sup>ST</sup> APPLICANT  
MAKORI YUSUPH MASIAN.....2<sup>ND</sup> APPLICANT  
HENRY JESTON NAGWA.....3<sup>RD</sup> APPLICANT  
DAMIAN MAYEGA GURTY.....4<sup>TH</sup> APPLICANT  
ROSE ATUPELE NGOGO.....5<sup>TH</sup> APPLICANT  
AND 108 OTHERS**

**VERSUS**

**THE TANZANIA RAILWAY CORPORATION.....1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

Date of Last Order: 15.12.2021  
Date of Ruling 26.01.2022

**RULING**

**V.L. MAKANI, J**

The applicants herein have filed this application seeking for the following orders:

*That this honorable court may be pleased to grant the leave to produce documents that listed to be added in the plaint but not produced for the applicants in Civil Case No. 205 of 2017; before Hon. Makani, J.*

*Costs be provided for.*

*Any other reliefs(s) this honourable court may deem just and reasonable to grant.*

The application is made under section 95 and 97; Order VII Rules 18(1) and (2) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**), and is supported by the affidavit of Mwesigwa George Ishengoma, Advocate for the applicants.

With leave of the court the application was argued by way of written submissions.

The submissions on behalf of the applicants were drawn and filed by Mr. Ishengoma, Advocate. I must admit that the submissions are convoluted and difficult to understand. Mr. Ishengoma, Advocate when making his introduction said:

*"....the aim of seeking the leave of this honourable court be granted to an application filed praying to produce documents that listed to be added in the Amended Plaintiff but still not produced by the first witness in his testimony but needs other witnesses to produce it accordingly in the Civil Case No. 25 of 2017."*

My understanding of this quote is that the applicants are seeking leave of the court to produce documents listed but not annexed to the amended plaintiff to be annexed and since they have not been

tendered by the first witness **(PW1)** to be tendered by other witnesses accordingly.

Mr. Ishengoma said such leave is given by the court after observing that by doing so doing justice shall be seen to be done due to the good strong and sufficient reasons which are supported by provisions and authorities. He said grant of leave is discretionary granted and judiciously exercised. He cited the case the of **Ratma vs. Cumarasamy & Others (1934) 3 All ER 933** where it was stated that it is the discretion of the court, but it is not enough it must have the material to work on so as to exercise such discretion. He also cited a Ugandan case of **Dattan vs. Ahmad (1959) EA 218**, and the books of **B.D. Chipeta: Civil Procedure in Tanzania** and **C.K. Takwani: Civil Procedure, 5<sup>th</sup> Edition** where in the latter book it is stated that:

*"the court has power to receive any document at a later stage if the genuineness of the document is beyond doubt and it is relevant or material to decide the real issue in controversy. And he added that, no document whether public or private which are above suspicion should be excluded if they are necessary for the just decision of a case. The discretion must be exercised judicially and consider the fact under circumstance of each case; the rule must be*

*liberally construed so as to advance the cause of justice."*

He also cited the case of **Sadiq Hassan Khan vs. Hashim Ali Khan (1916) 38 Allahabad 627** (India) and prayed for the application to be granted.

Submissions in reply were drawn and filed by Ms. Gati Museti, State Attorney. She said the prayers in the chamber summons are the same prayers made by the applicant during examination in chief of **PW1**. The court rejected the prayer by refusing to admit the documents which were not attached to the plaint neither filed before the court as a list of additional documents as required by the law. She went on stating that bringing the same prayer at this time renders the court *functus officio* and cannot entertain the present application as it has already been determined. She cited the case of **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser, Civil Application No. 22 of 2012 (CAT-DSM)** (unreported) where it was stated that once a judgment is given the judge of that court becomes *functus officio* in respect of the said matter.

Ms. Museti also pointed out that the applicants by bringing this application are departing from the scheduling order without leave of the court which is contrary to Order VIII B Rule 23 of the CPC. She said according to the scheduling order there were no further applications or discoveries to be made by the parties. By this application it means the applicants have departed from the scheduling order without leave of the court. To support this argument Ms. Museti cited the case of **Litenga Holding Limited vs. Mettali Impex GmbH, Misc. Civil Application NO. 68 of 2020 (HC-DSM)** (unreported).

Ms. Museti also said that the court is not properly moved by the applicant by the use of the provisions of Order VII Rules 18(1) and (2) of the CPC. She said this provision has to be used simultaneously with Order XII Rule 2 of the CPC. She said the latter provision provides for the manner and requirement of how leave is to be procured. And this is by the applicant adducing sufficient reasons to of non-production of the documents to the satisfaction of the court. She said the affidavit does not give any such reasons. She cited the case of **Bank of Africa Tanzania Limited vs. OM-Agro Resources Limited & 6 Others, Commercial Case No. 139 of**

**2019 (HC-Commercial Division, DSM)** (unreported) where the Indian case of **Ashoka Marketing Limited vs. Rothas Kumar & Others AIR 1966 Cal 591, 70 CWN 729** was quoted with approval. She thus said that the court was not properly moved. She concluded by praying that the court dismisses the application with costs.

In rejoinder Mr. Ishengoma said prior to the hearing of the main case he compiled files for the 5 representatives to present to court but because the plaintiffs are many it may be possible that they were forgotten. He said it was unfair for learned State Attorney to cite the case of **Mohamed Enterprises** (supra). He said there was no judgment or decree that was issued prior to the application to admit or reject the documents. He said the applicants are praying to the court to tender essential documents which were not filed and this came to the knowledge of the applicant during the premature hearing. He reiterated his prayers for the application to be granted.

I have listened to the submissions by the learned Counsel and State Attorney. Indeed, once an order of the court is given the court cannot give another order on the same issue. However, the court can

exercise its inherent powers and vacate its order upon discovery of a fact which was not known to it.

In this present case, on 28/07/2021 this court did not allow some of the documents that were listed under paragraph 27 of the Amended Plaint to be tendered in court as exhibits on account that there were only listed but not annexed to the Amended Plaint. Further, there was neither a list of additional documents to be relied upon by the plaintiffs. But upon perusal of the court file I have discovered that on 25/03/2020 the plaintiffs filed a list of additional list of documents to be relied upon, a list which was copied to the respondents. The list was for the following documents:

- (a) Amended list of plaintiffs
- (b) Total sum of money claimed by the plaintiffs is Six Billion, Four Hundred Twenty Six Million and Nine Hundred Thousand Tanzania Shillings only (6,426,900,000/=)
- (c) Residential licences
- (d) Land Purchase Agreements
- (e) Different Government receipts
- (f) Photographs of their respective houses and structures before and after demolition

(g) Letters of administration

(h) Deed of gifts

These were the same documents referred to in paragraph 27 of the Amended Complaint save for items (a) and (b) above. In essence, if the said list were discovered on the date of the hearing of **PW1** then the court would have decided whether or not to admit the documents as long as they were on the additional list of documents filed in court. Unfortunately, this fact was not raised at the hearing date by both the Counsel for the plaintiffs (who filed the list) and the State Attorney. And even in their submissions this fact is not raised. mentioned if at all the list was filed and was on record. Her submissions only emphasized that the court is *functus officio*. But for substantive justice to prevail, it would not be appropriate to ignore the fact that on the record there is a list of additional documents to be relied upon which was filed by the plaintiffs.

In that regard, this court hereby acknowledges that there is a list of documents to be relied upon filed by the plaintiffs, and secondly if the court were made aware of the existence of this list, then its order of 28/07/2021 would have definitely been different.



In view thereof, the court invokes the overriding principle under section 3A of the CPC and grants the application on reasons other than those stated by the applicants. The court hereby takes note of the additional list of documents filed by the plaintiff in this court on 25/03/2019 in Civil Case No. 205 of 2017 and hearing of the suit is to proceed as appropriate. Considering the nature of the application, there shall be no order as to costs.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**26/01/2022**

