

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

**MISC. LAND APPLICATION NO. 439 OF 2022**

**SHAMSA SALIM HAMDUN ..... 1<sup>ST</sup> APPLICANT**  
**SAID SALIM HAMDUN ..... 2<sup>ND</sup> APPLICANT**  
**ANTAR SALIM HAMDUN ..... 3<sup>RD</sup> APPLICANT**  
**NASHWA SALIM HAMDUN ..... 4<sup>TH</sup> APPLICANT**

(All beneficiaries to the Estate of the late SALIM HAMDUN SAID)

**VERSUS**

**HAMDUN SALIM HAMDUN ..... 1<sup>ST</sup> RESPONDENT**  
**THE ADMINISTRATOR GENERAL ..... 2<sup>ND</sup> RESPONDENT**  
**TANZANIA RAILWAYS CORPORATION ..... 3<sup>RD</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**A. MSAFIRI, J**

On 01/8/2022, the applicants hereinabove instituted an application praying for the following orders;

1. That the Honourable Court be pleased to issue a status quo Order/Order for injunction restraining the Respondents and/or their agents from making unlawful acts of access to premises comprised in landed property on Plot No. 5A, situated at Vingunguti, Ilala Municipality, Dar es Salaam which is registered in the name of Salim Hamdun Said, the applicants' father (now deceased); restrained from

*Alls.*

unlawful eviction of tenants, destruction of properties therein, causing insecurity and commotion in the neighbourhood pending the expiry of the 90 days' Notice issued to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

2. Costs of the Application and;
3. Any other relief as the Honourable court may deem fit and just to grant.

The application was filed under a Certificate of Extreme Urgency and was supported by the affirmed joint affidavit of all the applicants.

On 03/08/2022, the application was scheduled for the parties to appear before the Court. The applicants were represented by Mr. Musa Daffa, learned advocate with Daud Mzeri, learned advocate. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were represented by a team of State Attorneys led by Mr. Deodatus Nyoni, Principal State Attorney. The others were Mr. Vincent Tango, Principal State Attorney, Ayub Sanga, State Attorney, Mathew Fuko, State Attorney, Yuda Okonyi, State Attorney and Janeth Mandawa, State Attorney.

The 1<sup>st</sup> respondent was absent. The Court was informed that he was duly served but did not appear in Court. Mr. Nyoni submitted before the Court that the matter was for mention and they have been served shortly with the application.

He said that, however, the 2<sup>nd</sup> – 4<sup>th</sup> respondents have concerns which they have observed in the application and they are on points of law. That, these

*Acts.*

issues are in respect of competence of this application before this Court. He prayed for the leave to address the Court on those concerns which he claimed they are on points of law. To cement his point, he cited the case of **Ghati Methusela vs. Matiko Marwa Mariba**, Civil Application No. 6 of 2006, High Court Mwanza (unreported).

Mr. Daffa for the applicants objected to the prayers by the respondents on the grounds that, the purported concern on point of law is a preliminary objection in disguise so the applicants will be taken by surprise. He submitted that the respondents should file a formal preliminary objection. He pointed further that, the respondents have no right to audience since they have not filed counter affidavit and that, the only audience the applicants have is on point of law.

The Court, having observed the submissions by both parties, it was of the view that, the 2<sup>nd</sup> – 4<sup>th</sup> respondents have an audience to address the Court on points of law only. In addition, the Court was of the finding that, the point/issue of law can be raised at any stage of the proceedings before the judgment either by the parties or by the Court, suo motu. Basing on those reasons, the Court granted leave for the 2<sup>nd</sup> – 4<sup>th</sup> respondents through their learned counsels, to address the Court on the said concerns/ issues on point of law.

Mr. Nyoni, started his submission by addressing the Court that they have three issues on point of law. However, later he abandoned the second issue and address on the two issues only. *Alle*

He said that, the first issue is on the locus standi. That, the applicants have sued as beneficiaries of the estate of the late Salim Hamdun Salim. That, this is contrary to section 100 read together with Section 99 and Section 71 all of the Probate and Administration of Estates Act, Cap 352.

Mr. Nyoni argued that, the applicants were supposed to sue through the Administrator General who is the administrator of the estate of the late Salim Hamdun Said. Instead, the applicants have sued as the beneficiaries and have included the Administrator General as the 2<sup>nd</sup> respondent. He averred that, this is un-procedural and fatal. Furthermore, if the applicants have any issue regarding the estate of the late Salim Hamduni Said, the proper cause was to file probate cause in the Probate Court. He prayed for the Court to dismiss this application as the applicants have no locus stand.

The second issue on point of law was that, the applicants have not moved this Court properly as the application has been brought under the wrong enabling provision of law. That, the application is brought under Section 3(2) of the Judicature Application of Laws Act, Cap. 358 instead of Section 2(3) of the same Act. He said that, section 3(2) of the Judicature Application of Laws Act does not exist. He prayed for the dismissal of the application.

On reply, Mr. Daffa readily conceded that this application is incompetent before the Court on the issue of locus standi. He agreed that the applicants have no locus stand to file this application. However, he pointed that the remedy for incompetent application is to strike it out and not dismissal as it has been prayed by the counsel for the 2<sup>nd</sup> – 4<sup>th</sup> respondents.

*Adls.*

He added that, the matter can be dismissed where it has been finally determined on merit. He prayed for the application to be struck out without costs.

Mr. Tango, rejoining for the 2<sup>nd</sup> – 4<sup>th</sup> respondents, he maintained that since the applicants have conceded that they have no locus standi, then the proper course is to dismiss the application. He also prays for the Court to use its discretion and order for the costs to be borne by the applicants.

Since the applicants have conceded that they have no locus standi to institute this application, then the only issue for my determination is whether to dismiss or struck out this application.

The 2<sup>nd</sup> – 4<sup>th</sup> respondents through their counsels, have urged the Court to dismiss the application since the applicants have no locus standi. However, they did not provide any provision of law or position of law which guide their stance. I agree with the counsel for the applicants that since this matter has not been argued and determined on merit, then the remedy is not to dismiss it but to strike it out.

I therefore strike out this application with costs.

It is so ordered.



**A. MSAFIRI,**

**JUDGE**

**03/08/2022**