

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 169 OF 2023**

**GOODCHANCE JOHN MSAKI.....1<sup>ST</sup> APPLICANT**  
**ISMAIL HASSAN KITEGO.....2<sup>ND</sup> APPLICANT**  
**MSOFE S. MSOFE.....3<sup>RD</sup> APPLICANT**  
**DASTAN MASSAWE.....4<sup>TH</sup> APPLICANT**  
**GRACE FUDAH NKYA.....5<sup>TH</sup> APPLICANT**  
**CHACHA RICHARD.....6<sup>TH</sup> APPLICANT**  
**DEUS F. SHIRIMA.....7<sup>TH</sup> APPLICANT**  
**ASHA WAZIRI.....8<sup>TH</sup> APPLICANT**  
**WILTSON MUSYOKA.....9<sup>TH</sup> APPLICANT**  
**IBRAHIM KITEGO.....10<sup>TH</sup> APPLICANT**  
**HASSAN KITEGO.....11<sup>ST</sup> APPLICANT**  
**ALLY H. HAMZA.....12<sup>ND</sup> APPLICANT**  
**ZAINABU SAIDI.....13<sup>RD</sup> APPLICANT**  
**LUCA CLARISSA FURAHA.....14<sup>TH</sup> APPLICANT**  
**OMARY RAMADHAN.....15<sup>TH</sup> APPLICANT**  
**STEVEN EMELA.....16<sup>TH</sup> APPLICANT**  
**HONORY PRISCLIA MATONGA.....17<sup>TH</sup> APPLICANT**  
**JOSEPH JOHN MSOKA.....18<sup>TH</sup> APPLICANT**  
**ALFRED LYANDO.....19<sup>TH</sup> APPLICANT**  
**INNOCENT MDUMA.....20<sup>TH</sup> APPLICANT**

<b>RAJABU ISSA.....</b>	<b>21<sup>ST</sup> APPLICANT</b>
<b>RAJABU MBIRO.....</b>	<b>22<sup>ND</sup> APPLICANT</b>
<b>JOYCE JACKSON NTAZIHA.....</b>	<b>23<sup>RD</sup> APPLICANT</b>
<b>HUSSEIN YUSUPH NGONYANI.....</b>	<b>24<sup>TH</sup> APPLICANT</b>
<b>JULIAS A. MWAJIJA.....</b>	<b>25<sup>TH</sup> APPLICANT</b>
<b>FATUA SULEMAN.....</b>	<b>26<sup>TH</sup> APPLICANT</b>
<b>SALOME SAMWELI.....</b>	<b>27<sup>TH</sup> APPLICANT</b>
<b>MARIA RASHID.....</b>	<b>28<sup>TH</sup> APPLICANT</b>
<b>OMARI KIKOTI.....</b>	<b>29<sup>TH</sup> APPLICANT</b>
<b>MAIMUNA T. KATIMBA.....</b>	<b>30<sup>TH</sup> APPLICANT</b>
<b>RAHMA KIKOTI.....</b>	<b>31<sup>ST</sup> APPLICANT</b>
<b>JULIUS NGWENGA.....</b>	<b>32<sup>ND</sup> APPLICANT</b>
<b>AMBAKISYE MWAIBAKO.....</b>	<b>33<sup>RD</sup> APPLICANT</b>
<b>MKOKOTOLO UPUNDA.....</b>	<b>34<sup>TH</sup> APPLICANT</b>
<b>AHIMIDIWE NGODA.....</b>	<b>35<sup>TH</sup> APPLICANT</b>
<b>MARTIN AMOS.....</b>	<b>36<sup>TH</sup> APPLICANT</b>
<b>LILDA R. SIMBA.....</b>	<b>37<sup>TH</sup> APPLICANT</b>
<b>MANENO NDALU.....</b>	<b>38<sup>TH</sup> APPLICANT</b>
<b>DANIEL PETER MATONYA.....</b>	<b>39<sup>TH</sup> APPLICANT</b>
<b>BALARI RASHID MATALUMA.....</b>	<b>40<sup>TH</sup> APPLICANT</b>
<b>NESTO CHARLES TARIMO.....</b>	<b>41<sup>ST</sup> APPLICANT</b>
<b>SEVEPIN PETER MKINI.....</b>	<b>42<sup>ND</sup> APPLICANT</b>
<b>MUSSA J. HODARI.....</b>	<b>43<sup>RD</sup> APPLICANT</b>
<b>MARIAM HAMIS.....</b>	<b>44<sup>TH</sup> APPLICANT</b>
<b>SOPHIA MATHIAS.....</b>	<b>45<sup>TH</sup> APPLICANT</b>
<b>GAUDENSI JOSEPH.....</b>	<b>46<sup>TH</sup> APPLICANT</b>
<b>MAGRETH PETER KIMARIO.....</b>	<b>47<sup>TH</sup> APPLICANT</b>

LEONIA THOBIAS KIPILA.....48<sup>TH</sup> APPLICANT  
 NEEMA INNOCENT.....49<sup>TH</sup> APPLICANT  
 OMARI MFAUME.....50<sup>TH</sup> APPLICANT  
 MICHAEL MUSHI.....51<sup>ST</sup> APPLICANT  
 STELLAN NOBERT.....52<sup>ND</sup> APPLICANT  
 FIDELIS E. KILawe.....53<sup>RD</sup> APPLICANT  
 SALUM HABIB.....54<sup>TH</sup> APPLICANT  
 HAMIS SAID.....55<sup>TH</sup> APPLICANT  
 MARIA ERASMUS.....56<sup>TH</sup> APPLICANT  
 ELIZABETH MACHANGE.....57<sup>TH</sup> APPLICANT  
 BROWN KIBAHAKI.....58<sup>TH</sup> APPLICANT  
 SESILIA KALISTI.....59<sup>TH</sup> APPLICANT  
 SOPIA MATHIAS.....60<sup>TH</sup> APPLICANT  
 MUNYIVANGA J. MKINI.....61<sup>ST</sup> APPLICANT  
 SAMWELI KISWALA.....62<sup>ND</sup> APPLICANT  
 ELIAS NDUNGURU.....63<sup>RD</sup> APPLICANT  
 HALIMA GERALD MALEMBA.....64<sup>TH</sup> APPLICANT  
 MICHAEL MUSHI.....65<sup>TH</sup> APPLICANT  
 AISHA NELSON.....66<sup>TH</sup> APPLICANT

***VERSUS***

KIBAHA TOWN COUNCIL.....1<sup>ST</sup> RESPONDENT  
 COMMISSIONER FOR LANDS.....2<sup>ND</sup> RESPONDENT

PERMANENT SECRETARY,  
 MINISTRY OF LIVESTOCK  
 AND FISHERIES.....3<sup>RD</sup> RESPONDENT  
 ATTORNEY GENERAL OF THE  
 UNITED REPUBLIC OF TANZANIA.....4<sup>TH</sup> RESPONDENT

## **RULING**

09<sup>th</sup> May 2023.

**L. HEMED, J.**

On 28<sup>th</sup> day of March 2023, the 66 above named applicants, lodged the present Mareva Application under section 2(3) of the Judicature and Application of Laws Act, [Cap 358 RE 2019] and section 68(e) and 95 of the Civil Procedure Code, [Cap 33 RE 2019], against the respondents seeking for the following order:

*"...That this Honourable Court be pleased to issue an Order in nature of Mareva injunction restraining the Town Director of the 1<sup>st</sup> Respondent from selling of applicants' parcels of land pending filing, hearing and determination of main case and application for Interim Injunction to be filed after expiry of Ninety (90) days statutory notice of intention to sue the Government..."*

According to the chamber summons used to institute the application, it is supported by the affidavits of **GODCHANCE JOHN MSAKI** and **SEVERIN PETER MKINI**. However, in the case file there is an affidavits of **JOSEPH PIUS ASSENGA** and the joint affidavit of

**FROMENZI ERASMI MTALO and STEPHEN EMELA.** It is not known why the two affidavits are in the case file as they have not been referred anywhere in the Chamber Summons.

On 13<sup>th</sup> day of April 2023 the respondents filed a joint counter affidavit to challenge the application. Alongside the counter affidavit they raised a preliminary objection on points of law as follows:-

*i) The affidavit in support of the chamber summons is incurably defective for contravening with mandatory provisions of Order XLIII Rule 2 of the Civil Procedure Code CAP.33 R.E.2019*

*ii) That the application is bad in law as it is supported by affidavits of only two out of 66 Applicants by the name of GODCHANCE JOHN MSAKI and SEVERIN PETER MKINI.*

*iii) The affidavit of counsel for the applicant is incompetent in law as it contravenes provisions of Order XIX Rule 3 of the Civil Procedure*

*Code, CAP. 33 RE 2019 and S.8 of the Notaries  
Public and Commissioners for Oaths Cap 12 RE  
2019. (sic)*

*iv) The affidavit of the 1<sup>st</sup> applicant is bad in law  
for it depones matters in law in paragraph 12 of  
the affidavit contrary to Order XIX Rule 3 of the  
Civil Procedure Code.”*

The matter was called for oral hearing of the preliminary objection on the 9<sup>th</sup> day of May 2023. The respondents were represented by **Ms. Lilian Machagge, Ms. Elizabeth Lukumay** and **Ms. Lucy Matemu** learned state attorneys, while the applicants enjoyed the service of **Mr. Joseph Assenga** learned advocate.

Arguing in support of the preliminary objection, Ms. Machagge abandoned the 3<sup>rd</sup> and 4<sup>th</sup> limbs of objection and combined the 1<sup>st</sup> and 2<sup>nd</sup> limbs in her arguments. She argued that Order XLIII Rule 2 of the Civil Procedure Code requires that any application to be supported by an affidavit. According to her, the application at hand has been filed by 66 applicants but there are only 4 affidavits deponed to support the application. She mentioned the said affidavits to be that of Godchance John Msaki (1<sup>st</sup> Applicant), Severine Peter Mkini (42<sup>nd</sup> Applicant),

Joseph Pius Assenga (advocate) and the joint affidavit of one Fromenzi Erasmi Mtalo and Stephane Emela (16<sup>th</sup> Applicant).

The learned State Attorney submitted further that since the present application has been supported by the affidavits of only three applicants, the whole application is incompetent and thus deserves to be struck out. She cited the decision of the Court of Appeal of Tanzania in **Mohamed Abdillah Nur & 3 others vs Hamad Masauni & 2others**, Civil Application No. 436/16 of 2022 to support her argument. She also added that the omission cannot be cured under oxygen principle. She prayed the Court to strike it out with costs.

Submitting to oppose the preliminary objection, Mr. Assenga stated that the application is in compliance with the provisions of Order XLII Rule 2 of the Civil Procedure Code, [Cap 33 RE 2019]. In his opinion, even one affidavit is enough to support the application and since the present application has been supported by four (4) affidavits, the application is competent.

The learned advocate for the applicants contended that if the Court will find the application to have such defect then should apply the overriding objective principle. He referred the Court to the decision of the Court of Appeal in **Dar Express Co. Ltd vs Mathew Paulo**

**Mbaruku**, Civil Appeal No.132 of 2021, where the Court insisted on the application of overriding objective. He distinguished the decision of CAT in **Mohamed** (supra) that in the said decision the CAT was discussing the Court of Appeal rules which are inapplicable to this Court. He ended up praying for dismissal of the preliminary objection.

In her short rejoinder, Ms. Lilian reiterated her submissions in chief. She also distinguished the decision in the case of **Dar Express** (supra) that it is irrelevant to the circumstance of this case. She also rejoined that the decision in **Mohamed Abdillah Nur** (supra) is applicable in the circumstance of this case because the procedure for filing applications in the Court of Appeal of Tanzania and in the High Court are the same.

Having heard from the submissions of both learned counsel let me turn to determine the merits of the preliminary objection. I am aware that the procedure of filing application in this Court is governed by the Civil Procedure Code, [Cap 33 R.E 2019]. Order XLIII rule 2 of the Code, provides thus:

*"Every application to the Court made  
under this Code shall, unless otherwise  
provided, be made by a chamber summons*



**supported by affidavit...**” (Emphasis added)

Therefore, in terms of the above cited provision of the law, for an application of this nature to be proper, it has to be made by way of chamber summons supported by affidavit. Having gone through the application at hand, it is unequivocally that the same has been made by way of chamber summons and supported by the affidavit of the 1<sup>st</sup> and 42<sup>nd</sup> applicants. As aforesaid, there are other two affidavits in the case file which seem to be deponed by Joseph Pius Assenga and another jointly deponed by Fromenzi Erasmi Mtalo and Stephen Emela. The said two affidavits have not been referred in the chamber summons to be among the affidavits to support the application. In that regard, the said affidavits, having found to have no connection with the chamber summons, are considered to be misplaced and thus cannot be considered.

I have also gone through the affidavits of **Godchance John Msaki** and **Severin Peter Makini** and found that they have deponed on their own behalf and not on behalf of the other 64 applicants. In application like the one at hand, where there are more than one applicant there must be an affidavit or affidavits to cover all applicants.

The phrase " *...by a Chamber summons supported by affidavit...*" in Order XLII Rule 2 of the CPC above, has the meaning that the affidavit that supports the application must cover all applicants. In other words, where the application involves several applicants, the applicants may wish to have a joint affidavit to support the application. The most important thing is that such affidavit must cover all applicants involved in the matter.

The present application has been supported by the affidavits of the 1<sup>st</sup> and 42<sup>nd</sup> applicants only. In the said affidavits no where has been stated or shown to have also been deposed on behalf of the other 64 applicants. The issue that arises is whether it is fatal.

The Court of Appeal of Tanzania in **LRM Investment Company Limited & Five others v. Diamond Trust Bank Tanzania Limited & Another**, Civil Application No.418/18 of 2019 (unreported), while dealing with Rule 49(1) of the Court of Appeal Rules, 2009, which is similar to Order XLIII Rule 2 of the CPC had this to say:

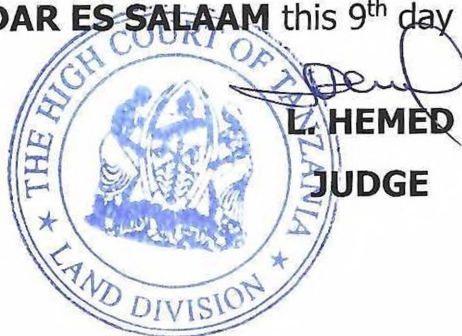
*"The ailment of the application not being supported by the affidavit of the fifth and sixth applicants renders the application I incompetent."*

The position herein above is also found in **Haidar Thabit Kombo & ten others v. Abbas Khatib Haji & Two others**, Civil Application No.2 of 2006, **NBC Holding Corporation and Another v. Agricultural & Industrial Lubricants Supplies Limited & Two others**, Civil Application No.42 of 2000 and in the recent decision in **Mohamed Abdillah Nur & 3 others v. Hamad Masauni & 2 others**, Civil Application No.436/16 of 2022.

Going by the cited authorities, failure by the applicants to file affidavit or affidavits to cover all of them is fatal to the application. It renders the same incompetent before the Court. In the instant application, the two affidavits purporting to support the application do not cover all the 66 applicants. It follows therefore that the application is incompetent.

In that regard, I have no option but to strike out the entire application. The application is hereby struck out with costs.

**DATED at DAR ES SALAAM** this 9<sup>th</sup> day of May 2023.



**COURT:** Ruling is delivered this 9<sup>th</sup> day of May 2023 in the presence of Ms. Lilian Machagge, Ms. Elizabeth Lukumay and Ms. Lucy Matema State attorneys for the respondents and Mr. Joseph Assenga Advocate for the applicants. Right of appeal explained.

