

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

LAND APPLICATION NO. 98 OF 2023
(Arising from Land Case No. 48 of 2023)

ZARMEENA IKBAL HAJI1ST APPLICANT
FATMA IKBAL HAJI.....2ND APPLICANT
YAKUB MABRUK SALIM.....3RD APPLICANT
GULAM MUSTAFA ASHFAQ LAKHU4TH APPLICANT
KHADIJA HUZEIFA MAURICE WALLA.....5TH APPLICANT
I DEAL OFFICE SUPPLIES LIMITED.....6TH APPLICANT

VERSUS

COSMOS PROPERTIES LTD1ST RESPONDENT
EXIM BANK (T) LTD.....2ND RESPONDENT
WALTER BUXTON CHIPETA AS RECEIVER AND
MANAGER.....3RD RESPONDENT
YOGESH MANEK.....4TH RESPONDENT
HANIF JAFFER.....5TH RESPONDENT
PASCAL KAMUZOR.....6TH RESPONDENT
SHAFIN JAMAL.....7TH RESPONDENT
JUMA MWAPACHU.....8TH RESPONDENT
THOMAS WESCOTT.....9TH RESPONDENT
MUHAMMAD OWAIS JAVEID.....10TH RESPONDENT
MUHAMMAD JAVED.....11TH RESPONDENT
GULAM MAHUMMAD HASSAM.....12TH RESPONDENT
NURUL AMIN GULAM.....13TH RESPONDENT

R U L I N G

Date of last Order:12/04/2023

Date of Ruling:02/06/2023

K. D. MHINA, J.

This application of temporary injunction was brought under a certificate of urgency by way of chamber summons, which has been preferred under Order XXXVII, Rule 1 (a) and 4, Section 68 (c) (e) and 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), the Applicants are moving this Court to;

- i. To grant an order for temporary/ interim injunction restraining the respondents, their servants, agents and other persons deriving titles from them from entering, selling and or exercising any legal action against the properties of the applicants described as apartments No. P-1 on the 1st floor, No. P-2 on the 2nd floor, No. P-3 on the 3^d floor, No. P-4 on the 4th floor, No. P-5 on the 5th floor, No. P-6 on the 6th floor, No. P-7 on the 7th floor, No. P-8 on the 8th floor, No. P-9 and office No. 9 on the 9th floor, No. 2105 on the 21st floor, basement shops no. 4, 29 and 30a, Penthouse No 6 on the 23^d floor and one bedroom apartments No. P1-S7 on the 1st floor, No. P3-S7 on the 3^d floor No. P6-S7 on the 6th floor and P8-S7 on the 8th floor and their respective car parking slots over plot No. 63/23 UWT Street,*

Upanga Area, within Dar es Salaam City pending the hearing and determination of the main suit.

- ii. Costs of the application to follow the event.*
- iii. Any other orders or reliefs the Court may deem fit to grant.*

The chamber summons is supported by the joint affidavit affirmed by the applicants, which expounds the grounds for the application.

After being served with the application, despite filling their respective counter-affidavits but also the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents confronted the application with a notice of a preliminary objection that canvassed two grounds, namely;

- i. That the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents are improperly sued because the applicants have not first applied and obtained the order to raise the veil of incorporation. Since the Respondents are the Directors of the 2nd Respondent, they cannot be sued in their individual/ personal capacities.*
- ii. That annex "A" (video clip) is improperly tendered for admission in contravention of the whole of the provision of Section 18 of the Electronic Transaction Act, Cap 442.*

In a "twist of events", after being served with the counter-affidavits, the applicants confronted the same with a notice of preliminary objection to the following effect;

- i. That the purported counter affidavit of the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents is defective and contains a defective verification clause which does not disclose the source of information.*
- ii. That the purported counter affidavit of the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents contains false dispositions making the entire counter-affidavit to be a falsity affidavit.*

From the above scenario as it is trite that when a court is seized with the notice of preliminary objection, it should determine it first before going to the merits or demerits of the matter; therefore, this Court will determine the preliminary objection raised by way of first in first out (FIFO).

Therefore, I will start by dealing with the points of the preliminary objection raised by the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents (hereinafter to be referred to as the first set of the P.O)

The preliminary objections were argued by way of written submissions. The applicants were represented by Mr. Crispin Mwebesa and Edward Peter Chuwa, learned advocates, while the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents were represented by Mr. Elisa Abel Msuya, also a learned advocate.

When laying the foundation for his submission, Mr. Msuya revisited the principles which guide preliminary points of law by citing **Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd** [1969] E.A 696, at page 700, where the preliminary point of objection is defined as follows;

"A preliminary objection is in the nature of what used to be a demurrer

It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

He stressed that two issues are relevant; **one**, a point of law is argued on the assumption that all the facts pleaded by the other side are correct, and **two**, no ascertainment of facts is allowed and or it cannot be raised if court discretion is allowed.

Mr. Msuya also cited the decision of the Court of Appeal in **Ali Shabani and 8 others vs. TANROADS and another**, Civil Appeal No. 261 of 2020 (unreported), at page 8, where it was held that;

"It is clear that an objection as it is were on account of time bar is one of the preliminary objections which court have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from the abstracts without reference examination of any other evidence; under the circumstances, we are satisfied that the learned trial judge rightly held that the preliminary objection was based on a pure point of law and dismissed the suit for being time-barred".

Since Mr. Msuya was laying the foundation by justifying that the points raised are worthy of being considered as preliminary objections, I think at this juncture it is essential for this Court, before going to the submissions, to analyse if the points raised "pass" the test of being considered as a preliminary objection.

On this, the counsel for the applicants, Mr. Mwebesa and Mr. Chuwa, submitted that the preliminary objections were not properly raised as they did not qualify as preliminary objections, particularly on the Miscellaneous Application for Injunction.

Further, they submitted that when the Preliminary Objection was filed, the parties had yet to file a Written Statement of Defense in the main suit, which was filed on 27th March 2023. When looked at, the objections were solely based on the suit, i.e. Land Case No. 48 of 2023, as the issues of whether one has been improperly sued or not or whether the document is irrelevant or wrongly pleaded are matters relating to the main suit and not the application. All points of pleadings must be raised in the written statement of defense, be it points of law or facts. This is provided under Order VIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2019, which provides as follows;

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

Further, they cited the decision of this Court in **CRDB Bank Limited vs. Noorally K. J. Dhanani**, Commercial Case No. 102 of 2001, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported), where it was held that a Notice of Preliminary Objection that is contained in the

Written Statement of Defense contravenes the provisions of Order VIII Rule 2 of the Civil Procedure Code. Therefore, it ought to be discarded as it is improperly before the court to adjudicate upon it.

The counsel for the respondent filed the rejoinder which, I don't see the reason to summarize it. The reason being, it reiterated and cemented the submission in chief. Thus, in my opinion it did not raise any new argument

Having summarised the submissions on whether the first set of P.Os contains a pure point of law, the entry point is the decision of the Court of Appeal in **Sharifa Twahib Massala vs. Thomas Mollel and three others**, Civil Appeal No. 67 of 2011 (Unreported) where it was held that a pure point of law does not arise if there are contentions of facts which are yet to be ascertained in a trial by furnishing evidence.

In the first set of P.O.s, as I alluded to earlier, the points were the issue of lifting the corporate veil and the second one, the issue of improperly tendering of a flash disc which contains a video clip. Therefore, the question is whether these are the pure points of law.

Starting with the first one on lifting the corporate veil. This should not detain me long because this Court has already decided on that issue in **IAF (East Africa Ltd) vs. Sahara Media Group Ltd**, Application for Execution No7 of 2022, Tanzlii [HC-Arusha], whereby Phillip, J held that;

"... the justification for lifting the corporate veil or otherwise needs evidence. In the upshot, the point of preliminary objection is hereby dismissed for lack of merit."

Therefore, flowing from above, this is not a pure point of law worth being considered as the preliminary objection.

Likewise, the second point regarding tendering of a video clip, in my opinion, does not qualify to be considered as a preliminary objection. First, it is even premature to object to the tendering of that object. By the way, this is just an application for a temporary injunction that is yet to be heard on its merits. Second, as it was held in **Sharifa Twahib Massala**, the pure point of law does not arise if there are contentions of facts that are yet to be ascertained in a trial by furnishing evidence.

The respondents are trying to bring procedures of admissibility of electronic evidence applied in trials into an application for temporary injunction. In his submission, Mr. Msuya stated that there was non-

compliance with sections 18 (2) and (3) of the Electronic Transaction Act. But in law, it is trite that affidavits should contain matters of facts and not matters of law. Therefore, the P.O. is misplaced and is a misconception.

Ergo, from the discussion above, the first set of preliminary objections raised by the 2nd, 4th, 5th, 6th, 7th, 8th and 9th lack merits, and I proceed to dismiss the same.

On the second set of preliminary objections raised by the applicants against the counter affidavit i.e

- i. That the purported counter affidavit of the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents is defective and contains a defective verification clause which does not disclose the source of information.*
- ii. That the purported counter affidavit of the 2nd, 4th, 5th, 6th, 7th, 8th and 9th respondents contains false dispositions making the entire counter-affidavit to be a falsity affidavit.*

I wish to start by commenting on two issues, quite briefly, both from the submissions in chief to support the P.O.; **one**, in the submission, the counsel for applicants raised a new issue which was not notified by the notice of preliminary objection. It is on the submission that there was/were no counter-affidavit by the 4th, 5th, 6th, 7th, 8th and 9th respondents and that the deponent, Mr. Mwasage, was not authorised to depone the affidavit. These issues, which were introduced in the submissions, were not raised properly. On this, I wish to remind parties to abide by the “rules of the game”. **Two**, the second point of the P.O. on the falsity of the counter-affidavit was substantiated at all. It seems the counsel for the applicants opted to abandon submitting it.

Therefore, what remains is the first limb of the P.O. regarding the verification clause for the consideration of this Court.

In their submission, the counsel for the applicants submitted that there was a failure to disclose the source of information. The deponent Edmund Mwasaga had verified that all that he had stated in paragraphs 1 – 23 was true to the best of his own knowledge.

Further, they stated that the 4th, 5th, 6th, 7th, 8th and 9th Respondents were all individuals. But the deponent averred by virtue of his position could swear the affidavit on their behalf. That means that the entire counter-affidavit was based on information from the said individuals.

They narrated that in paragraph 5 of the counter affidavit, the deponent disputed the contents of the 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the affidavit supporting the application. Paragraphs 4 and 5 stated that the 4th Respondent was among the attendees of the launch of the pre-sale, but the deponent disputed those facts without disclosing the source of information. Therefore, they argued that it is trite that failure to disclose the source of information in an affidavit renders the affidavit incurably defective.

In response, Mr. Msuya briefly submitted that the deponent Mr. Edmund Mwasage being the Principal Officer of the 2nd respondent, had knowledge of all matters conducted by his employees, especially on the matter involving the selling of Uhuru Height Units Apartments.

The applicants filed the rejoinder which in principle cemented the earlier position elaborated in the submission in chief.

Having gone through the counter affidavit, I don't find any paragraphs indicating the deponent stated that he obtained other information from other persons so that he could disclose that source. Therefore, the verification clause is proper, as the deponent verified that the facts were true to the best of his knowledge.

Even if, for instance, the verification clause would be defective for failure to disclose the source information (failure to indicate which facts his knowledge and which were based on his beliefs) still, the counter-affidavit would not have suffered the "wrath of being struck out" as per the decisions of the Court of Appeal.

In **Ramadhani Mikidadi Vs. Tanga Cement**, Civil Application No. 275/01 of 2019 (Tanzlii), the Court held that;

"We are aware that a defective verification is amenable to amendment by the applicant upon being granted leave by the Court".

Again, in **Jamal Mkumba and another Jamal Mkumba and another Vs. The Attorney General**, Civil Application No. 240/01 of 2019 (TanZlii), the Court of Appeal held that;

"We think this is one of those cases which demands for substantive justice in its determination. But we are satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to the law and parties be heard on merits".

Therefore, I hold that the verification clause in the counter-affidavit is proper. However, as I alluded to above, even if it would be defective, still the remedy would be to amend and not to strike as submitted by the counsel for the applicant.

In the upshot, the P.O. raised lacks merits, and I consequently dismiss it.

Since in the first set of P.O, I dismiss the P.O raised by the 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents against the applicants, and in the second set of P.O, I dismiss the P.O raised by the applicants, against 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents, that lead me to order that each party shall bear his or her own costs.

In conclusion, let the application be heard on merits after disposing of the preliminary objections.

It is so ordered.




K. D. MHINA

JUDGE

02/06/2023