IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPLICATION NO. 253 OF 2023

(Arising from Land Case No. 102 of 2023)

MASHISHANGA MAGANGA.....1ST APPLICANT
TABU MAGANGA.....2ND APPLICANT
KOBURUNGO MAGANGA.....3RD APPLICANT
MATOVU MAGANGA..... .....4TH APPLICANT

VERSUS

ALEX MAGANGA.....1ST RESPONDENT
SHOHAM PROPERTY DEVELOPERS LTD.....2ND RESPONDENT

Date of last Order:18/05/2023
Date of Ruling:15/06/2023

R U L I N G

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 2 (1) (a) and 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), the Applicants are moving this Court to;

i. *That a temporary injunction be issued against the respondents, their servants and workmen not to temper, sell, construct any structure on the suit plots numbers 60, 61, 62, 63, 64,65,*

66,67,68,69,70,71,72, 73, 770, 775 Block C, Mbezi Beach Juu Area, pending the hearing of the main case.

ii. *Any other reliefs this Court may deem fit to grant.*

The chamber summons is supported by an affidavit sworn by Mashishanga Maganga, the 1st applicant, which expounds the grounds for the application.

After being served with the application, despite filling their respective counter-affidavits but the respondents confronted the application with a notice of a preliminary objection that canvassed two grounds, namely;

i. *That this application is bad in law as it contains four applicants, but it is supported by the Affidavit of the first applicant only.*

ii. *That the Applicants have no Locus Standi to institute the present application.*

This application involves a father (1st respondent) and his children (the applicants). The app background to this matter briefly, as can be gleaned from the pleadings (affidavit and counter affidavit), is as follows, the applicants allege that the 1st respondent was married to their late mother, who passed away on 24 April 2005. After that, the 1st applicant was appointed an administrator of their late mother's estate, Paulina

Basigara. It was further alleged that at the family meeting when the applicants wanted a share of their mother in the suit plots, the 1st respondent promised the applicants that he would continue to hold the suit plots in trust of himself and the applicants until when it was convenient to give them the share. Because of that, the applicants resided in the suit plots and made some development thereon.

The applicants further allege that in March 2023, the 1st respondent informed the 1st applicant that he had decided to sell the suit plots to the 2nd respondent and was retiring back to his home village in Same Kilimanjaro.

On his part, the 1st respondent alleges that the plots belonging to him were in his name. He further contends that the applicants are adults with their own separate lives. He allowed them to live on Plot No. 61 Block "C" Mbezi Beach as invitees for being his children with no intention to be the co-owners. He also alleges that this application is an attempt by the applicants to inherit his properties while he is still well and alive.

The allegations above put the father and his children at issue, hence this application.

The application was argued by way of oral submission. Mrs. Genoveva Namatovu Kato learned advocate represented the applicants, while Mr. Paul Kipeja, also a learned advocate, represented the respondents.

In supporting the first limb of preliminary objection, Mr. Kipeja submitted that this application had been filed by four applicants, but there was only one affidavit of Mashishanga Maganga which supported the application. The 2nd, 3rd and 4th applicants did not file their affidavits.

Therefore, he stated that it is a trite principle that the application must be by way of chamber summons supported by affidavit.

He further stated that, in this application, three applicants failed to support the application, and consequently, that failure means the application was not supported by their affidavits. To bolster his argument, he cited the decision of this Court in **Cats (T) Ltd and four others vs. International Commercial Bank (T) Ltd,** Misc. Commercial Application No. 116 of 2022 (HC- Commercial Division) [Tanzlii] where at pages 6-7, it was held that;

> *"..there is no dispute that there were two applicants who had no affidavit.....*
>
> *...then this applicant must be and is hereby found to be incomplete for want of affidavits of the 3rd and 4th applicants."*

Mr. Kipeja explained that according to the above-cited case, all applicants were supposed to file their affidavits. Therefore, since this application lacks the affidavits of the 2nd, 3rd and 4th applicants, he urged the application to be struck out.

On the second limb of the preliminary objection, he submitted that the applicants had no locus stand to file this matter. He narrated that paragraphs 3, 4, and 5 of the affidavit indicated that the basis of the application was because the applicant's late mother, Paulina Basigara, was a co-owner of the suit property. Further, the 1st applicant stated that he was the administrator of his late mother's estate.

But this application was not filed by the administrator of the estate of the late Paulina Basigara.

From above, he stated that locus stand is a legal principle which provides for the interested party who may file a suit, and it was well articulated in **Lujuna Shubi Balonzi Snr vs. The Registered Trustee of CCM** (1996) TLR 203.

He further stated that among the applicants, no one filed this application as an administrator of the estate of the late Paulina Basigara.

He concluded by submitting that since the law under Rule 6 of the Fifth Schedule of the Magistrates Court Act is clear concerning the powers of the Administrators of an estate that they may file proceedings on behalf of the estate, then the applicants lack locus; therefore, it was not proper for the applicant to file this application.

In response, Mrs. Kato submitted that it was true that the application was filed and supported by the affidavit of the 1st applicant only, but in the chamber application, it was indicated that the applicant filed the same at the instance of other applicants and supported by one affidavit.

She further submitted that the cited case of **CATS (T) Ltd** (Supra) elaborated that an affidavit must support the chamber summons, and that was precisely what they did. Further, the cited case did not explain if there was a need for filing more than one affidavit and did not indicate what was prayed by the applicants.

In further reply, she stated that applications of this nature can be determined depending on the circumstances of each case because even if only one applicant should remain still, the court may grant the prayer.

Mrs. Kato also submitted that they filed the supplementary affidavit to indicate the danger posed over the suit land by the respondents who were cutting trees and constructing a wall fence which would hinder the entrance for the applicants. Therefore, even one affidavit is sufficient to disclose the mischief and the damage done.

She prayed that this court should consider the supporting affidavit rather than striking out the application by using the overriding objective principle.

On the issue of locus, she submitted that the applicants had locus in filing this application.

The counsel for the respondent himself admitted that the mother of the applicants was the co-owner of the suit land; therefore, the applicants had a beneficial interest in the suit land.

Further, she argued that the issue of facts needs evidence and facts. Therefore, it could not be raised as a preliminary objection. Because at this stage, it is difficult to decide whether the applicants had a beneficial interest or not.

Regarding the issue that the 1st applicant was not an administrator, she submitted that it was true because the administration cause was already determined to the finality and the estate was already divided. That was why he did not file the matter as an administrator but as the beneficial heir. Therefore, the cited case of **Lujuna Shubi Balonzi Snr (Supra)** is distinguishable.

In the rejoinder, Mr. Kipeja stated that what was submitted by the counsel for the applicants was the submission from the bar. Further, he submitted that for an application, the evidence is by an affidavit. Therefore, only the 1st applicant brought his evidence, and in his affidavit, he did not indicate if the affidavit was on behalf of other applicants. Consequently, it was not true that all applicants supported the application.

In his further submission, he stated that to refer the supplementary affidavit was an abuse of the court process as no order granted permission to file the same.

He also commented on the cited case of **CATS (T) Ltd** (Supra) that it was stated that the application must be supported by affidavits of all applicants.

Regarding the overriding objective principle, he submitted that it is not in every error or mischief that the overriding objective principle is applicable. Therefore, overriding could not save this application.

On the issue of locus, he pointed out that what was submitted by the counsel for the applicants was from the bar, she stated that the applicant was the administrator of the estate, but he filed this application not as an administrator because the administration cause was already closed. This notion was not indicated in the affidavit.

Mr. Kipeja also explained that the cited case of **Lujuna Shubi Balonzi Snr (Supra)** is not distinguishable because it propounds what is the locus stand is.

He also indicated that according to the affidavit, the basis of the right alleged to be infringed originated from the statement that the applicants' late mother co-owned the land with the 1st respondent.

Therefore, the matter was supposed to be filed by the administrator.

The submission that the applicants filed the matter as beneficiaries prove they have no locus standi. Because if the estate was divided and the administration case was closed, then the beneficial interest cannot be raised.

He concluded by submitting that the applicants did not indicate whether they had registered interest in the suit property.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the oral submission made by both learned counsel for the parties, the issues that have to be resolved are:

> *"1. Whether the application is defective as it contains four applicants but supported by the affidavit of the 1st applicant only."*
>
> *2. Whether the Applicants have no locus to institute the present application".*

In determining the issues, I will start with the second one, whether the applicants have locus standi or not. This is because of Mrs. Kato's submission that it could not be raised as a preliminary objection because

it needs evidence and facts. Therefore, at this stage, it is difficult to decide whether the applicants have a beneficial interest or not.

Therefore, the sub-issue to determine here is whether locus standi is a point of law worthy of being raised as a preliminary objection or not. But first, it is essential to understand what is a preliminary objection.

On this, I will start by citing the famous case of **Mukisa Biscuits Manufacturing vs. West End Distributors Ltd** (1969) EACA 696 at page 700, where it was held that;

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which, if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration."*

And at page 701, it was thus held–

> *"A preliminary 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".*

Therefore, what can be gleaned from the above-cited case are;

One, preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. It must be in the nature of a legal objection not based on the merits or facts of the case but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the suit or application

Two, if the objection is sustained, that should dispose of the matter. For instance, an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration.

Three, it must consist of a point of law that has been pleaded or arises by clear implication out of the pleadings. That means a preliminary objection must base its fact on pleadings. This is a position also in **Mount Meru Flowers vs. Box Board Tanzania**, Civil Appeal No 260 of 2017, CAT(Tanzlii), where it was held that;

> *"...it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only consists of a point of law which has been*

pleaded, or which arise by dear implication out of the pleadings".

Four, also a preliminary objection challenges the competence of a court to hear and determine a particular cause before it. See **Selcom Gaming Ltd vs. Gaming Management (T) Ltd and another**, Civil Application No. 175 of 2005, CAT (Tanzlii)

From the discussion above, for the point of law to qualify and stand as a preliminary objection, it must pass the four conditions above.

As for the locus standi, first, it is essential to understand its meaning. The Court of Appeal in **Peter Mpalanzi vs. Christina Mbaruka**, Civil Appeal No. 153 of 2019 (Tanzlii) defines it to mean

"Simply defined as the right or legal capacity to bring an action or to appear in a court.

....is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject matter. Unless a person stands in a sufficient close relation to the subject matter so as to give a right which requires protection or infringement of which he brings the action, he cannot sue on it".

In **Lujuna Shubi Balonzi Snr** (Supra), the applicability of the principle of locus standi was expounded when it was held that;

"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has the power to determine the issue but also that he is entitled to bring the matter before the court".

The question is whether locus standi is a point of law worthy of being raised as the preliminary objection.

This issue should not detain me long because there are several authorities by the Court of Appeal already set out a principle on whether or locus standi is a pure point of law. In the cited case of **Peter Mpalanzi (Supra),** it was held that;

"..locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a court at the earliest opportunity or once it is raised".

Therefore, from above, locus standi is the legal capacity and competence to sue in a court of law; hence it touches on the issue of jurisdiction.

From the above findings, the preliminary objection regarding locus standi was rightly raised by the counsel for the respondents. The next

question is whether the applicants have a locus standi to file this application against the respondents.

As indicated earlier, as per the pleadings, the fact that triggered the applicants to file this case was that they claimed their late mother was a co-owner of the suit property. After the passing of their mother, the 1st respondent promised the applicants that he would continue to hold the suit plots in trust of himself and the applicants until when it was convenient to give them the share.

Further, the 1st applicant stated that he was the administrator of his late mother's estate. At the hearing, Mrs. Kato submitted that administration cause was determined to its finality and the estate was already divided. That was why he did not file the matter as an administrator but as the beneficial heir.

On the other hand, Mr. Kipeja stated that the matter was supposed to be filed by the administrator. But if the estate was divided and the administration case was closed, the beneficial interest could not be raised. Further, the applicants did not indicate whether they had registered interest in the suit property.

Therefore, from the above, the land in dispute, subject to this application, was not among the properties in the estate the 1st applicant had administered. Two, the 1st applicant is no longer the administrator after the administration cause was determined to its finality and closed. Three, the applicants filed this application in their personal capacities, as the children of the 1st respondent. Therefore, they filed this application as beneficial heirs.

That is what was pleaded in the affidavit, and a clear implication arose out of the pleadings and was explained in the submissions.

This issue is not a new phenomenon in our jurisdiction, as there is a plethora of authorities. For instance, in **Ibrahim Kusaga v. Emmanuel Mweta** (1986) TLR 26, it was held that;

> *"I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases, all those interested in the determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of the deceased's property. The law regarding the institution of civil claims has not been changed by the Administration of estate enactments. It only provides a machinery whereby a*

legally recognized person is placed in the place of a deceased person in all matters relating to the deceased's estate".

Also, in **Karimu Shaibu vs. Mussa Halfani Bahatisha**, Misc. Land Application No. 17 of 2015, HC-Mtwara (Tanzlii) it was held that;

"On the first issue, both parties agree that the appellant had no locus standi to file the suit at the Ward Tribunal. It is not in dispute that the appellant filed the claim on behalf of the estate of a deceased person (his late father) and that it was only the person appointed as the administrator of his estate who ought to have commenced the suit. I agree with the counsel on this issue. The law as it now stands is that a claim for and on behalf of the deceased may only be instituted by the administrator of the estate. I took the same position in ***Zuhura Bakari Mnutu v Ali Athumani (supra)****".*

Therefore, it is quite clear that the applicants filed this application in their personal capacities while the law requires a claim for and on behalf of the deceased, Paulina Basigara, only be instituted by the administrator of the estate. If the late Paulina Basigara and her husband, the 1st respondent, co-owned the land subject to this application, the only person to claim for her portion is supposed to be the administrator of her estate.

From the discussion above, I hold that the applicants have no locus standi to file this application. Therefore, because the issue

On the remedy, I take the similar "route" that my brother, the late Utamwa, J, took in **Hassan Mpocho vs. Bernard Edmund Mndolwa and another**, Civil Case No. 90 of 2010, when he held that;

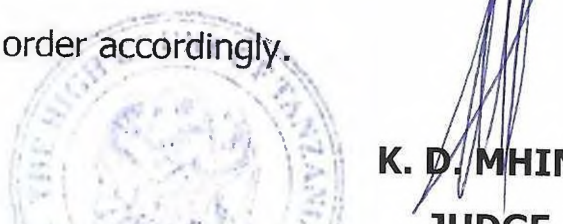
> *"As to the suggestion by both learned Counsel for the defendants that the remedy for want of locus standi is to dismiss the suit, I am of the settled view that, their proposal is not tenable for, in our civil practice a dismissal Order presupposes that a matter has been heard on merits, which is not the case here. On the other hand a Striking Out Order envisages putting court proceedings to an end by virtue of a technical or legal defect, this particular attitude is sustained by the prudence of the Court of Appeal in* ***Zaid Sozy Mziba vs. Director of Broadcasting, Radio Tanzania Dar es salaam and another****, Civil Appeal No; 4 of 2001, at Mwanza. The Court of Appeal envisaged this same stance in* ***Bernard Malinga vs. Presidential Parastatal Sector Reform Commission and another****, Civil Appeal No; 65 of 2007, at Mbeya and in* ***Alliance Insurance Corporation Ltd and nine others v.***

Commissioner of Insurance and two others, *Civil Reference No; 5 of 2005, at Dar es salaam as well as in* ***Makinyumbi Estate Ltd and Another vs. Vidyadhar Girdharlal Chavda and Another***, *Civil Appl. no; 187 of 2005, at Dar es Salaam. It must also be noted here that, the effect of the Dismissal Order on one hand and the Striking Out Order on the other are distinct. Though both orders in effect put the proceedings before the court to an end, the former will render the matter a res judicata if re-filed in court while the latter order will not, i.e. the party against whom the Striking Out Order is made has a room to re-file the matter in court upon legally rectifying the defect.*

Flowing from above, since the issue of locus standi alone disposes of the application, I see no reason to deliberate and determine the first limb of the objection.

In the event, I sustain the second limb of the preliminary objection that the applicants have no locus to file this application. Consequently, I strike out this application with costs.

I order accordingly.



K. D. MHINA
JUDGE
15/06/2023