

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

MISC. LAND CASE APPLICATION NO.788 OF 2022

FREDA GREEMY MAGOMBE..... 1ST APPLICANT

PETER JOSEPH SWAI (*Holder of Power of Attorney of Freda Greemy
Magombe*).....2ND APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE SOLICITOR GENERAL.....2ND RESPONDENT

THE NATIONAL HOUSING CORPORATION.....3RD RESPONDENT

FOSTERS AND COMPANY LIMITED.....4TH RESPONDENT

R U L I N G

Date of Last Order: 30. 01.2023

Date of Ruling: 16.02.2023

T. N. MWENEGOHA, J.

This is an application for a **MAREVA** Injunction order, sought by the applicants here in above jointly, against the 3rd and 4th respondents and any person working under their instructions. The aim is to restrain the respondents from evicting the 1st applicant (a tenant), from Apartment No. 202, located at Plot No. 604/00, Charambe, Upanga Magharibi/Mindu

Street, within Ilala Municipality in Dar es Salaam Region, until the expiry of 90 days' Statutory Notice of intention to sue the government. The Application was made under **Section 2 (3) of the Judicature and Application of Laws Act, Cap 384, R. E. 2019** and **Sections 65 and 95, of the Civil Procedure Code, Cap 33 R. E. 2019**. It was supported by the affidavit of the 2nd applicant, Peter Joseph Swai.

Briefly, between the 1st applicant and the 3rd respondent, there exists a contractual relationship (lease agreement) over the suit premises. The 2nd respondent was authorized, by virtue of a Power of Attorney from the 1st applicant, to take legal actions for and on behalf of the 1st applicant, over the said premises. The contracting parties are in dispute, hence the instant case.

However, before the case was scheduled for hearing, the Court ordered the parties to address it on two issues which touch the root of the Application at hand as follows; -

- 1. Who is competent to appear between the donor and donee of the Power of Attorney in this Application?**
- 2. Effect of absence of the affidavit by 1st applicant to accompany the instant Application.**

The parties complied to the order. Both filed their submissions on the issues and their arguments briefly are as follows.

Mr. Kephass Mayanje, Advocate for the applicants, was of the view on the 1st issue that, it is not fatal for both the principal and the agent to appear as applicants in the circumstances of this case. It is because, the authority given to the agent (2nd Applicant) is conditional. That, the reasons for

granting the authority to the 2nd applicant is the sickness on part of the donor. If she recovers, she will come to prosecute her case.

As for the 2nd issue, it was argued by Mr. Mayenje that, since the 1st and 2nd applicants are principal and agent, and they are praying the same orders in the chamber summons, there is no harm for the Application to be accompanied with one affidavit. Above all, impleading the 1st applicant without attaching her affidavit does not contravene any law. As long as the affidavit of the 2nd applicant is there, it suffices to support the Application, as they have the principal and agent relationship.

In reply, Advocate Karoli Valerian Michael Tarimo argued on the 1st issue that, the relationship between the applicants is a "donor" and "donee". In the eyes of the law, they cannot within the same time bring any action claiming over the same property, under the same capacity. One has to cease to be an applicant for lacking *locus standi*. He cited the case of **Monica Danto Mwansansu (By Virtue of Power of Attorney from Atupakisye Kapyela Tughalaga) versus Israel Hosea and Issa Mwakajebele, Land Revision No. 2 of 2021, High Court of Tanzania at Mbeya.**

As for the 2nd issue, it was argued that, the absence of the 1st applicant's affidavit to support the Application makes this Application incompetent. The Application brought by two applicants, cannot be supported by a single affidavit, sworn by one applicant.

Having heard the arguments of parties through their respective counsels, it is time now to determine the merits or otherwise of the issues so noted above.

Firstly, whether the donor and donee of a Power of Attorney can sue joint over the same subject matter and seek same reliefs as in the case at hand. I will start by addressing on what a Power of Attorney is and its Application in law. Simply put, a Power of Attorney is a document giving or authorizing a person or act on behalf of another in some issues including legal matters. The one person authorizing the other is a principal, grantor or donor. The one authorized is called the agent.

In the case at hand, both the donor and her representative are parties. They are jointly suing the respondents over the same subject matter. On the basis of such records, both claiming a right over the respondents. However, the contract was between the 1st applicant and the 3rd respondent. Therefore, it is the 1st applicant who has the right to sue over the said agreement, owing to the existing contractual obligations between her and the 3rd respondent. In her absence, her agent, the 2nd applicant will step in her shoes by virtue of the Power of Attorney in question.

If the principal is present, the agent lacks the authority to act for her. It is so because a Power of Attorney is just an arrangement one can make in the event he or she become incapacitated or unable to deal with his/her affairs. If she is capable of dealing with her affairs, like in our case, the donee cannot act on her behalf. The rules are simply that, an agent cannot speak or otherwise act in whatever manner, for the principal who is present and capable of discharging his or her obligations.

It is evident then, in the instant matter, the 2nd. applicant lacks the locus standi to sue the respondent owing to the presence of the 1st applicant. He is privy to the arrangements (Lease Agreement), between the 1st

applicant and the 3rd respondent, which is the basis of the dispute in this case, see **Monica Danto Mwansansu (By Virtue of Power of Attorney from Atupakisye Kapyela Tughalaga)**. Therefore, the 1st issue has been affirmatively answered.

Now, turning to the 2nd issue, that, we have only one affidavit to support the chamber Application with two applicants. The said affidavit is from the 2nd applicant who is acting by virtue of the Power of Attorney from the 1st applicant. In the said affidavit, the 1st applicant has been mentioned to be the lawful tenant in the disputed premises, owing to an agreement she entered in 2018, September the 7th, with 3rd respondent, see para 1-9 of the affidavit). That is to say, the affidavit in question has mentioned the 1st applicant in almost all 9 paragraphs. The law is settled that, if an affidavit mentions another person, the said person is also required to swear an affidavit, otherwise the said information becomes hearsay. In **Benedict Kimwaga vs Principal Secretary, Ministry of Health. Civil Application No. 31/00 Court of Appeal of Tanzania at Dar es Salaam.**

"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information is unnecessary, as is the case here, or where it can be expunged, then there is no need to have the other affidavit or affidavits."

The 1st applicant being the party to the agreement, her information is material to the case, unlike her representative. Without her affidavit to

accompany this Application, the Application has to fail for being filed without an affidavit to support the same. Additionally, as I have explained above, the 2nd applicant cannot speak for the 1st applicant while the said person is present in our records. Hence, his affidavit also cannot support this Application. In absence of the affidavit of the principal party (1st applicant), the 2nd issue has also been answered in affirmative.

In the end, the Application is struck out with costs.

It is so ordered.


T. N. MWENEGOHA
JUDGE

16/02/2023

