

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

MISC. LAND APPLICATION NO.819 OF 2022

(Arising from Execution No. 56 of 2022; Original Case No. 168 of 2011)

ELIA FREDERICK ULOMI	1ST APPLICANT
JONAS KASTORY MTISI	2ND APPLICANT
PASCAL BONIFACE NDIYUNGUYE	3RD APPLICANT
FELICK YORAM KALENGELA	4TH APPLICANT
FRANK ONESPHORY MREMA	5TH APPLICANT
LAMECK JACOB STEPHANO	6TH APPLICANT
BARAKA DAMIAN TOYI	7TH APPLICANT
JOYCE JOEL KOMBA	8TH APPLICANT
MURIMI PATRICE CHACHA	9TH APPLICANT
RAMADHANI ISSA BAKORA	10TH APPLICANT
JAMILA HAMISI UCHECHE	11TH APPLICANT
REHEMA NURDINI OMARI	12TH APPLICANT
YASINI HAMISI	13TH APPLICANT
BEDA S. KIMARIO	14TH APPLICANT
JONAS FLORIAN	15TH APPLICANT
BARAKA NKABO	16TH APPLICANT
CHRISPIN PALAKATA	17TH APPLICANT
AYUBU ALHARUNA	18TH APPLICANT
RAHIM BELEKO	19TH APPLICANT
NGOWI EDES NOLASCO	20TH APPLICANT
AMANDUS CHATILA	21ST APPLICANT
MWITTA CHACHA	22ND APPLICANT
JUSTINA DAUDI	23RD APPLICANT
CHRISTOPER MOSES	24TH APPLICANT
MWAJABU ATHUMANI	25TH APPLICANT
ALLY KHASIM	26TH APPLICANT
RASHID HALIFA	27TH APPLICANT

KEDMUN ANTHONY	28TH APPLICANT
AMOS BENDERA	29TH APPLICANT
RAMADHANI UPUNDA	30TH APPLICANT
STEVEN SIMON	31ST APPLICANT
MOHAMED LIKECHA	32ND APPLICANT
SAMWELI DANGWA	33RD APPLICANT
SHAIBU HUSSEIN	34TH APPLICANT
ANNUL HADI	35TH APPLICANT
HASSAN ALFANI HEMEDI	36TH APPLICANT
FAAJI ISSA	37TH APPLICANT
ANDREW OMARY	38TH APPLICANT
JOSHUA LAULANT	39TH APPLICANT
AGUSTINO PASCAL	40TH APPLICANT
KOMBO MIYOMBO	41ST APPLICANT
PASCAL ROBERT	42ND APPLICANT
ALLY VIEDO	43RD APPLICANT
DAVID MOSHI	44TH APPLICANT
BEIAN JOHN	45TH APPLICANT
KAJALA DOTTO	46TH APPLICANT
STEPHANO ASENKA	47TH APPLICANT
FUJO KISIMA	48TH APPLICANT
ANITA ZAKARIA	49TH APPLICANT
LUSEKELO SETH	50TH APPLICANT
RAPHAEL JULIUS	51ST APPLICANT
CASTO KOMBA	52ND APPLICANT
AZIMIO NKINI	53RD APPLICANT
ALEX ABDALAH	54TH APPLICANT
GERVACE YOTHAM	55TH APPLICANT
MOSES ELIAS MSELA	56TH APPLICANT
JOEL KOMBA	57TH APPLICANT
ADAM A. MAKALA	58TH APPLICANT
BONIFACE MWASIPOSYA	59TH APPLICANT
IDDI ALLY	60TH APPLICANT

ISMAIL A. ABDALLAH 61ST APPLICANT
HAMISI ATHUMANI 62ND APPLICANT
SHAMTE SAID NGWENYA 63RD APPLICANT
SPIAN MATHIAS 64TH APPLICANT
ISAYA EZRA 65TH APPLICANT
JANETH ALLY URIO 66TH APPLICANT
FRANK STEVEN CHOGOGWE 67TH APPLICANT

VERSUS

SEVERIN STANLEY MALLYA 1ST RESPONDENT
GIDEONI SHANA DAUDI 2ND RESPONDENT
BOSCO DAUDI SHANA 3RD RESPONDENT
CHRISOTPHER LAURENT SAJILO 4TH RESPONDENT
MIKONGO K. MIKONGO 5TH RESPONDENT
ALLEN NELSON MASSAWE 6TH RESPONDENT
STANFORD KWAY 7TH RESPONDENT
JOSEPH ALLOYCE NGALLYA 8TH RESPONDENT
SUNGU JACKSON NKURLU 9TH RESPONDENT
AMBROSE NGASSA 10TH RESPONDENT
CDJ CLASSIC GROUP LIMITED 11TH RESPONDENT

Date of Last Order: 02/08/2023

Date of Ruling: 07/09/2023

RULING

I. ARUFANI, J

The applicants in this application are seeking for the following orders:

- 1. That this honourable court may be pleased to investigate the matter in the respondents move in execution of the decree in Land Case No. 168 of 2011 which has the effect of dispossessing the applicants of their land and properties.*

- 2. That this honourable court be pleased to declare the applicants are lawful owners of their land properties and declare the attempted dispossession unlawful and illegal.*
- 3. That the honourable court be pleased to is (sic) an order permanently possessing the applicants of their land and restricting the respondents from further interference.*
- 4. That the court be pleased to make an order directing that the costs of this application be borne by the respondents.*
- 5. That the honourable court be pleased to issue any other order or direction as the court shall deem proper and fit to grant.*

The application is made under Order XXI Rules 98 (1) (2) and 99 and Section 95 of the Civil Procedure Code Cap 33 R.E 2019 (Henceforth; the CPC) and it is supported by the affidavit sworn jointly by the first to twelfth applicants. The application was opposed by the counter affidavit sworn by Hilda Dickson Msanya, advocate for the respondents.

With leave of the court the application was argued by way of written submissions. While Mr. Robert R. Rutaihwa and Mr. Paul Happe, Advocates filed submissions on behalf of the applicants, Mr. Omega Steven Myeya, Advocate filed submissions in reply on behalf of the respondents. A rejoinder was filed by Mr. Rutaihwa and Happe on behalf of the applicants.

The applicants in their submissions have adopted the contents of the affidavit stating that they are owners of the properties in Utulivu Street constituting part of Malolo area (formerly known as Kinondo), Mabwepanda Ward, Kinondoni Municipality, Dar es Salaam Region, the area whose notice of eviction has been given (the suit land). The applicants state that each of them has attached to the affidavit evidence pertaining to the ownership of how they owned the suit land.

The applicants state that, on 26/11/2022 they were caught by surprise when the Chairperson of the area, one Zephania Maega told them to vacate the area as it belongs to the respondents. They say the notice was served on the Chairperson but was addressed to one Ephraim Juma Shayo who is not one of the applicants. The applicants state despite that the notice was not addressed to any of them but the 11th respondent, who is the Court Broker threatened them with the eviction order emanating from Execution No. 56 of 2022.

The applicants in their submissions have briefly stated the history of the matter and the nature of the decree subject of the eviction. They stated that in Land Case No. 168 of 2011 the respondents were sued by Ephraim Juma Shayo as an attorney of Averin Malyango who claimed to be the owner of the piece of land measuring 16 acres. The claimant

alleged then that the respondents had trespassed into the said land a fact which triggered the institution of the suit.

The land was however not described in the decree but in the judgment as to be located in Malolo area Mabwepande in Kinondoni Municipality. The claimant Ephraim Juma Shayo as an attorney lost the case and the respondents were declared the lawful owners of the piece of the land in dispute. The applicants claim that the decree was a declaratory decree from a declaratory judgment because it merely declared the respondents the lawful owners, but the said piece of land was not specified. The applicants state by the time the suit was proceeding one Frolian Kamugisha and Jonas Kastory Mtisi (the 2nd Applicant) were in occupation of part of the suit land and the rest was owned by the local authority.

They further stated that all the transactions (sale or purchase) thereafter by the mentioned applicants were witnessed by the local authority and the said applicants paid all the requisite fees. The applicants claim that the suit land (Malolo Area) is about 5,000 acres and it has not been disputed in the counter affidavit. They further argued that the land in occupation by the Applicants is about 50 acres which is not part and does not form the 16 acres that were decreed to be owned by the respondents in Land Case No. 168 of 2011.

The applicants submit that the respondents claimed that each of them had plots of different size, but this has not been reflected in the counter affidavit and for about 12 years they have not located their land while they had the judgment. The applicants also pointed out the fact of the law that an advocate cannot swear an affidavit for a party regarding ownership of the land as that would be hearsay. They cited the case of **Joseph Peter Daudi & Another vs. Attorney General & 30 Others, Misc. Land Application No. 447 of 2020 (HC Land Division)** (unreported).

The applicants state that the decree, the execution order and notice of eviction does not relate to them and they are not mentioned in the said documents, but as reflected in the affidavit the threats by the 11th respondent proclaiming the eviction exercise through the area chairperson triggered them to come to court to resist the dispossession as lawful owners of their land.

In a nutshell the applicants state that:

*(a) The judgment and decree subject of execution is declaratory in nature hence not executable to any one including the applicants. In other words, the decree cannot be enforced or even stayed. They relied on the article titled Enforcement of Judgments in Nigeria: **Issues, Law and Challenges, Global Journal of Politics and Law Research, Vol. 9,** and also the case of **Catherine***

Honarati vs. CRDB Bank Plc & 3 Others, Civil Application No. 42 of 2016 (CAT) (unreported).

- (b) The judgment, decree and execution order do not relate to the land in occupation by the applicants. The decree does not specify the land which the respondents are owners.*
- (c) That the applicants have managed to establish their title to land by evidencing documents of ownership. But the respondents have not produced any documents, but they rely on a decree which merely state 16 acres in the same suit area.*

The applicants therefore pray for the application to be granted with costs. In submissions in reply, Mr. Myeya, advocate for the respondents started by adopting the counter affidavit and observing that the matter before the court is incompetent as only 12 applicants swore the affidavit as opposed to the 67 applicants listed therein hence the application is not maintainable. He said the chamber summons is not supported by an affidavit of all the applicants. He said the 13th to the 67th applicants lack the locus to sue or bring the application before the court. He suggested that there ought to be a representative suit or otherwise permission from the applicants who did not swear the affidavit. He said this is not a technicality but a matter that goes to the root of the matter.

He cited in his submission the case of **Chinahenan International Cooperation Group V. Salvand K.A. Rwegasira**, [2006] TLR 220 and

Article 107A(2)(e) of the Constitution of the United Republic of Tanzania. He said the application by the applicants is *res judicata* under the eyes of the law as the same was fully decided and judgment and decree was passed by this court. He said the only option they had was for them to try and find a way of how to become parties to the Land Case No. 168 of 2011 and see how they could pursue their rights. He prayed for the court to find that Land Case No. 168 of 2011 was fully decided by this court.

Mr. Myeya said the applicants are trying to convince the court that they live in Utulivu Street and there is evidence to that fact, but he said this is trying to make the court rehear the case and it is not proper because it would be hearing the same case twice. He observed that this is an abuse of the court process. He said an advocate if instructed can swear an affidavit, so the argument by the applicants that the advocate for the respondents was not supposed to swear the counter affidavit on behalf of the respondents in the matter has no merit and the cases cited are not applicable in this situation. He concluded by stating that, there is a judgment and decree in Land Case No. 168 of 2011 in favour of the 1st to 10th respondents and it cannot be challenged by the application before the court.

In rejoinder the applicants said the issue of locus standi was supposed to be raised as a preliminary objection and not within the submissions. However, they pointed out that this argument is misconceived, and the applicants have the right to institute the application. They also said the learned Counsel for the respondents misconceived the rules applicable to affidavits and those governing representative suits. The applicants state that the affidavit has been sworn by the 1st to the 12th applicants for their own and on behalf of the rest of the applicants with their knowledge and consent.

As for the issue of *res judicata* raised by the counsel for the respondents, the applicants' counsel pointed out this is not relevant because the conditions for *res judicata* are well known and in this case the parties are not similar as the applicants were not parties in Land Case No. 168 of 2011. They also argued even the title is also not similar because the land possessed and owned by the applicants is not the one referred in the decree involving the respondents. They concluded by submitting that this is a fitting application, and it should be allowed as it is uncontested in facts and principles. They prayed for the application to be granted as prayed.

Before going to the merit of the application the court has found there are points of law raised in the submissions of the counsel for the

parties. Mr. Myeya raised in his submission the issues of law in respect of the applicant's *locus standi* and the application to be *res judicata*. With due respect to the counsel, this court will not indulge itself in dealing with the issues of law raised in the submission of the counsel for the respondents as were raised as preliminary objections and on 30/05/2023 the counsel himself withdrew all of them. In that regard, Counsel waived the rights to argue all preliminary objections on points of law.

Though the point of *res judicata* was not expressly raised in the notice of preliminary objection, but inclusion of it in the submissions is not proper as counsel knew that the court had already noted that there were no further objections in the way. The court will therefore not go contrary to its order and in that respect, the issue of *locus standi* and *res judicata* raised in the written submissions by the counsel for the respondent shall not be considered by the court.

The stated stand of the court will equally apply to the point of law raised in the submission of the counsel for the applicant that the advocate for the respondents could have not sworn the counter affidavit on behalf of the respondents on the matter which were not within her knowledge as the stated point of law was supposed to be raised before going to the hearing of the application on merit and not to raise it in the submission.

Back to the merit of the application the court has found the main issue for determination in this application is where the application is meritorious. The court has found the gist of this application lies under Order XX1 Rule 98(1) (2) and 99 of the CPC which states:

98 (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

99. Where the court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property.

The wording of the above quoted provisions of the law shows there are some conditions which the court is required to consider when dealing with the application made under the above quoted provisions of the law. Firstly, the applicant is required to be not a judgment debtor to make an application under the above cited rules. Secondly, the applicant can only resort into the cited provision when is dispossessed of the property by

the decree holder or purchaser of the property sold in execution of a decree.

After the above two conditions being satisfied, the court is required to investigate the complaints of the applicants pursuant to sub rule 2 of Rule 98 and after being satisfied the applicant was in possession of the property on his own account or on account of some person who is not a judgment debtor, it can exercise the power conferred to it by Rule 99 of the CPC to direct the applicant be put into possession of the property. (The above stated conditions can be seeing in **Mulla, The Code of Civil Procedure**, Sixteen Edition, Vol. III at page 2994.)

While being guided by the above stated conditions the court has found the present application as elaborated by the applicants, shows the applicants were served with notice of being evicted from the land they alleged is owned by them lawfully. That means the applicants have not been dispossessed of their land and each of them is still in possession of his land. The court has found the applicants stated the said notice of eviction was issued in Execution No. 56 of 2022 which originated from Land Case No. 168 of 2011 and the applicants were not parties in the mentioned proceedings.

Although the applicants have not been dispossessed of their land but the court has found they have been served with the notice of being evicted from their land. That makes the court to come to the finding that, the condition of being disposed of their land set out under Rule 98 (1) of the CPC for the application to be properly before the court has not been satisfied in the instant application. Having arrived to the stated finding the court has found the issue to determine now is whether the applicants are entitled to the orders they are seeking from this court.

The court has found Mr. Myeya, counsel for the respondents argued that the application intends to rehear Land Case No. 168 of 2011 which declared the first to tenth respondents are lawful owners of land measuring 16 acres located at Malolo Mabwepande area. With due respect to the counsel for the mentioned respondents this is not the case of rehearing the case which declared the mentioned respondents are lawful owners of the mentioned land. The court has come to the stated finding after seeing the applicants herein were not parties to Land Case No. 168 of 2011 and Execution No. 56 of 2022 and for that reason, they want the court to investigate why the respondents wants to evict them from their land whereas they are the lawful owners.

The applicants in their affidavit have attached the requisite documents of their ownership to their land. As correctly said, the respondents have not controverted the fact that the applicants are owners of the said suit land. Their only claim as deposed at paragraph 3 of the counter affidavit is that the facts have no legal foundation to make the court to hear and determine the matter. Since ownership of the applicants to the land in dispute has never been removed in any case it is apparent clear that they cannot be evicted from their land before showing justification of doing so.

The court has arrived to the above finding after seeing that, although it is true that the decree in Land Case No. 168 of 2011 declared the respondents are lawful owners of the land measuring 16 acres located at Malolo Mabwepande Area, Kinondoni Municipality but as rightly argued by the counsel for the applicants the stated description is too general as 16 acres of land can be anywhere within the mentioned Area. The court has found as argued by the counsel for the applicants, the fact has not been denied by the respondents that, Malolo Area consists of about 5,000 acres. That means the mentioned 16 acres of land can be anywhere else in the mentioned area and not necessarily within the land of the applicants.

In the premises the court has found the move of evicting the applicants from their land before ascertaining the applicants are within the 16 acres of land declared by the court in the decree issued in Land Case No. 168 of 2011 are lawfully owned by the first to tenth respondents is not proper. The court has arrived to the stated finding after seeing the respondents have not presented anything substantial before the court to show the land the applicants claim to be the lawful owners are the lands declared by the court is owned by the first to tenth respondents.

They have only presented to the court the judgment and decree of the court which to the view of this court cannot be executed against the applicants before being ascertained the land held by the applicants is within the land declared by the court is owned by the mentioned respondents. The stated finding of this court is based on the fact that, as stated earlier in this judgment the respondents were sued in the Land Case No. 168 of 2011 by one Ephrem Juma Shayo through the power of attorney of Averin Malyango that they had trespassed the land measuring 16 acres. After the mentioned plaintiff failed to substantiate his claims, the respondents were declared lawful owners of the stated 16 acres of land.

The court has found the applicants are seeking in their chamber summons the order of declaring them lawful owners of their land and properties and the permanent order to restrain the respondents from further interference with their land and properties. Although it has been found the eviction the respondents intends to carry out against the applicants is not justifiable because of the reasons stated herein above but still the court cannot grant the orders the applicants are seeking from this court. The reason for coming to the above finding is because the order which the court is empowered to make in the application made under the provisions the instant application is made as provided under Rule 99 of Order XXI of the CPC is only an order of directing the applicants to be put into possession of the land or property which where dispossessed of.

Since the applicants are still in possession of their land, the court cannot grant them the order provided under the afore cited provision of the law. As for the prayer of being declared lawful owners of their land the court has found still the applicants have a chance of resorting into other available legal forums to seek for determination of their complaints against the respondents or any other person. The court has found as rightly argued by the counsel for the respondents the applicants can find a way of becoming parties in the matter upon which the impugned

eviction order was issued so that they can seek for an order of being declared lawful owners of their land.

It is because of the above stated reasons the court has found the application of the applicants cannot be granted because the orders they are seeking from this court cannot be granted by the court. In the upshot the application is accordingly dismissed. After considering the nature of the application and what has been stated in this ruling the court has found it is not justifiable to grant costs in this application. It is so ordered.

Dated at Dar es Salaam this 7th day of September, 2023.



Court:


I. Arufani
JUDGE
07/09/2023

Ruling delivered today 07th day of September, 2023 in the absence of the applicants but in the presence of Ms. Hilda Msanya and Ms. Zuhura Shafii, learned advocates for the respondents. Right of appeal to the Court of Appeal is fully explained.




I. Arufani
JUDGE
07/09/2023