

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

MISC. LAND APPLICATION NO. 409 OF 2023

1. GODCHANCE JOHN MSAKI 2. SEVERIN PETER MKINI 3. ELIZABETH MACHANGE 4. ISMAIL HASSAN KITEGO	}	APPLICANT'S
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VERSUS

1. KIBAHA TOWN COUNCIL 2. PERMANENT SECRETARY, MINISTRY OF LIVESTOCK AND FISHERIES 3. THE ATTORNEY GENERAL	}	RESPONDENT'S
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R U L I N G

*Date of last Order: 17/08/2023
Date of Ruling: 17/10/2023*

K. D. MHINA, J.

By a chamber summons taken under Order 1 Rule 8 (1) of the Civil Procedure Code [Cap. 33 R. E. 2019] ("**the CPC**"), the applicants, on behalf of 168 others, instituted this application against the respondents.

The applicants, *inter-alia*, are seeking the following orders: -

- i. That this Court be pleased to grant leave to Applicants to file a representative suit for and on behalf of 168 others whose names*

and signatures are annexed to the affidavit which forms part of this application.

- ii. Any other relief as it deems fit and just to grant in the interest of justice.*

The application is supported by the joint affidavit of the applicants, which expounded the grounds of the application.

After being served with the chamber summons and its supporting joint affidavit, the respondents confronted the same with a notice of a preliminary objection that canvassed three grounds, namely;

- i. The application is bad in law since the Applicants fail to establish cause of action against the respondents.*
- ii. The application is bad in law as it contravenes with Order 1 Rule 8 (1) of the CPC.*
- iii. The affidavit is incurably defective as the applicants verified unknown facts in the contents of paragraphs 5, 6 and 7.*

As it is trite, this Court had to deal with preliminary objections first because once a court is seized with a preliminary objection, it is first required to determine the objection before going into the merits or the substance of the case or application.

Though the respondents raised three grounds in their notice of preliminary objection, in their joint submission in chief, they dropped the first ground regarding the cause of action.

The objections were argued by way of written submissions duly drawn and filed by Ms. Jesca Shengena, learned Principal State Attorney for the respondents, and Mr. Joseph Assenga, learned advocate for the applicant.

Before going to the substance of the preliminary objection, I must state right away that it is a law and practice that parties are bound by their pleading. In the circumstances of this matter, parties are bound by what was raised in the notice of preliminary objection. See **Peter Ng'homango vs. The Attorney General**, Civil Appeal No. 114 of 2011 (CAT unreported).

I flatly stated as above because, in the submission in chief, the respondents tried to "smuggle" other issues not raised in the notice of P.O. and without the leave of the Court. The issue such as the locus standi of the 3rd respondent. That is unprocedural, so I will ignore all issues raised improperly and deal with the grounds raised in the notice of P.O. and submissions for and against the grounds.

In supporting the second ground of the P.O., Ms. Shengena submitted that the application contravenes Order 1 Rule 8 of the CPC, which laid down a principle that, in a representative suit, parties must have; **one**; common interest in the suit, **two**; willing to join in the suit, and **three**; consent of the parties sought to be represented. To bolster her argument, she cited **Kihila Willium and five others vs. National Ranching Co. Ltd**, Misc. Application No. 11 of 2022 (HC-Bukoba), which quoted the decision of the Court of Appeal in **K.J Motors and three others vs. Richard Kishamba and others**, Civil Application No. 74 of 1999.

She explained that in the instant application, there were discrepancies in signatures, which needed proof that the applicants were dead or alive and that they consented to be represented.

She stated that the attached names and signatures failed to prove their willingness to join the suit since some admitted that they were trespassers.

On the third ground, Ms. Shengena submitted that the affidavit contravenes the provisions of Order 9 Rule 3 (1) of the CPC, for the reason that the applicants had verified paragraphs 5, 6 and 7 of the affidavit which are non-existing thus the affidavit became incompetent.

She cited **Michael Clement vs. Abdallah Mfaume Mdogwa and others**, Misc. Land Application No. 165 of 2022 (HC-Land Division) and submitted that since the affidavit is incurably defective, then there is no application before this court.

In response Assenga attacked the second ground of the P.O., for the reason that the objection does not meet the requirements to be considered as a preliminary objection as enunciated in **Mukisa Biscuits Manufacturing vs. West End Distributors Ltd** (1969) EACA 696.

He explained that what was raised by the respondents were the points of facts which require evidential proof.

On the third ground, he admitted that paragraphs 5, 6 and 7 of the affidavit were non-existing and he submitted that was a typographical error.

Further, he submitted that the verification of the non-existing paragraphs in the affidavit is minor and cannot invalidate the affidavit. To bolster his submission, he cited the decision of the Court of Appeal in *Mantrac (T) Ltd vs. Goodwill Ceramics (T) Ltd*, Civil Appeal No. 269 of 2020, where it was held that;

"it is a settled law that where the offensive paragraph of the affidavit are inconsequential they can be expunged leaving the substantive part."

The respondents did not file the rejoinder.

Having gone through the chamber summons, affidavits and submissions from both parties, the issue before me is whether or not the application is proper before this Court.

Straight away I will start with the second ground of preliminary objection and the key issue here is whether what was raised in the ground is a point worthy of being considered as a point of law.

In the cited case of **Mukisa Biscuit (Supra)** it was held that;

"The preliminary objection must raise a pure point of law."

It was held further that;

"Preliminary objection is in the nature of what used to be a demurrer. It raised 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 what is the exercise of judicial discretion."

On my side, having gone through the submission in chief what were raised in the first ground of the P.O. regarding; **one;** the discrepancies in signatures in the list of the applicants, which needed proof that the applicants were dead or alive and **two;** whether they consented to be

represented and their willingness to join the suit, these are purely factual issues which requires proof to establish which need to be determine on merits in the main application. Therefore, the ground is not a pure point of law at all.

Therefore, as rightly argued by Mr. Assenga, the second ground of the P.O., does not qualify a preliminary objection as per **Mukisa Biscuit (Supra)**.

The third ground of appeal should not detain me long. The circumstances triggered the third ground of P.O, was because in the joint affidavit immediately after paragraph 4, it was inserted and written paragraph 8. Therefore paragraphs 5,6 and 7 were skipped. On the other hand, in the verification clause, the applicants verified the skipped paragraphs, which are actual non-existing. In fact the paragraphs are inconsequential.

On this, there is a plethora of authorities by the Court of Appeal. In **Phantom Modern Transport (1985) Ltd v. D.T Dobbie (T) Ltd**, Civil Reference No. 15 of 2001 and 3 of 2005 (unreported) it held that;

"Where defects in an affidavit are inconsequential those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the Court can proceed to act on it.

Therefore, since paragraphs 5, 6 and 7 are non-existing, hence inconsequential, I overlook the same since in any way cannot affect the propriety of the affidavit.

Flowing from above, I hold that the P.O. raised by the respondents are devoid of merits. Consequently, I dismiss the P.O raised and order the application be heard on merits

I order no costs to this application.




K. D. MHINA
JUDGE
17/10/2023