

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

**MISCELLANEOUS APPLICATION No. 797 OF 2022**  
(ARISING FROM LAND CASE NO. 120 OF 2022)

**RASHID ABDALLAH KILUVIA.....1<sup>ST</sup> APPLICANT**  
**NASSIB BAKARI MBAGA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ASSEY ALEMYO MURO** (Suing under Power of Attorney of  
GEOFFREY WILSON MURO).....**1<sup>ST</sup> RESPONDENT**  
**MY SPACE & 15 OTHERS.....RESPONDENTS**

Date of Last Order: 06.02.2023  
Date of Ruling 27.02.2023

**RULING**

**V.L. MAKANI, J**

The 1<sup>st</sup> respondent herein has raised the following preliminary objections raised by the 1<sup>st</sup> respondent that:

- 1. This court lacks power to issue double temporary injunction to different person on the same disputed piece of land.*
- 2. That the application is bad in law for non-disclosure of the 15 respondents.*
- 3. The application is bad in law for intention to challenge the deed of settlement to which the applicants were not party over the said deed of settlement.*

*4. The applicant's affidavit is bad in law for not containing the 2<sup>nd</sup> applicant's affidavit nor legal authorization from the 2<sup>nd</sup> applicant authorizing the 1<sup>st</sup> applicant to swear affidavit on his behalf.*

The matter proceeded orally. Mr. Ododa represented the 1<sup>st</sup> respondent while Mr. Nyangarika, Advocate represented the applicant.

In arguing the first preliminary objection Mr. Ododa prayed for and was granted leave to remove the word "double" so the objection could read as *"the court lacks power to issue temporary injunction on different persons on the same subject matter"*. He said that on 26/10/2022 this court recorded a Deed of Settlement in respect of 13 people out of 15 in Land Case No.129 of 2022 who joined in the suit as interested parties vide Misc. Land application No.517 of 2022. That through Athanas Wigan, Advocate, they joined in the case with the intention of a settlement, and they agreed and, an order was given. He said Mr. Wigan then withdrew from representing the two applicants herein, so the Deed of Settlement was recorded and registered in respect of the 13 respondents in the application. That since there was an injunction on the same property this court cannot

give another injunction on the same property while the parties are the same.

On the second point of preliminary objection, he said that respondents are not reflected. That it is only the 1<sup>st</sup> respondent and My Space & 15 Others. That the 1<sup>st</sup> respondent does not know if the 2<sup>nd</sup> respondent is alone, or his name is My Space and 15 Others or otherwise. That the omission may cause a right not to be given or given to the wrong person. He said the cases in which the 1<sup>st</sup> respondent has filed there is no party known as My Space & 15 Others. That non-disclosure of proper parties is fatal.

As for the third point of objection, he said that the intention to challenge the Deed of Settlement is irrelevant as the applicants were not parties, so they do not have the right to challenge the said Deed of Settlement. That the deed did not touch on the land which the applicants are claiming. That since the Deed was not in respect of the applicants this application must be dismissed.

As for the fourth point of preliminary objection he said that the 1<sup>st</sup> applicant has signed the affidavit of the 2<sup>nd</sup> applicant without authorization. That the affidavit is only one and the 1<sup>st</sup> applicant has taken oath on behalf of the 2<sup>nd</sup> applicant without authorization. That in verification clause it is stated on personal knowledge of the 1<sup>st</sup> applicant as such the affidavit is defective in its nature. He prayed for the affidavit to be expunged from the record as there is no authorization by the 2<sup>nd</sup> applicant for the 1<sup>st</sup> applicant to swear affidavit on his behalf. He prayed for the application to be dismissed.

In reply to the first point Mr. Nyangarika said that there is no point of law raised and that all what is raised are points of facts. That the issue of a Deed of Settlement being challenged is a fact. That from 26/10/2022 to when the application was filed there is change of circumstances. That the temporary injunction given disappeared with the Deed of Settlement which was registered, so there was change in circumstances. He said temporary injunction is the discretion of the court and Counsel cannot raise and challenge the discretion of the court. He said in the case of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696** it

was stated that an objection cannot be raised to challenged discretion of the Court. He said that the applicant never signed the Deed of Settlement and they have filed their Written Statement of Defence, therefore they have the right to file this application.

As for the second point of preliminary objection about non-disclosure of the 15 others Mr. Nyangarika submitted that when one reads the application it is clear that it arises from Land Case No.129 of 2022 so all the parties in the said Land Case are also parties to this case. He said there is no omission because there was no need of repeating all the names while it is reflected that the application is arising from Land Case No. 129 of 2022. That in any case, since there is a settlement, the only parties are the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That non-disclosure is not fatal. Nevertheless, the court may direct parties to disclose the parties. He said that it is not necessary to list them down because of the Deed of Settlement.

As for the third point of objection, Mr. Nyangarika said that, there is nothing as an intention to challenge the Deed of Settlement in the

whole of the application. That the applicants are not parties to the Deed of Settlement so they cannot challenge it. That even the order of temporary injunction cannot challenge the Deed of Settlement.

As for the fourth point of preliminary objection he said that under Order XXXVII Rule 2 (1) of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**), an application for temporary injunction can be supported by an affidavit, which is the case herein. That even Order XLIII Rule 2 of the CPC, the Chamber Summons has to be supported by an affidavit and not all applicants have to file their affidavit. That the contents of an affidavit cannot be challenged through preliminary objection. That there is no point of law raised as those are facts which ought to be argued in the main application. That the issue of verification was not raised in the notice, and it was raised during submission. He prayed for the objections to be dismissed with costs.

In rejoinder, Mr. Ododa reiterated his main submission and added that certificate of urgency talks of the intention to challenge the deed of settlement, also in paragraph 9 of the affidavit. That Order XXXVII

Rule 2 (1) of the CPC does not state anywhere that one applicant can swear an affidavit on behalf of the other. That there is a misconception, and it is not correct. On the issue of discretion of the court he said that once a decision has been made the court becomes *functus officio*. That the applicants were not parties to the Deed of Settlement and the mention of My Space and 15 Others is nowhere in the court documents, so saying the application arises from Land case No.129 of 2022 is not correct but it is a new case that ought to have been filed separately. That My Space and 15 others being not in court may create multiplication of cases. He insisted that the application be dismissed.

The main issue for consideration is whether the preliminary points of objection raised by the 1<sup>st</sup> respondent has merit.

Mr. Ododa argued the first point of preliminary objection that this court lacks power to issue temporary injunction on different persons on the same subject matter. In rebuttal, Mr. Nyangarika observed that this is not point of law, rather it needs ascertainment of the facts.

Considering the arguments from both sides, I find that Mr. Ododa did not mention any provision of the law alleged to have been offended by the applicants. In the landmark case of **Mukisa Biscuits** (supra) it was held among other things that:

*"Preliminary objection consists of a point of law which if argued may dispose of the suit. It cannot be raised if any fact has to be ascertained"*

Since Mr. Ododa did not mention which provision of the law was offended, the raised objection remains a matter of fact which does not qualify as preliminary point of objection in terms of the case of **Mukisa Biscuits** (supra). Thus, the first point of preliminary objection is devoid of merit.

On the second point of preliminary objection, Mr. Ododa argued that in the application only the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent are mentioned, that the other 15 respondents have not been mentioned by the applicant which in his view is fatal. I have noted and as correctly argued by Mr. Nyangarika, the applicants are seeking temporary injunction pending the final determination of Land Case No.129 of 2022. In the said Land case No. 129 of 2022, the 15



respondents have been clearly listed. In my view, the omission of their names in this application is not fatal as they are mentioned in the main case within which the ownership of suit property is in issue. Thus, the names of the 15 others are known through Land Case No.129 of 2022. The situation would have been different if the application at hand was independent and not in connection with Land Case No.129 of 2022. The second point of preliminary objection is also devoid of merit.

As for the third point Mr. Ododa is of the view that the applicants were not parties to the Deed of Settlement, thus it is bad in law for them to challenge the same. Mr. Nyangarika highly disputed Mr. Ododa's contention, that there is no aim of contesting the Deed of Settlement. In the Chamber Summons, the applicants are seeking the order of temporary injunction against respondents, pending the hearing and determination of Land Case No.129 of 2022. At any angle, the aim is to bar respondents from dealing with the subject matter in Land Case No.129 of 2022 not to challenge the Deed of Settlement. This application does not touch the merit of Land Case No. 129 of 2022, therefore there is nothing like challenging the Deed

of Settlement in this application. Mr. Ododa is talking about Certificate of Urgency in this application and in his view, it indicates that the Deed of Settlement is going to be challenged in this application. With respect, it is common knowledge that the court has to be moved by way of a Chamber summons supported by an affidavit (See Order XLIII, Rule 2 of the CPC). A Certificate of Urgency is not part of the pleadings. It is an administrative measure to indicate the urgency of the matter for the court to give it a priority. In other words, it is mostly used for speedy management of the case but cannot be considered as part of the pleadings. Thus, it was a misconception by Mr. Ododa to rely on it. This point too lacks merit.


In the fourth point of preliminary objection, Mr. Ododa challenges the affidavit, that it has been sworn only by the 1<sup>st</sup> applicant in absence of the 2<sup>nd</sup> respondent's authorization. I have noted that it is only the 1<sup>st</sup> applicant who has sworn the affidavit, further it is not a joint affidavit and there is no authorization by the 2<sup>nd</sup> applicant for the 1<sup>st</sup> applicant to swear the supporting affidavit on his behalf. Thus, I firmly hold that since there is no authorization as explained above, and the affidavit is not a joint affidavit it follows that the only affidavit

supporting the application is that of the 1<sup>st</sup> applicant. In that regard the fourth point of objection has merit and to that extent the 2<sup>nd</sup> applicant having no supporting affidavit is expunged from the record.

Having so observed the preliminary objections on points of law are dismissed save for the fourth objection to the extent that the 2<sup>nd</sup> applicant is expunged from the record. Costs shall follow events.

It is so ordered.



  
**V.L. MAKANI**  
**JUDGE**  
**27/02/2022**