

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

MISC. LAND APPLICATION NO. 409 OF 2023

**GOODCHANCE JOHN MSAKI..... 1ST APPLICANT
SEVERINI PETER MKINI.....2ND APPLICANT
ELIZABETH MACHANGE.....3RD APPLICANT
ISMAIL HASSAN KITEGO.....4TH APPLICANT**

VERSUS

**KIBAHA TOWN COUNCIL.....1ST RESPONDENT
MINISTRY OF LIVESTOCK & FISHERIES.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT**

RULING.

*Date of last order: 30/11/2024, 30/01/2024
Date of Ruling: 12/02/2024*

MWAIPOPO, J

The applicants herein have preferred this application under order 1 Rule 8(1) of the Civil Procedure Code Cap 33 R.E 2019 seeking for the following orders;

- a. That this Honourable Court be pleased to grant applicants leave to file a representative suit for and on behalf of 168 others whose names and signatures are annexed to the Affidavit which forms parts of this application.
- b. Any other relief as it may please the Honourable Court to grant in the circumstances.

The application is supported by the joint affidavit of **GOODCHANCE JOHN MSAKI, SEVERINI PETER MKINI, ELIZABETH MACHANGE, and ISMAIL HASSAN KITEGO** who are the applicants. Upon being served with the Chamber application, the Respondents also filed their Counter Affidavit sworn by Dennis Kahamba Festo, Principal Surveyor from the Office of the 1st Respondent.

When the matter came for hearing the Applicants were represented by Mr. Joseph Assenga, learned Advocate and the Respondents enjoyed the services of Ms. Jesca Shengena Principal State Attorney, Ms Lucy Matemu and Mr Revocatus Mathew, both State Attorneys. The Application was argued by way of written submissions pursuant to the timetable ordered by the Court.

Submitting in support of the application, the Counsel for the Applicant began his submissions adopting the Applicants Affidavit to form part of the submissions. He then proceeded to seek leave of the Court to withdraw the 3rd Applicant, one Elizabeth Machange from the Application and proceeding with the remaining three (3) Applicants. The learned Counsel argued that the other Applicants have consented to the withdrawal of Ms. Elizabeth Machange vide Para 13 of their Reply to Counter affidavit. They stated that their prayer is based on Order XXiii Rule 1(2) (b) of the Civil Procedure Code which allows the Applicant to withdraw from the application at any time after the institution of

the suit. In support of their submissions, the Counsel cited the case of **CRDB Bank Plc & 2 Others vs Aziz Mohamed Aboud & Morogoro Canvas Mills (1998) Ltd HC (Commercial Division) Cause No.277/2015 (unreported)** in which it was held that; the provisions of Order XXIII Rule 1(3) of the Civil Procedure Code apply to suits as well as Applications like the present one. The Applicants also cited Mulla's Code of Civil Procedure (10th Edition) as extracted from B.D Chipeta Civil Procedure in Tanzania at Page 234 to drive point home that if a party desires to withdraw from suit with liberty to refile them he must do so under sub rule 2 to permit him to withdraw from the case and not afterwards.

With regard to their application for leave to file a representative suit, the Counsel for the Applicant submitted that the Application has been filed under the provisions of Order 1 rule 8 of the Civil Procedure Code Cap 33 RE 2019. The Applicants pray for leave on behalf of 168 others whose names and signatures are annexed to the Affidavit (Attendance Register Annexure KLM 7) The Application is supported by the Joint Affidavit of all the Applicants and the Reply to Counter Affidavit. The Counsel further submitted that all conditions for filing an application for representative suit have been fulfilled as follows;

First and foremost, the Applicants have fulfilled the requirement of filing a representative by filing an application for leave registered as Misc. land Application No. 409/2023 which is already in Court. In support of this move

they cited the case of **Kiteria Manezes and 33 Others vs. Area Engineering work Ltd and the Attorney General (1998TLF 434.**

Secondly, the Applicants have cited the presence of those several or numerous persons who are interested on the intended main suit and are indeed willing to join in it. This requirement is supported by the case of **Abdallah Mohamed Msakandeo & Others vs City Commission of Dar es Salaam & 2 Others**[1998], where it was held that;

“The law requires an application for leave to file a representative suit to establish that numerous persons are similarly interested in the intended suit and they are willing to join it”.

He submitted that the Applicants’ Joint Affidavit reveals existence of several persons at three Mitaas of Kidimu, Lumumba and Mkombozi, Pangani Ward Kibaha Town Council. The Applicants and other persons are displeased with execution of scheme of regularization of interests in land dubbed as “Mradi wa Kupima, Kupanga na Kumilikisha Viwanja 20,000 Mitaa ya Kidimu, Lumumba na Mkombozi, Kata ya Pangani Halmashauri ya Mji Kibaha”. The impugned Project documents are marked as KLM3, under para 8 of the Affidavit. The existence of several persons who seek to challenge the project are witnessed by both annexure KLM 5 And KLM 7 which consist of the signed attendance Register of 172 people, minutes of the meeting and extract resolution. Further,

the Notice of Meeting KLM 6 invites all KLM residents who are not satisfied with the execution of the scheme of regularization and intended sale of their parcels of land to attend meeting for choosing few to represent them. Further "Azimio la Pamoja" marked KLM 7 shows clearly residents whose names are appended attended. The Counsel submitted that the facts are clear that the Applicants have shown presence of others who have similar interest and who are indeed willing to join the intended main suit. The chosen Applicants have appended their names, Mitaas, mobile phone numbers and signatures to the Joint Affidavit to express their willingness.

With regard to the arguments raised in the Counter Affidavit, the Counsel for the Applicants submitted that he gathered two points from it, one, that there is no proof that Denis Kahamba was authorised by the 2nd and 3rd Respondents to swear in the Counter Affidavit and two, there is partial denial and admission of the facts in the Joint affidavit and since are denying some facts this means there are triable issue which require determination of this Court. There are issues of land ownership and execution of scheme of regularization of interest within KLM which require determination of this case They cited the case of **Saulo Makungu & 18 Others v Busirime Village Council, & 2 Others Misc. Civil Application No29 of 2021. HC Musoma** (unreported), to cement their position that the Applicants have signified their willingness to join in the said suit to fight for their land rights and thus have met the

requirements stated under Order1 Rule 8 of the CPC. They finally prayed for the Court to allow and grant the Application for leave to file a representative suit and the three Applicants be allowed to represent 168 others whose names and signatures are annexed to the supporting Affidavit.

Submitting in rebuttal, the Counsel for the Respondents prayed to adopt the contents of the Counter Affidavit to form part of their submissions in Court. She then proceeded to respond to the prayer by the Applicants for the withdrawal of the 3rd Applicant, Elizabeth Machange, relying on Order XXIII Rule 1 (2) (b) which provide for the withdraw of suits and abandonment of part of the claim. The Counsel argued that contrary to the cited provision, in the Application at hand, the Counsel for the Applicants pray to remove one of the parties to a suit, so she submitted that the Counsel for the Applicants has misdirected himself on the said order since it deals with withdrawal or abandonments of suits as per the notes on the margin. She thus prayed for his prayer not to be entertained by this Court.

The learned State Attorney submitted that, since the Applicants are applying for leave to file a representative suit, after purporting to be appointed by 168 others, one Applicant cannot be withdrawn from the suit unless the whole Application is withdrawn with or without liberty to refile it. She contended further that, 168 people appointed four people to represent them and not three people. Thus their consent is needed when the number of their

appointed representative is reduced. As the Application is of common interest if the Applicants wish to remove one Applicant, then they have to withdraw the Application and file a fresh one if they so wish. In this regard the Respondents thus distinguished the case of **CRDB Bank PLC** (supra) as it dealt with the issue of withdrawal of a claim /suit and not parties to the Application.

The learned State Attorney argued that, the Applicants submission is misconceived hence misleading as the Counsel for the Applicants has raised a new ground in the Affidavit contrary to what their Application is seeking and has cited Order XXIII Rule 1 (2) (b) while the main application was filed under Order 1 Rule 8 of the CPC Cap 33 RE 2019 . She thus maintained that the Application is incompetent for being omnibus and for containing new issues at the stage of hearing, something, which amounts to departure from pleadings and submissions from the bar. She referred the Court to the case of **James Funke Gwagilo vs AG [2004] TLR 161, Hood Transport Company Limited vs East African Development Bank** Civil Appeal No.262 of 2019, **CAT** (unreported) and the case of **Godchance John Msaki and 3 Others Vs. Kibaha Town Council and 2 Others Misc. Land Application No. 409/2003** (unreported) to cement the position that parties are bound by their own pleadings. The Counsel thus concluded under this point that; the Application is incompetent for raising a prayer which is not supported by an Affidavit from Elizabeth Machange to prove the allegation, secondly, for being

omnibus and thirdly, for being incompetent for raising facts which have not been pleaded before in the affidavit hence the Application should be struck out with costs.

Regarding grounds for granting leave to file a representative suit, the counsel for the Respondents submitted that the Application for representative suit must meet the elements provided under Order 1 Rule 8 of the Civil Procedure Code, that parties should have (1) Common interest (ii) willingness to join in the suit (iii) consent to the person sought to be represented.

She alluded that the Application has not met the conditions above because the Applicants' submissions to withdraw the 3rd Applicant raises issues as to whether the Applicants have common interest in the suit, which is an important criterion to be decided before the Court grants leave to file a representative suit. The prayer for the withdrawal of the 3rd Applicant also automatically removes her from the 90 days statutory notice served to the Respondents. This consequently indicates that that the Applicants have no common interest in the suit, are not willing to join in the suit and that the Applicant has not consented to be represented hence it is their submissions that the Application has not met the requirements of the law and granting it will create more chaos.

With regard to the criteria for common interest, the learned State attorney submitted that the Application has not met the condition since the 3rd Applicant did not serve the Respondents with the statutory notice of intention to sue them as required by section 106 of the Local Government (Urban Authorities Act) since her name is not listed in the statutory 90 days notice with Ref No. NA/GC/09/2023 dated 5th March 2023 annexed as KLM 4. She argued that since the 3rd Applicant did not serve the Notice then the Application was wrongly instituted and the only remedy is to strike it out.

With regard to the criteria of the consent of the persons sought to be represented, there is discrepancy on their signatures, which lack proof that they consented. She further contended that there is no proof that the 3rd and 4th Applicants were present in the said meeting. The act of the 3rd and 4th Applicants to acknowledge the facts of the jointly sworn Affidavit while they were absent in the said meeting makes the Affidavit incurably defective. That the 3rd Applicant apart from not being in the meeting of 172 claimants convened on 17/06/2023, she was also not appointed by 172 claimants to represent them therefore she falls short to be consented to by the people sought to be represented. Worse enough she is not among the 172 claimants and in case she is added the total number will become 173 instead of 172 hence the Application is incompetent and it should be struck out with costs. She further submitted that this Court should act judiciously before granting this

application since the 3rd Applicant has shown no interest and there are so many others who have already paid for their plots but are acting under mob psychology hence they have lost interest to pursue the matter.

The Counsel also asserted that the Applicants should not be granted leave to represent others as they have failed to establish prima facie ownership of the suit land and how 172 claimants own the suit land, the size of the land each one owns. The purported attachment showing ownership of the suit land refers to only 21 people and among them, only one person Ismail Kitogo is among 172 people, the rest are strangers to the Application. He added that the Joint Affidavit cannot be relied upon as it contains untrue statements, that the said 3rd Applicant served the statutory notice to the Respondent while he did not do so as according to annexure KLM 4, she never served such notice to the Respondents. Therefore, the Affidavit cannot be relied to. She referred the Court to the case of **Kihila William & 5 Others v National Ranching Company Ltd & 2 Others Misc. Civil Application No.11 of 2022 HC Bukoba Registry (unreported)** whereby when narrating the case of **Igazo Messina vs Willow Investment SPRL, Civil Application No. 21 of 2001 CAT (Unreported)** the CAT held that;

Affidavits should only contain true facts....

With regard to the issue raised by the Applicants that the Deponent in the Counter Affidavit was never authorised to undertake the task, the learned State Attorney stated that, one Dennis Kahamba Festo is a Government employee holding the principal level position and an authorised officer for 1st 2nd and 3rd Respondents hence able to depone the facts which are in his knowledge and which he believes to be true. Therefore the submissions by the Applicants are misconceived.

Having gone through the rival submissions of the trained legal minds the crucial question is whether the Application at hand has merits and consequently the Court should grant leave for the Applicants to file a representative suit on behalf of 168 Applicants.

However, before I proceed with the analysis of the merit of the Application, the counsel for the Applicant has moved this Court to grant the Applicants leave to allow the 3rd Respondent, one Elizabeth Machange, to withdraw from the Application and proceed with the remaining three (3) Applicants. The learned Counsel has stated that the other Applicants have consented to her withdrawal and this is reflected under paragraph 13 of their Reply to Counter Affidavit. That they have made the prayer under Order XXIII Rule 1(2) (b) of the Civil Procedure Code which allows the Applicant to withdraw from the Application at any time after the institution of the suit whenever the Court is satisfied that there are other sufficient grounds for allowing the Plaintiff to institute a fresh

suit on the subject matter of the suit or part of a claim. The court may on such terms as it thinks fit grant the Plaintiff permission to withdraw from such a suit or abandon part of a claim with liberty to institute a fresh suit in respect of the subject matter of such a suit or such part of a claim

The Applicants have argued that these provisions are also applicable to Applications. I have scrutinised the provisions and noted that the Applicants have to submit reasons to the satisfaction of the Court that there are grounds or grounds exist for allowing the Applicant to withdraw from the case. Looking at the circumstances in the instant application the Applicants' Affidavit is silent on the issue of withdrawal of the 3rd Applicant. The issue has just suddenly surfaced in the Reply to Counter Affidavit as an afterthought. The main issue which relates to the Application is based on Order 1 Rule 8 and not Order XXIII Rule 1(2)(b). After carefully going through the provisions of Order XXIII 1(2)(b), this Court agrees with the Counsel for the Respondents that the prayer for the withdrawal of the 3rd Applicant from this application is a new issue, which has been raised during hearing of the Application at the stage of doing a Reply to Counter Affidavit. It is my view that this prayer was supposed to be filed as a separate Application and accompanied by sufficient reasons for the withdrawal of the 3rd Applicant including her supporting Affidavit. The Application is incompetent for not being supported with her Affidavit. I thus agree with the submissions by the Counsel for the Respondents that; since the

Applicants are applying for leave to file a representative suit after purporting to be appointed by 168 others, one Applicant cannot be withdrawn from the suit at the stage of hearing, unless the whole application is withdrawn with or without liberty to refile it. Indeed the 168 people appointed four people to represent them and not three people. Thus their consent is needed when the number of their appointed representatives is reduced. As the Application is of common interest if the Applicants wish to withdraw one Applicant from the Application, then they have to withdraw the whole Application and file a fresh one if they so wish. In this regard I also agree with the Respondents that the case of **CRDB Bank PLC (supra)** is distinguishable since it dealt with the issue of a withdrawal of a claim /suit and not parties to the Application.

Secondly, I am with all four corners with the Respondents that the submission by the Applicants is misconceived hence misleading as the Counsel for the Applicants has raised a new ground in the Affidavit contrary to what their Application is seeking and has cited Order XXIII Rule 1 (2) (b) while the main application was filed under Order 1 Rule 8 of Cap 33. It thus makes the application to be incompetent for being omnibus and for containing new issues at the stage of hearing, something, which amounts to departure from pleadings and submissions from the bar. I share the position of the Respondents that parties are bound by their own pleadings whose proof is cemented by the evidence adduced. When the Court is invited on an issue,

then the same must be featured in the pleadings. See the case of **James Funke Gwagilo (supra), Hood Transport Company Limited (Supra) and Godchance John Msaki and 3 Others (supra)** cited by the Respondents.

It is my further view that since the Application for a representative suit involves numerous people and the Applicants are appointed by those people through a special meeting, therefore it is the said meeting which can make a decision on this issue and not the three Applicants herein only. The prayer for withdrawal is therefore devoid of merit.

I now move to the merit of this Application. In the determination of this issue, the relevant law providing for the Application for representative suit is order 1 Rule 8(1) of the CPC. The Order reads as follows;

In one suit, one or more of such persons may, with the permission of the Court, sue or be sued or may defend, in such a suit, on behalf of or the benefit of all persons so interested, but the court shall in such cases give, at the Plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or where from the number of persons or any other cause service is not reasonably practicable, by public advertisement, as the court in each case may direct.

From the above-cited Order 8 rule 1, three elements must be fulfilled;

- i. Leave of the Court must be obtained
- ii. Common interest in the suit and willingness to join in the suit
- iii. Consent of the person sought to be represented

It is trite law that whoever is applying for a representative suit must meet the elements stated above. Starting with the first condition; It is an established principle that a person can only act as a representative and initiate proceedings on behalf of others with the same interest after he or she has obtained leave of the Court . In the case of Saulo **Makungu and 18 Others vs Busirime Village Council and Others Misc. Civil Application No. 29 of 2011, Kiteria Manezes and 33 Other vs Area Engineering Work Ltd and the Attorney General (1998) TLR 434.** It was held in this case that;

A pre condition to filing a representative suit is that an application for leave to file such a suit has first to be made.

Further in the case of **Sivanus Kotei and others versus Dodoma City Council and AG Misc. Civil Application No. 56 of 2023** it was stated that;

It is trite law that the person or persons who want to use or defend the suit on behalf of or for the benefit of all persons having the same

interest in the suit should apply for leave to institute a representative suit

With regard to this condition, the Applicants have contended that they have fulfilled the requirement of filing a representative suit by filing an application for leave registered as Misc. land Application No. 409/2023 which is already in Court. To support their arguments they cited the case of **Kiteria Manezes and 33 Others (Supra)**

I agree with the Applicants that this criteria has been met and it will not detain me for a long time. The Respondents have not disputed this fact in their submissions. Save for other elements.

With regard to the second element, that is Common interest in the suit and willingness to join in the suit. The law requires that an Application for leave to file a representative suit to establish that numerous persons are similarly interested in the intended suit and they are willing to join it. This requirement is supported by the case of **Abdallah Mohamed Msakandeo & Others vs City Commission of Dar es Salaam & 2 Others**[1998] where it was held that;

"The law requires an application for leave to file a representative suit to establish that numerous persons are similarly interested in the intended suit and they are willing to join it. The mere existence of numerous persons in the suit does not suffice the grant to leave to

file a representative suit. The Applicants have to show their willingness to be represented by one or several of them”.

I will analyse these two criteria together or simultaneously. In the course of doing it I have gone through the documents and records contained in the file in order to satisfy myself with the submissions of the parties and whether or not this criteria has been met. In the course of my perusal I have noted that the Applicants have attached a list of those several or numerous persons who are interested on the intended main suit and are indeed willing to join in it. The Affidavit reveals that they reside at three Mitaas of Kidimu, Lumumba and Mkombozi Pangani Ward Kibaha Town Council and are displeased with execution of scheme of regularization of interests in land dubbed “Mradi wa Kupima Kupanga na Kumilikisha Viwanja 20,000 Mitaa ya Kidimu, Lumumba na Mkombozi, Kata ya Pangani, Halmashauri ya Mji Kibaha”. The attached list consist of the signed attendance Register of 172 people, minutes of the meeting and extract resolution. The notice of meeting KLM 6 invites all KLM residents who are not satisfied with the execution of the scheme of regularization and intended sale of their parcels of land to attend meeting for choosing few to represent them. Further Azimio la Pamoja marked KLM 7 shows clearly residents whose names are appended to the list who attended the said meeting. While the Notice indicates the presence of numerous persons who are purporting to have similar interest and who are indeed purportedly



willing to join the intended main suit, I have also noted and observed that the 3rd Applicant in the Application did not serve the Respondents with the statutory notice of intention to sue the Government as required by section 106 of the Local Government (Urban Authorities Act) since her name is not listed in the statutory 90 days notice with Ref No. NA/GC/09/2023 dated 5th March 2023 annexed as KLM 4. Since the 3rd Applicant did not serve the Notice then the Application was wrongly instituted, the Applicants have failed to prove that they have common interest in the matter they wish to pursue and I agree that the only remedy available is to strike it out. Indeed the mere existence of numerous persons in the suit does not suffice the grant to leave to file a representative suit. The Applicants must show and prove that they have common interest and they are willing to be represented by one or several of them". Going by the prayer for the withdrawal of the 3rd Applicant and the 90 days Notice to sue, it shows that 3rd Applicant does not have common interest with the rest of the group and she is not willing to be represented by others or even be part of the Application. (See the case of **Abdalla Msakandeo** (supra) With regard to the criteria of the consent of the persons sought to be represented, as submitted by the learned counsel for the Respondents I have noted that there is discrepancy on the signatures of the Applicants, since the attached record of the meeting indicates that the 3rd Applicant did not attend the said Meeting hence did not sign. That the 3rd Applicant apart from not



being in the meeting of 172 claimants convened on 17/06/2023, she was not also appointed by 172 claimants to represent them, therefore she falls short to be consented by the people sought to be represented. I thus agree that she is not among the 172 claimants and in case she is added the total number will become 173 instead of 172 hence these shortfalls makes the Application to be incompetent. As for the issue raised by the Respondents that the 4th Applicant is not in the list of the people who attended the meeting, the argument is misconceived since the 4th Applicant's name and signature appear under number 45 in the list. However this does not still cure the defects noted above. Further the Respondents have argued on the issue of the incompetence of the Affidavit for containing untrue facts. They have cited the act of the 3rd Applicant of acknowledging the facts of the jointly sworn Affidavit while she was absent in the said meeting hence making the Affidavit incurably defective since the 3rd Applicant has shown no interest and was not part of the 90 days Notice issued to the Respondents and whatever she stated in the Affidavit amounted to lies and the Joint Affidavit cannot be relied upon as it contains untrue statements. I agree with these assertions by the Respondents and the position in the case of **Kihila William & 5 Others (supra)** and the case of **Igazo Messina (supra)** cited by the Respondents where the CAT held that;

An Affidavit being a substitute of oral evidence should only contain statements of facts. Since the Applicants jointly

swore that they all obtained the consent of 741 people sought to be represented while not, the said joint affidavit cannot be relied upon.

With regard to the arguments by the Respondents that the Applicants should not be granted leave to represent others since they have failed to establish prima facie ownership of the suit land and how 172 claimants own the suit land, the size of the land each one owns, I am of the position that we are yet to reach that stage where the Applicants will be required to show proof of ownership. The issue is not supposed to be dealt with in deep or extensively at this stage because as it goes to the merit of the matter. I however share the views of the Respondents that the purported attachment showing ownership of the suit land refers to only 21 people and among them, only one person Ismail Kitogo is among 172 people, the rest are strangers to the Application. This makes the Application incompetent for containing untrue statements. See the case of **Kihila William and others** (supra)

With regard to the issue raised by the Applicants that the Deponent in the Counter Affidavit was never authorised to undertake the task, I agree with the submissions by the learned State Attorney stated that, one Dennis Kahamba Festo is a Government employee holding the principal level position and an authorised officer for 1st 2nd and 3rd Respondents hence able to depone the

facts which are in his knowledge and which he believes to be true. Therefore the submissions by the Applicants are misconceived.

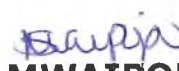
Therefore, all the three conditions must be met for an application to be granted. However, the Applicants have failed to satisfy the Court that their Application has met the three conditions enumerated above. The Application has only satisfied one requirement out of three. Thus the Application is incompetent. I hereby strike it out with costs. It is so ordered.

DATED at Dar Salaam this 12th day of February 2024.


S. D. MWAIPOPO
JUDGE
12/02/2024



Ruling delivered by E. Sanga RM, this 12th day of February 2024 in the presence of Learned Advocate Joseph Assenga for the Applicants and Ms. Jesca Shengena, Principal State Attorney and Lucy Matemu, State Attorney for the Respondents, is hereby certified as a true copy of the original.


S. D. MWAIPOPO
JUDGE
12/02/2024

