

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 124 OF 2023**

**MIRIAM JEREMIAH SOLOMON ..... APPLICANT**

**VERSUS**

**JOHN MAROA DAUDI ..... 1<sup>ST</sup> RESPONDENT**

**AZIM HUSSEIN DEWJI ..... 2<sup>ND</sup> RESPONDENT**

**KIGAMBONI MUNICIPAL COUNCIL ..... 3<sup>RD</sup> RESPONDENT**

**COMMISSIONER FOR LANDS ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

*24/04/2023 & 30/05/2023*

**A.MSAFIRI, J**

In this application filed on 15.03.2023 under the certificate of urgency, the applicant Miriam Jeremia Solomon is seeking for the Court to grant the so called *Mareva injunction* restraining the respondents herein from dealing with or the whole of a piece of land described as Plot No. 589 Block B Amani Gomvu area in Kigamboni Municipality pending the lapse of 90 days' Notice against the respondents.

The application was brought under the provisions of Section 2(3) of the Judicature and Application of Laws Act Cap 358 [R.E. 2019] and Section

*Alle*

95 of the Civil Procedure Code Cap 33 [R.E. 2019] by way of chamber summons supported by an affidavit deponed by Miriam Jeremiah Solomon (the applicant).

The application was opposed by the respondents who filed their counter affidavits. With the counter affidavit, the 2<sup>nd</sup> respondent filed a Notice of preliminary objection in which he raised three preliminary point of objections namely:

- 1. The Application is incurably defective for containing an affidavit which totally contradicts the provisions of Section 10 of the Oaths and Statutory Declaration Act Cap 34 [R.E. 2019]*
- 2. The Applicant has no locus standi to institute the current application: ALTERNATIVELY,*
- 3. The claims contained in the application are totally in contradictions of the provisions of Order II Rule 5 of the Civil Procedure Code, Cap 34 [R.E. 2019]*

As a rule of law and practise, this Court first has to determine the raised preliminary objection. On 24.04.2023 when the matter had come for hearing of the same, which was done orally, the applicant was represented by Mr. Alex Rusibamayila learned Advocate, the 1<sup>st</sup> and 2<sup>nd</sup>

*Alle*

respondents were represented by Ashura Mansour learned Advocate while the 3<sup>rd</sup> ,4<sup>th</sup> and 5<sup>th</sup> enjoyed the service of Lucy Kimaryo learned State Attorney.

Ms Mansour learned Advocate was the first to kick the ball rolling in support of the raised preliminary objection by consolidating the 2<sup>nd</sup> and 3<sup>rd</sup> preliminary objection and argued them as one.

She submitted on the 1<sup>st</sup> point of objection that the applicant's affidavit is defective for contradicting Section 10 of the Oaths & Statutory Declaration Act, Cap 34 [R.E. 2019]. That, the law provides that a person who is making a statutory declaration should be the same person who verifies and who depones the affidavit. However, in the applicant's affidavit the verifier and deponent appears to be different. That the person who signed the verification clause is different from a person who signed as deponent which is contrary to the law.

She referred the case of **Waziri Bukuku vs Halima Kondo**, Misc. Application No, 111 of 2010 High Court Land Division where the defective affidavit resulted to the dismissal of the application.

Ms Mansour contended further that the applicant's affidavit failed to indicate whether the applicant was physically known to the Commissioner for Oath who testified it or was identified to the latter by another person.

*ALLS*

She argued that, such defect is fatal as it resulted to the struck out of the application in the case of **Elisikia Emmanuel Mgonja vs Philimin Stephano Mbugo**, Application No. 8 of 2022, HC Moshi Registry.

On the 2<sup>nd</sup> and 3<sup>rd</sup> points of objections, Ms Mansour was of the view that the applicant is not the Administratrix of the estate of her late husband, hence that she has no locus to sue on her individual capacity unless there is proof that the suit land belongs to her. She prayed that this suit be dismissed with costs.

In response, Mr. Rusibamayila contended that Section 10 of the Oaths & Statutory Declaration Act, does not stipulate that the verifier and the deponent should be the same person, hence that the applicant's affidavit is not contrary to the law. He stated that the case of **Waziri Bukuku vs. Halima Kondo,(supra)** is distinguishable from this application and that it does not fit in the current circumstances.

However, he pointed that the affidavit clearly indicates that the applicant was introduced to the Commissioner for Oath by Linda Emmanuel, hence that failure to cross the alternative is minor defect to defeat the applicant's affidavit.

On the consolidated 2<sup>nd</sup> and 3<sup>rd</sup> points of objections, Mr Rusibamayila contended that the applicant indicated that she is the Administrator of the *Aelle*

estate of her late husband when she was replying to the 2<sup>nd</sup> respondent's counter affidavit at page 2 paragraph 4 of the same.

He added that beside that, Order XXX Rule 1 of the CPC and Sections 99 and 100 of the Probate and Administration of Estates Act, gives mandates to the executor or Administrator to represent the deceased interest in all purposes of the estate of the deceased. Hence that the applicant has interest over the suit land. He prayed for the Court to overrule the raised preliminary objections and let the application to proceed on merit.

In rejoinder, Ms. Mansour reiterated what was stated in submission in chief and further added that Order XXX Rule 1 of the CPC cannot apply in this situation.

After a careful scrutiny from the submission of the parties, the issue for determination is whether the raised preliminary objections have merit.

I will be guided by the principle established in the case of **Mukisa Biscuits Manufacturing Co. L.T.D versus West End Distributors L.T.D** (1969) EA 696, which affirmed a preliminary objection to have the following tests; -

*"A preliminary objection consists of a **point of law** which has been **pleaded**, or which arises by clear implication **out of***

*Adls.*

*pleadings, and which if argued as a preliminary point **may dispose of the suit**". (emphasis added).*

Further, the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women Christians Association of Tanzania**, Civil Appeal No. 2 of 2010 (Unreported) gives a detailed account of what a point of law is. It was observed in the said case that; -

*" .....a point of law must be that of sufficient importance and, I would add that **it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**"(Emphasis supplied).*

Starting with the consolidated 2<sup>nd</sup> and 3<sup>rd</sup> preliminary objections, in the instant application, it would appear that the said objection is premature. I say so, because, the applicant did not plead the issues of husband and wife neither the issues of administration of estates. As we all know, the preliminary objections must arise from the pleaded facts and not otherwise.

I have gone through the pleadings of the applicant, and I am of the view that the said preliminary objection does not arise from the pleaded facts. *ALLS.*

of the applicant, hence premature. Even if the preliminary objection could have been raised from the pleadings, I am of the firm belief that this point is of fact and law, that means it needs to be ascertained by evidence on the marital status of the applicant and whether she is the administratrix of the estate of her late husband or not.

Basing on that, I overrule the consolidated points of objection.

Coming to the 1<sup>st</sup> point of objection, it was argued that the applicant's affidavit was not prepared in conformity with the provision of Section 10 of the Oaths and Statutory Declaration Act, which requires the verification to be signed by the deponent.

Despite the fact that the verification clause was signed by the applicant Miriam Jeremiah Solomon on the place where it was supposed to be signed by the deponent, the applicant, it was not so done, as a result, that appears to be a defect contrary to the law as argued by Ms. Mansour.

However, in my view, I find this defect minor and curable because the applicant can be ordered to sign on that part and cancel the previous signature appearing on that part in order to save time and justice. This can be done by invoking the overriding objective principle established under Section 3A of the Civil Procedure Code. *Atto*

Applying the above principle, the defect in the applicant's affidavit can be cured by inserting a signature of the deponent as her name appears on the same, such amendment can be done as an alternative of striking out the matter.

On the other hand, the clause is very clear that the deponent was identified to the Advocate by Linda Emmanuel, and this is seen at page 7 of the applicant's affidavit.

It is my finding that both preliminary objections have no merit and are hereby overruled. Costs shall follow the event.

It is so ordered.



**A. MSAFIRI**

**JUDGE**

**30/05/2023**

