

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF TABORA
AT TABORA

MISC. CIVIL APPLICATION NO. 30 OF 2023

(Originating from Civil Revision No. 2 of 2021)

1. IDDI SEIF 2. MAIKO LUSAGANYA 3. JONAS MANYANYA 4. HAMISI LUMONDYA 5. PIUS ILINDILO 6. NIA RASHIDI	}APPLICANTS
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VERSUS

SIMON WOLFULGANG NDAUKA.....RESPONDENT

RULING

Date of Last Order: 13/09/2023

Date of Ruling: 18/09/2023

MATUMA, J.

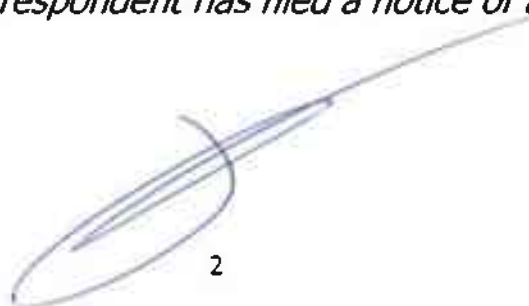
The Applicants through Civil Revision No. 2/2021 obtained a Ruling and Drawn Order against the respondent for payment of the value of 315 cows and 21 goats which were wrongly attached and sold in execution of a decree

in Civil Case No. 7 of 2019 at Tabora District Court. When the applicants were supplied with the drawn order in respect of Civil Revision No. 2/2021 supra, they discovered some omissions in the drawn order whereas the ruling of this court ordered the respondent to return to the Applicants the value of 315 cows and 21 goats which were wrongly attached and sold but the drawn order was drawn with an omission to include such order. They thus on 25/05/2023 wrote a letter to this court seeking for the court to rectify the said drawn order. This court vide its letter dated 28/06/2023 advised them to lodge a formal application so that both parties to the matter are summoned and heard on the application for rectification of the drawn order.

In compliance to the advice, the applicants lodged this instant application under section 96 of the Civil Procedure Code, Cap. 33 R.E 2019 seeking for rectification of a drawn order which was obtained vide Civil Revision no. 2 of 2021 in this court to include the herein above stated order of the court.

The respondent having been served with this application lodged his counter affidavit affirmed by his advocate Mr. Akram Magoti. In addition thereto, he lodged a notice of preliminary objection with three points of objection. The objections raised are to the effect that;

- i) *That the applicants' application is time barred.*
- ii) *That this court has no jurisdiction to entertain this application because the respondent has filed a notice of appeal to the Court of Appeal.*



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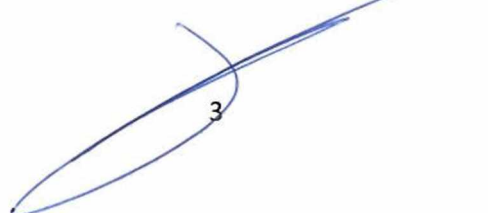
iii) *That the applicants' application is bad in law for not being supported by affidavits of the 1st, 2nd, 3^d, 5th, and 6th applicants.*

At the hearing of this Preliminary objection, the applicants were present in person and had the service of Mr. Frank Kavishe learned advocate. On his party the respondent who was also present, he had the services of Mr. M.K. Mtaki and Akram Magoti learned advocates.

Mr. Akram Magoti learned advocate argued the grounds of objection whereas in the first ground he submitted that the application of this nature under section 96 of the CPC supra has no prescribed time limitation. As such, it is subject to item 21 to the schedule of the Law of Limitation Act, Cap. 89 R.E. 2019 which provides for the general time limitations in respect of all applications whose time limitation is not clearly stated.

The learned advocate argued that in accordance to item 21 to the schedule of the Law of Limitation Act supra, time limit for applications of this nature is sixty days but this application has been filed beyond such statutory time limitation. To back up his arguments he cited the case of ***Maria Godwin Mawa versus Bakari Mawa, Land Appeal no. 28 of 2021*** (HC) at Moshi.

On the second objection, the learned advocate for the respondent argued that since they have filed a notice of appeal to the Court of Appeal, this court has no jurisdiction. He cited the case of ***Exaud Gabriel Mmari (As legal and personal representative of the estate of the late Gabriel Barnabas Mmari) versus Yona Seti Akyo & others, Civil Appeal No. 91 of 2019*** (CAT).



On the last Preliminary Objection, the learned advocate argued that only the 4th Applicant deposed an affidavit in support of this application while the rest of the applicants did not depose any affidavit in support of their application. He added that had the 4th applicant been authorized by his fellows to depose the affidavit and duly deposed such affidavit in their behalf, such affidavit would as a matter of law suffice but unfortunately in the instant matter in accordance to the affidavit of the 4th respondent, he was authorized by his fellows to affirm a counter affidavit which is a different document to the affidavit as the two serves different purposes.

The learned advocate thus prayed for this application to be dismissed with costs in terms of section 3 of the Law of Limitation Act.

Mr. Frank Kavishe learned advocate in reply to the objections, argued in respect of the first limb of the objection that section 96 of the CPC prescribes the time within which an application of this nature can be lodged which is **"at any time"** and therefore it is not subject to the cited provision of the law of Limitation Act. He distinguished the case of Maria Godwin to the instant matter because Maria's case was for extension of time while this one is merely for rectification of the drawn order.

On the second Preliminary objection, the learned advocate submitted that this court has jurisdiction to entertain this matter because it is not intended to revise the impugned decision but merely to correct the clerical errors. On the 3rd Preliminary Objection, Mr. Frank Kavishe learned advocate argued that an affidavit covering all applicants suffices to support the application and that in the instant matter the 4th applicant affirmed the

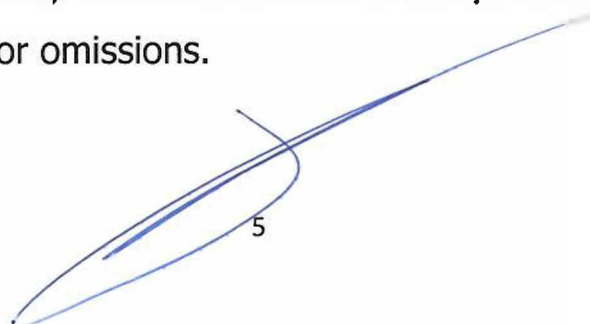
affidavit in his own behalf and on behalf of the rest of the applicants. He faulted Mr. Akram Magoti to rely on the phrase "**Counter affidavit**" which was just a typing mistake.

Having heard the arguments of the parties for and against the POs, I now determine them as hereunder.

In the first limb of the objection, I agree with Mr. Frank Kavishe learned advocate that section 96 of the CPC allows the party to the suit **at any time** to apply before the court for amendments of judgments, decrees or orders. Such provision is quite open and clear;

*"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, **at any time**, be corrected by the court either on its own motion or on the application of any of the parties."*

By "**purposive approach**" as it was held in the case of ***Joseph Warioba versus Stephen Wassira & Another (1997) TLR 272***, the Court of Appeal of Tanzania held that literal method of construing statutory provisions is completely out of date and the courts should interpret statutory provisions by purposive approach to give the real intent of the Parliament in enacting such provisions. By applying such approach, I find that such provision was made to spare time to either party to seek amendments or corrections of judgments, decrees or orders at any time on clerical errors, arithmetical mistakes or omissions.



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By including the phrase "*at any time*" in the provision, the law intended not to limit or subject the applicability of that provision to specific time. That provision is not for the court's own motion as Mr. Akram would wish us to believe because had it been so the said phrase would have been appealing in all provisions under which the court can act on its own motion. It is my firm finding that section 96 of the CPC is not there for injury or to affect either party. It is there just to accord the parties or the court an opportunity to have the judgments, decrees or orders amended or corrected to give the real meaning of the decision reached. It is not there for revising the already made judgment, decree or order. In that respect, it needs no specific time because no material prejudices can be occasioned and that is why the court is as well empowered to make the necessary rectifications suo motto unless the matter has already been overtaken by event under the circumstances to be apparent on record.

If we have to believe Mr. Akram's argument as being true, section 96 of the CPC supra would be having no useful purpose because if the judgment, decree or order is issued with clerical or arithmetical errors or omissions and sixty days passes without amendment or corrections then such judgment, decree or order would remain redundant with no meaning at all. Had it been so the section should have been specific that upon expiry of sixty days from the date of judgment, decree or order no amendments or corrections can be made on whatever omissions, clerical or arithmetical errors to such judgment, decree or order.

I therefore reject the arguments of Mr. Akram on this point and rule out that so long as the application for amendment or correction of the

judgment, decree or order is made not for the purposes of prejudicing either party but to give the said judgment, decree or order its real intent upon which it was issued, such application becomes competent and can be made at any time when need arises. The first limb of the Preliminary objection is thus dismissed.

The second Preliminary objection is not going to detain me much. First of all, it is a Preliminary Objection raised from the facts of the respondent himself. It is not founded on the pleadings filed by the applicants.

In the case of ***Shinyanga Mwananchi Garage versus The Attorney General & Another, Civil Case No. 02 of 2022***, this court at Shinyanga held that;

"The settled principle is that a preliminary objection should be raised from the facts pleaded in the plaint together with its annexures as being facts not in dispute. Such facts must be in contravention to the law."

Therefore, it is in law forbidden for a party to create his own facts and raise objections on them against the other party who has not pleaded such facts. Speaking on this matter, this court at Kigoma In the case of ***Festo Njau versus Reticia Nzozi (The administratrix of the estate of the late Tolegwa Muhere) and Another, Land Appeal No. 14 of 2021*** held;

"One cannot create his own facts and use the same to blow out the claimant/complainant thereof."



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Allowing such trend would prejudice plaintiffs or applicants as defendants/respondents would always be creating their own facts to attract legal course for the purposes of preempting the suits against them."

Therefore, it was wrong for the respondent to create his own facts and or to plead his own fact and raise objections against the applicants as that would be a one-sided battle.

Not only that but also the respondent has not attached the alleged notice of appeal be it to his counter affidavit or to the notice of his preliminary objection. The learned advocate in arguing such ground did not even cite the number of such appeal to the Court of Appeal or even the parties thereof. It is like, he wanted this court to go to the Court of Appeal to search for the existence of such notice of appeal and its current status.

The objection is therefore not backed up by any evidence serve for bare arguments of the learned advocate. Since the Preliminary objection has been raised on the facts pleaded by the respondent himself and since the pleaded facts by respondent required evidence to be attached which is missing, the purported preliminary objection is short of the requisite Preliminary Objection in law. It is therefore dismissed.

The last Preliminary Objection is nothing but a technical game tending to make this court as an arena for technical games. Mr. Akram Magoti learned advocate in his own submission agreed that one of the applicants may justifiably swear or affirm affidavit for his own behalf and on behalf of all other applicants provided that he has been authorized by the other

applicants to swear or affirm an affidavit in their behalf. He has even himself affirmed a counter affidavit on behalf of the Respondent herein.

In the instant matter the learned advocate avers that the 4th respondent was authorized to affirm **counter affidavit** and not **affidavit**. As such the 1st, 2nd, 3rd, 5th and 6th Applicants have no affidavits in support of their application.

I agree with Mr. Frank Kavishe learned advocate for the applicants that reading the chamber summons and the supporting affidavit in its context base, I find that the word "**Counter affidavit**" was a clerical error which did not prejudice the rights of the parties. It was intended to reflect that the 4th Applicant was authorized to affirm an affidavit and not counter affidavit.

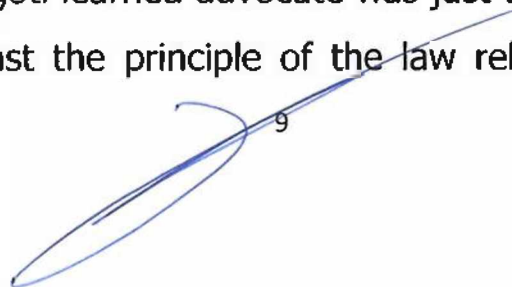
It is undisputed fact that what was deposed by the 4th applicant is an affidavit and not counter affidavit. It is titled "**AFFIDAVIT IN SUPPORT OF THE APPLICATION**". The 4th applicant in affirming such affidavit at paragraph one stated;

*"That I am affirming this affidavit for myself as well as dully authorized to affirm **this counter affidavit** on behalf of the 1st, 2nd, 3rd, 5th and 6th herein above"*

For all intent and purposes, the term "**Counter affidavit**" did not mean counter affidavit in its real sense. It was intended to mean "affidavit" and that is why it stated "**This** counter affidavit". By using the term "**This**" was to refer to the affidavit at hand.

Mr. Akram Magoti learned advocate was just trying to play a game of technicality as against the principle of the law relating to the overriding

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objectives as provided for under Article 107 A (2) (a) of the Constitution of the United Republic of Tanzania, 1977 and section 3A (1), (2), 3B (1), (a) & (e) of the Civil Procedure Code supra as amended by section 6 of the Written Laws (Miscellaneous Amendments) Act no. 8 of 2018.

In the circumstances, the third objection is as well dismissed. In its totality the preliminary objections are dismissed with costs.

It is so ordered.



MATUMA
JUDGE
18/09/2023

Court; Ruling delivered in the presence of the 1st, 2nd, 3rd, 4th, 5th applicants, Frank Kavishe learned advocate for the applicants and Akram Magoti learned advocate for the respondent.



MATUMA
JUDGE
18/09/2023