

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 36 OF 2023

- 1. RAMADHANI ATHUMANI PAZI 1ST APPLICANT**
2. SHABAN MOHAMMED MCHORA 2ND APPLICANT
3. ALLY KAWANDA 3RD APPLICANT

VERSUS

- 1. ABDALLAH HASHIM ZEIN SAGGAF..... 1ST RESPONDENT**
2. ASUMPTA MSHANA 2ND RESPONDENT
3. ABUBAKAR KUNENGE 3RD RESPONDENT
4. SARAH MSAFIRI 4TH RESPONDENT


RULING

Date of last Order: 24/5/2023

Date of Ruling: 08/6/2023

A. MSAFIRI, J.

The applicants namely Ramadhani Athmani Pazi, Shaban Mohammed Mchora and Ally Kawanda have filed this application under Order 1 Rule 8, Order XXXVII Rules 1,2,3 and 5, and Sections 68(c) and 95 all of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). They are seeking for among others the following orders;

1. That this Honourable Court be pleased to grant leave to the applicants to file a representative suit. 

2. This Honourable Court be pleased to issue an interim order against the respondents, their agents, servants and any person deriving authority from them, restraining the said respondents from selling, advertising for sale, inviting bids, commencing discussions for sale and or altering the status of ownership of properties over the disputed land.

The 1st respondent, while filing his counter affidavit, he also filed a preliminary objection on the following points of law to the effect that.

- a) *THAT, the Application is premature for being preferred in serious contravention of Local Government (Urban Authorities) Act, Cap 288 R.E 2010 as amended by Written Laws (Misc. Amendment). Act No. 1 of 2020.*
- b) *THAT, the suit is bad in law for it being preferred in contravention of the Government Proceedings Act, Cap. 5 R.E 2019 as amended by Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.*
- c) *THAT, the impugned suit is bad in law and incompetent for it being preferred in contravention of express provision of section 9 of the Civil Procedure Code, Cap 33 R.E 2019.*
- d) *THAT, the application is bad in law and untenable for being omnibus contrary to the laws and rules of civil practice.*

The 2nd, & 4th respondents did not file their counter affidavits. 

On 08/6/2023 when this matter was scheduled before the Court, Mr. Innocent Sama, learned advocate appeared for the applicants, while Mr. Ferdinand Makore, learned advocate appeared for the 1st respondent.

The 2nd, 3rd, 4th respondents were absent without notice.

Mr. Sama addressed the Court and prayed for the leave to withdraw the application because it contains many and serious irregularities which he claimed that they are clear in the chamber summons. He prayed to withdraw the application under Order XXIII Rule 1(2) (a), (b) of the Civil Procedure Code, Cap 33 R.E 2019 (herein the CPC) and that the withdrawal be granted without costs.

Mr. Makore objected the withdrawal prayer on the reason that, it is a settled law that the applicant cannot withdraw the application where there is a Notice of preliminary objection. He argued that to allow that will amount to preempt the raised preliminary objections.

Mr. Makore submitted further that the applicants through their counsel has conceded to some of the preliminary points of objection so the proper way was for the applicants to concede to the raised preliminary objections where the remedy is for the Court to strike out the same and not withdrawal. *Alle.*

He prayed for the withdrawal prayers by the applicants not to be granted and the Court be pleased to strike out the application with costs.

In rejoinder, Mr. Sama practically maintained his submissions and prayers before the Court.

Having heard the submissions by parties in this application through their counsels, I agree with the submissions by Mr. Makore for the 1st respondent that it is a cardinal principle of law that once a preliminary objection has been raised, the other party cannot seek for amendment or withdrawal as it is the case in the application at hand. This is for a reason that in whatever circumstances, amending or withdrawing the matter amounts to preempt the raised preliminary objection, and it might be seen as the party's attempt to correct the detected mistake by using the way of amendment or withdrawal. See the case of **Standard Chartered Bank & Another vs. VIP Engineering & Marketing Ltd & others**, Civil Application No. 222 of 2016, CAT, DSM (Unreported), where the Court of Appeal held that;

"It is trite principle of law that where a party has raised a preliminary objection in a case, the other party cannot be allowed to rectify the defect complained of by the party who raised the

Alls.

objection. This is because to do so would amount to pre-empting that preliminary objection."


Guided by that principle, the applicant cannot at this stage, be allowed to withdraw the matter.

Gathering from submission from the counsel for the applicant, the same has conceded to the raised preliminary objection. I say so because, some of the anomalies' pointed out by the applicant in the submission, were also raised in the preliminary objection. It is clear from the submission of the counsel for the applicant, the applicant is conceding to grounds no. 1 and 2 of the preliminary objection.

Since the applicant has conceded to the raised preliminary objection which makes this application incompetent before this Court, then as observed earlier the remedy available is for this Court to strike out the application.

The application is hereby struck out with costs.

It is so ordered.


A. MSAFIRI
JUDGE
08/6/2023

