

TANZANIA / JUDGMENT

ADELMARSI C

COURT
TANZLII

DECIDED
31 July 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM MISC. LAND APPLICATION NO. 11534 OF 2024 ADELMARSI C.
MOSHA..... Ist APPLICANT AVELINA J.
MARO..... 2nd APPLICANT JUBILATE TUMSIFU SAWE
(Administrator of the Estate of the late TUMSIFU E. SAWE..... 3rd
APPLICANT BERNO BATINAMANI (Administrator of the Estate of the late BONAVENTURE
MANALLA BATINAMANI..... 4thAPPLICAN CASIMIR JUMA
MABINA..... 5thAPPLICAN CHRISTOPHER
NYAKI..... 6thAPPLICAN CORNELIUS
KARIWA..... 7thAPPLICAN DELFINA LUSUVA
(Administrator of the Estate of the late JOHN EMILY LUSUVA..... 8th
APPLICANT DOREEN NGUMA PONDAMALI (Administrator of the Estate of the late ALFRED
MARTIN NGUMA..... 9thAPPLICAN EDDA LEO
NYAKI.....10TMAPPLICAN EMMANUEL ALIKO
MWABULAMBO..... 11TM APPLICANT FERDINAND A.
SOKA..... 12ndAPPLICAN GLADNESS E.
LYIMO..... 13rdAPPLICAN GODFREY JOSEPHAT
MSANYA (Administrator of the Estate of the late JOSEPHAT MSAMI
MSANYA..... 14TM APPLICANT GRACE N.
MUSHI..... 15TMAPPLICAN HILDA ISMAIL
MBUYEKU..... 16TMAPPLICAN HUGO J.
KISIMA..... 17TM APPLICANT IDD JUMA
SUED..... 18TMAPPLICAN LUCIANA LINUS
STWIPA (also Administrator of the Estate of the late LINUS KIKOKO STWIPA in the name of 1
LUCIANA L. KYAMHANGA..... 19th APPLICANT PETER
BARTHOLOMEW MOSHA.....20TM APPLICANT PHALET YASON
UKASHU..... 21TM APPLICANT BEATRICE PAUL LUVINGA
(Administrator of the Estate Of the late STANISLAUS MARTIN NGUMA..... 22nd
APPLICANT ROSE PETER SANGAWE..... 23rd APPLICANT SEATON
I. MLAY..... 24TM APPLICANT SHOSE MAKULE
(Administrator of the Estate of the late AISA TUHERI MAKULE..... 25TM
APPLICANT STANFORD HERWICK MOSES (Administrator of the Estate of the late HELENA

ROBERT MAMBEGELE.....	26 TM APPLICAN SUWIYE PETER
LANDA.....	27 TM APPLICAN THADEI J.
MUSHI.....	28 TM APPLICANT VALERIA T.
NGUMA.....	29 TM APPLICAN WAHIABORA
POLYCARP KIMARO.....	30 TM APPLICAN WINIFRIDA
SOKA.....	31 st APPLICAN THOMAS
LYIMO.....	32 nd APPLICAN VERSUS THE
ATTORNEY GENERAL.....	1 st RESPONDENT MINISTRY OF WORKS
AND TRANSPORTATION.....	2 nd RESPONDENT TANZANIA NATIONAL ROADS
AGENCY.....	3 rd RESPONDENT MINISTRY OF LAND HOUSING & HUMANI
SETTLEMENT DEVELOPMENT.....	4 TM RESPONDENT 2

RULING

12h & 31st July 2024 L. HEMED, J, This is an application brought by the applicants under sections 68 (e), 95 and Order XXXVII Rule 1 (a) of the Civil Procedure Code, [Cap. 33 RE. 2019]. The applicants are seeking for the following orders inter-parties- "... (c) That this court be pleased to make an order granting temporary injunction restraining the respondents or /and their agents, workmen, employer or any person under their instruction, from demolishing the plaintiffs premises pending the hearing and determination of land case No. 11 of 2024 pending in this court before Hon. Luvanda, J.

- (d) Costs of this application to follow events.
- (d) Any such other order (s) as this honorable court may deem fit and just to make The application has been supported by the affidavit deposed by Mr. Benito Mandele, Advocate of the applicants. The respondents opposed it vide the counter affidavit of one Eng. John Mkumbo, the principal officer of the 3rd Respondent. It should be noted that, when the matter was called on 29th May, 2024, Ms. Kause Kilonzo, learned State Attorney registered 3 a point of objection that the application is bad in law for being supported by a defective affidavit. The court directed both, the preliminary objection and the application to be argued simultaneously by way of written submissions. All submissions were filed pursuant to the filing schedule directed by the court. Mr. Benito Mandele, Advocate acted for all applicants while Ms. Kause Kilonzo, learned State Attorney, actively represented the respondents. Let me start with the Preliminary objection. I have extensively read the rival submissions and found that the basis of the objection is that the affidavit that supports the application is defective for containing hearsay evidence. The Learned State Attorney asserted that the law requires the affidavit to be confined to facts which the deponent is able of his own knowledge to prove and must be free from extraneous matters. It was the view of the learned counsel that the impugned affidavit is incurably defective for failure to meet the stated requirement provided under Order XIX Rule 3 (1) of the CPC. She submitted further that an advocate can swear and file an affidavit in proceedings which he appears for his client but on matters which are in the advocates personal knowledge. She glued her argument with the decision of the Court of Appeal of Tanzania in Lalago Cotton Ginnery and

oil Mills Company Ltd vs. The Loans and advances Realization Trust 4 (LART), Civil application No. 80 of 2002. The learned state attorney was of the view that the court cannot act on hearsay evidence. Reliance was put on the case of Said Salum Hamdun and 2 Others vs. The administrator General, Mise. Civil application No. 267 of 2022 where it was held inter alia that an advocate cannot be both counsel and witness in the same case. She ended praying the entire application be struck out. In reply thereof, Mr. Mandele contended that the impugned affidavit does not offend the provision of Order XIX Rule 3 (1) of the Civil Procedure Code [Cap 33 RE 2019]. He stated that the said provision has an exception that on matters of interlocutory application like the one at hand, affidavits founded on information are accepted. Mr. Mandele was of the further view that the limitations set out in Lalago Cotton Ginnery and Oil Mills Company Ltd vs. The Loans and Advances Realization to be Trust (LART) (supra) are met in that the deponent has the information which he believes to be true he has been appearing in previous proceedings from which he acquired the knowledge of the matters which he is now deposing to. He ended arguing the court to overrule the preliminary objection. 5 Having carefully considered the rival arguments by counsel for both parties as regard the preliminary objection, it is now apt to determine whether the objection is meritorious. It is worth to note that the point which this court is called to address is whether an advocates can depone an affidavit on information supplied to him/her by his/her client in a case. Order XIX, Rule 3 (1) of the Civil Procedure Code [Cap. 33. R.E. 2019] provides thus: - 'Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted provided that, the grounds thereof are stated' Basically, an affidavit is a sworn statement in writing made under oath or an affirmation before a Commissioner for Oaths. Affidavit being a written evidence must be confirmed to such statements as the deponent is able of his own knowledge to prove. I am aware that, under Order XIX Rule 3 (1) of the CPC (supra) there is an exception that in interlocutory application the affidavit can contain statements of the deponent's belief. The question is whether such exception is applicable to advocates? According to case law, an advocate can depone and file affidavit in proceedings in which he appears for the client but only on matters which are 6 in personal knowledge of that advocate. This position was set by the court of appeal of Tanzania in Lalago Cotton Ginnery ad Oil Mills Company Limited vs. The Loans and advances Realization Trust (LART), (supra) that: "...an advocate can swear and file an affidavit in proceedings in which he appears for his clients but on matters which are within his persona! knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client" [Emphasis added]. The dictum herein above envisages that an advocate who represents a party in court is not permitted to present his evidence vide affidavit except in special circumstances where such an advocate has personal knowledge. With regard to the instant matter, I have gone through all 16 paragraphs of the affidavit deposed by Mr. Benito Mandele, Advocate of the applicants who is also representing them. All facts pleaded are based on the information supplied to him by the applicants. This is evident by the verification clause which is such that: " Tz BENITHO MANDELE, being the Advocate of the applicants and dully authorized to make this affidavit

do hereby states that all what I have stated in paragraphs i 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15, and 16 is true according to the information as received from the applicants". The verification herein above reproduced, unequivocally reveal that the whole affidavit contains statements of other persons than the deponent. In light of what was held in Lalago Cotton Ginnery and Oil Mills Company limited {supra}, whatever has been deposed by Mr. Mandele in the impugned affidavit was not within his personal knowledge as an advocate. From the foregoing, I find merits in the preliminary objection. The affidavit deposed by Mr. Benitho Mandele, Advocate of the applicants is defective for containing hearsay evidence. It follows therefore that, since the application has been supported by defective solo affidavit, the application becomes incompetent. It thus deserves to be struck out. I do hereby proceed to strike out the entire application with no orders as to costs. Order accordingly. 8

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Prepared on 14 October 2026 · Esheria