

TANZANIA / JUDGMENT

MISCELLANEOUS LAND APPLICATION NO

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TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISCELLANEOUS LAND APPLICATION NO. 27536 OF 2023 {Originating from Land Case No. 128 of 2023) AVIC COAST LAND DEVELOPMENT (T) LIMITED..... 1st APPLICANT JOHN CHAGAMA..... 2nd APPLICANT TANZANIA HOUSE OF BUSINESS COMPANY LIMITED..... 3rd APPLICANT VERSUS JUMA ABDALLAH ZOMBOKO AND 50 OTHERS..... RESPONDENTS

RULING

07t/'& 21st May 2024 GWAE, J This ruling originates from a preliminary objection raised by the counsel for the 1st to 47th respondents concerning the application for setting aside ex parte Order in Land Case No. 128 of 2023 dated 04th October 2023 by this court against the 1st, 2nd and 3rd applicants herein. The points raised are to the effect that:- "1. That the application is bad in law for being accompanied by a defective affidavit which is sworn by a person who has no locus and authority to swear the affidavit for the applicants. i

2. That the application is time - barred." Hearing of the PO proceeded by way of written submission. Mr. Aliko Harry Mwamanenge, learned advocate represented the applicant and Mr. Edward Chuwa assisted by Ms. Monalisa Mushobozi, both learned advocates represented the 1st to 47th respondents. The 48th and 52nd respondents did not file their submissions despite of being aware of the preliminary objection so raised. Therefore, the matter proceeded ex- parte against them. Regarding the 1st point of objection, Mr. Chuwa challenged paragraph 1 of the affidavit in support of the application and stated that, Samuel Komu, being the principal officer of the applicant had no power to swear affidavit on behalf of the 2nd and 3rd applicants without a legal authority such as a power of attorney. He stated that, Samuel Komu verified the affidavit by stating that, the facts deposed are true to the best of his knowledge and only some 3 paragraphs which relate to the institution of the case and perusal of the court file are based on the information from Advocate Aliko Harry Mwamanenge. However, the said Aliko Mwamanenge has not sworn an affidavit to support the said information. 2 The counsel for the said respondents further stated that, Salum Komu has never appeared in court in any proceedings for the 1st applicant or the 3rd applicant. To him, service of summons to the 2nd and 3rd applicants are the matter personally known to them unless they told the respondent. He therefore argued that, the

application lacks the requisite supporting affidavits of the 2nd and 3rd applicant, affecting the competency of the application. To support his argument, he cited the case of ABSA Bank Tanzania Limited & Another vs Hjordis Fammestad, Civil Application No. 695/16 of 2022) [2024] [26 March 2024]. On the 2nd point of objection, the 1st to 47th respondents' counsel submitted that this application is time barred since it is preferred under Order VIII Rule 14 (2) of the Civil Procedure Code, Cap 33 R.E 2019 and since no time limit is set for filing an application to set aside ex-parte order. He added that, according to Item 21 of Part III of the Schedule to the Law of Limitation, 60 days from 4th October 2023 when ex-parte order was granted lapsed on 13th December 2023. He went on cementing that this application was filed on 13th December 2023 beyond 60 days provided by the law. He prayed that this application be dismissed with costs. 3 In his reply submission, Mr. Alike argued that, an application can be accompanied by an affidavit of each applicant or one affidavit on behalf of all applicants or of any other person or persons provided the said other person or persons are knowledgeable to the facts of the matter. To bolster his argument, he referred to the case of ABSA Bank Tanzania Limited & Another (Supra). Mr. Alike also submitted that, the case of ABSA Bank Tanzania Limited & Another vs. Hjordis Fammestal (Supra) cited by the 1st to 47th respondents is distinguishable to the circumstances of this matter. He thus argued that, in the cited case, one Florian Pesha sworn an affidavit on behalf of the applicants for an extension of time to lodge notice of appeal against the impugned judgment and decree. Therefore, according to him, in ABSA case there were some facts, which were new to the deponent, but in this application, there is no facts, which belong only to other applicants that Samwel Komu had no knowledge of the same. He was of the view that, even if other applicants would swear a different affidavit, it would not make any deference from the facts deposed by Samwel Komu. It was his submission that Mr. Samuel Komu was competent person to swear an affidavit on behalf of the applicants and because he has been involved in the dispute. 4 Regarding the objection that, the application is time barred. Mr. Aliko submitted that, the delay was caused by electronic filing system (eCMS). He stated that, this application was electronically filed on 1st December 2023 but it was not seen in the system. They made several follow ups and informed Hon. Chugulu, the former Deputy Registrar of this court regarding the situation they faced and she told them that, the application had not been assigned to the judge because of the system failure. She swore an affidavit explaining the situation. It was until 13th December 2023 after being advised by Mr. Malima, a member of Information Technology team to file the new application. Subsequently, they successful filed this application. He urged this court to invoke the principle of overriding objectives because the issue of eCMS system is a technical issue, which was beyond the applicants and the advocate's control. To support his argument he referred to the case of Yakobo Magoiga Kichere vs. Penina Yusufu, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania, at Mwanza (Unreported). In rejoinder submissions, Mr. Chuwa reiterated his submission in chief and prayed that the application be dismissed with costs. Having dispassionately considered the rival arguments of counsel for the parties and the supporting affidavit of Samuel Komu, the issue 5 for the court's determination is whether two points of objections are meritorious. Starting with the first point of objection on the alleged defects of the

affidavit in support of the application. The centre of the dispute lies on the competency of Samuel Komu, a principle officer of the 1st applicant to swear an affidavit on behalf of the 2nd and 3rd respondents. Paragraph 1 of the affidavit sworn by Samuel Komu in support of this application states thus:- "That, I am the Principal Officer of the 1st Applicant duly authorized to swear this Affidavit on behalf of all Applicants, thus conversant with the facts I am about to depone hereunder." It is a legal requirement under Order XLIII Rule 2 that, every application to the court must be made by way of chamber summons supported by affidavit. In the case of LRM Investment Company Limited and 5 Others vs. Diamond Trust Bank Tanzania Ltd, Civil Application No. 418 of 2019 (unreported), it was stated that:- "Every formal application to the Court shall be supported by one or more affidavits of the applicant or 6 of some other person or persons having knowledge of the facts." Further, in the case of ABSA Bank Tanzania Limited & Another vs Hjordis Fammestel, (Supra) it was held that:- "... It is also correct as Mr. Kamara submitted that; one applicant can swear an affidavit on behalf of other applicants. I do not see if there is any problem of one or more applicants to swear their affidavits on behalf of their fellows, when duly and properly authorized". Guided by the above positions of the law, it is the requirement of the law that, for one or more applicants to swear an affidavit on behalf of the other or other persons in a judicial proceeding, the deponent must have knowledge of the facts to be deposed and must be duly authorized to swear an affidavit on that behalf. In the instant application, it is stated by the said Samuel Komu in the verification clause that, he had the knowledge of the contents of the affidavit except paragraph 4, 5 and 6 which information he received from Advocate Aliko Harry Mwamanenge, the counsel for the 1st applicant herein. More so, at paragraph 1 of the affidavit in support of the application, he stated that he was duly authorized to swear the affidavit on behalf of all applicants. 7 Mr. Aliko submitted that, Samuel Komu had knowledge with the facts and even if other applicants would have sworn the separate affidavits no new facts would have been raised. On the other hand, Mr. Chuwa did not identify the paragraphs of the affidavit, which are not in the knowledge of the deponent, which needed the 2nd and 3rd respondents to depose on their own capacity. Failure by Mr. Chuwa to specifically state the paragraphs of the affidavit, which were not supposed to be deposed by Samuel Komu impliedly confirms that, all the facts verified by the said Samuel Komu to be in his knowledge were really in his knowledge. Regarding the requirement of the authorization by the 2nd and 3rd respondents to Samuel Komu, it is undeniable facts that, Mr. Samuel Komu neither produced a power of attorney or board of resolution to swear an affidavit on behalf the 2nd and 3rd respondents. However, the circumstances of the case impliedly suggest that, the 2nd and 3rd respondents impliedly ratified his act of swearing an affidavit. In the case of Dangote Industries (TO Limited vs. Warnercom (T) Limited, (Supra), it was stated that:- "The ratification is viewed from the fact that, the applicant did not in any way disassociate itself from the contents of the affidavit which was lodged almost 8 two years ago. Further, the applicant did not distance itself from the advocate who drew and filed the notice of motion synchronously with the disputed affidavit..." Guided by the above-cited authority, the 2nd and 3rd applicants herein since this suit was instituted on 13th December, 2023 have not contested or disassociated in any way from the contents of the affidavit. Further, Advocate

Aliko Harry Mwamanenge who is representing the applicants drew and signed the affidavit in dispute. It is in these circumstances, I find that, the applicants impliedly ratified Samuel Komu to depose the affidavit in support the application. The 2nd point of objection need not to detain me much, I have observed that, the applicant has filed an affidavit deposed by Hon. Agatha Chugulu, the former Deputy Registrar of this Court, confirming that, this application was filed on eCase Management System, but the system rejected from sending the application to the Judge in Charge for assignment. According to paragraph 5 and 6 of the affidavit by Hon. Agatha Chugulu, this application was filed online on 1st December 2023, but due to some technical error, a fresh application was filed and assigned to a Judge on 13th December 2023. In the circumstances, I find the information provided by the Deputy Registrar of the Court is reliable and no apparent to disbelieve the same. 9 In the circumstances, I find both points of objections raised by the learned counsel for the 1st to 47th respondents are devoid of merit. Consequently, both limbs of objections are hereby overruled. Costs shall abide the result of the parties' main case. DATED at DAR ES SALAAM, this 21st May, 2024 io

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