

TANZANIA / JUDGMENT

mwajuma ally abdallah 21 others vs elizabeth josephat kyakula 2022 tzhclandd 12370 27 september 2022

COURT
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27 September 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM MISC. LAND CASE APPLICATION NO. 468 OF 2022 MWAJUMA ALLY
ABDALLAH..... 1st APPLICANT SAID ISSA IBRAHIM.....
2nd APPLICANT JAMES BUTER..... 3rdAPPLICANT
MUSA JUMA MUSA..... 4th APPLICANT NASORO IDRISA
HEMED..... 5thAPPLICANT IBRAHIM
ALLYTINDWA..... 6thAPPLICANT MERIKIORY
WILYAM..... 7TMAPPLICANT ISSA SADICK
HUSSEIN..... 8thAPPLICANT MWALAMI JUMA
JOJA..... 9thAPPLICANT CATHERINE
MACHUIO..... 10TM APPLICANT SEVERA MARIKI
MROSSO..... 11TMAPPLICANT AMIR HOSSEN
KADRI..... 12TM APPLICANT SHAHA ABDALLAH
YUSUPH..... 13TMAPPLICANT ROBERT RICHARD
MVAMBA..... 14TMAPPLICANT FRANK CHARLES
FUNGO..... 15TMAPPLICANT RAY MWAIHAKI KA
MILO..... 16TMAPPLICANT i AHMED AYUBU
MWANGA..... 17thAPPLICANT JEMA KONDO
PEMBE.....18thAPPLICANT OMAR SAID
KALUWEI..... 19thAPPLICANT GAZO MZEE
PAZI..... 20thAPPLICANT ALLY OMARY
MKUMBA..... 21stAPPLICANT MUSA SHABANI
MATIGATI..... .22nd APPLICANT VERSUS ELIZABETH JOSEPHAT
KYAKULA.....RESPONDENT

RULING

Date of last order: 19/09/2022 Date of Ruling: 27/09/2022 T. N. MWENEGOHA, J. The applicants herein above are seeking for an order of injunction against the respondent, to restrain her from developing, alienating, dividing or disposing off any piece of land, pending determination of the main suit. The application was brought under Order XXXVII Rule 1 (a) and Section 68 of the Civil Procedure Code, Cap 33 R. E. 2019 and accompanied by the joint affidavit of the applicants. The respondent on the other hand, objected the application on two grounds that; -

1. The affidavit in support of the application is defective for contravening the provisions of GN. 125 of 1967 and GN 132 of 1967. 2
2. The affidavit in support of the chamber application is defective and bad in law for being verified by persons who have not sworn or affirmed the affidavit. Hearing of the objection was heard by way of written submissions Advocate Nereus B. Mutongore appeared for the respondent while the applicants were represented by Advocate Joseph Mandela Mapunda. In his submissions, Mr. Mutongore argued generally that, the applicants made a joint affidavit, but neither of them has stated whether they are Christians, Moslems, Hindus or pagans, contrary to items 1,2,3 and 4 of the 1st schedule, of the Oaths and Affirmation Rule, GN No. 132 of 1967. He cited the case of Venceslaus Malasi Kimario vs. Akilimali Abdallah Kambangwa, Misc. Land Case Application No. 199 of 2021, High Court of Tanzania, Land Division at Dar es Salaam. In this case it was observed that; - "It is now, it is difficult for the court to know for sure if the applicant when taking the affidavit was a Christian, Moslem, Hindu or non-believer. It should be noted that, an affidavit is a substitute of oral evidence, and it has to be a proper within the confines of law. He also cited the case of Justus Mazengo and 41 Others vs. Tanzania Portland Cement Co. Ltd, Misc. Application No. 2 of 2022, High Court of Tanzania, where it was held that; - "Assumptions are not part of legal training. We, lawyers were trained to deal with facts and apply them to the law and not assumptions. We should leave assumptions to the professions which assumptions is order of the day. In reply, Mr. Mapunda was of the view that, the objection is baseless. The applicants have sworn and affirmed in the opening paragraphs of the affidavit. That, the use of the word "swear" implies Christian and affirm for Muslims, and this has been reflected in the 1st paragraph of the affidavit. Above all, the applicants have separately affirmed and sworn in the jurat which implies their beliefs. Therefore, the defects claimed does not affect the application. The court ought to invoke the provisions of Article 107A(2) (e) of the Constitution of the United Republic of Tanzania,
1977. Also, the overriding objective rule, as established under section 3A of the Civil Procedure Code, Cap 33 R. E. 2019, and the case of Feruzi Mustafa and Another vs. Ngimbwa Farmers Association, Misc. Land Application No. 16 of 2020. Having gone through the submissions of the parties, the question for determination is whether the objections have merits or not. The contention is whether the affidavit is defective, owing to the absence of the missing facts, showing the religion of the deponents. The respondent's counsel did maintain that, the missing facts are crucial in administering oaths, hence, failure to include them is fatal,

as provided in GN 125 of 1967 and GN 132 of 1967 and the case of Venceslaus Malasi Kimario (Supra). The applicants' counsel in fact, did not dispute the respondent's contention, rather urged the court to invoke the overriding objective rule and do away with the noted technicality by the respondent. As it has been decided in a number of authorities, an affidavit is a substitute of oral evidence. It should be free from any defect to make it useful in the court of law. The court is not allowed to assume or decode any statement or fact from the affidavit. The same should be self-explanatory. The affidavit at hand lacks this quality. It needs the court to assume that the affidavit in Question has been deposed by persons of both religions, Muslims and Christians. Hence, I find the 1st objection to be of merit and sustain it accordingly see, Venceslaus Malasi Kimario (Supra). As for the 2nd objection, I see no need to discuss it, as the findings in the 1st objection are capable of disposing the entire application. Eventually, the application is hereby struck out with costs. 5

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/mwajuma-ally-abdallah-and-21-others-v-elizabeth-josephat-kyakula-Affidavitdefects-tanzlii-2022--6a3ea52b3b1caa9129824559

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