

TANZANIA / JUDGMENT

monica mabura others vs mwasi amoni warioba others 2021 tzhc 2045 27 january 2021

COURT
TZHCDECIDED
27 January 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF MUSOMA AT MUSOMA CIVIL REVISION NO. 7 OF 2020 {Arising from the decision the
Resident Magistrate's Court of Musoma at Musoma in Civil Case No. 7 of 2019)

1. MONICA MABULA..... 1st APPLICANT
2. GHATI PIUS..... 2nd APPLICANT
3. MTOLELA PIUS..... 3rd APPLICANT
4. NYAMITI PIUS..... 4th APPLICANT VERSUS
1. MWASI AMONI WARIOBA..... 1st RESPONDENT
2. SHUKRANI PIUS MWEMBE.....2nd RESPONDENT
3. LEOKADIA SHIGULU SELVESTER..... 3rd RESPONDENT
4. KARIBA PIUS MWEMBE..... 4th RESPONDENT
5. PAULO PIUS MWEMBE..... 5th RESPONDENT

RULING

17h December 2020 and 27h January, 2021 KISANYA, J.: Before me is an application for revision made under section 79 (1) (a) (b) and (c) and 95 of the Civil Procedure Code, Cap. 33, R.E. 2019. It is supported by a joint affidavit sworn by the applicants, Monica Mabula, Ghati Pius, Mtolela Pius and Nyamiti Pius. The Chamber Summons and affidavit were drawn by Mr. Emanuel Gervas, learned advocate of the Centre for Widows and Children Assistance (CWCA- Musoma). The reasons for revision are stated in the said affidavit. When this application came up for hearing on 17th December, 2020 at 9.00 am, Mr. Emanuel Gervas, learned advocate entered appearance for the applicants. On the other side, Mr. Daud Mahemba, learned advocate appeared for the first respondent while the third respondent appeared in person. The second, fourth and fifth respondents did not make appearances. At the very outset, Mr. Mahemba raised a preliminary

objection on point of law that, the application was incompetent for being supported by an affidavit which contravened the provisions of section 7 of the Notary Public and Commissioner for Oaths Act, Cap. 12, R.E 2002 (the NPCOA). Mr. Gervas informed the Court that he was ready to submit against the preliminary objection raised orally by Mr. Mahemba. However, he prayed for time to research and collect authorities on the matter. The hearing was then adjourned to 02.00 pm on the same day. Submitting in support of the preliminary objection, Mr. Mahemba argued that the affidavit contravened section 7 of the NPCOA. He pointed out that the said affidavit in this case was administered or attested by Ms. Mary Joachim who works with Mr. Emanuel Gervas in the same office which drafted it. Citing the case of *Calico Textile Industry Limited vs Zenen Investment and 2 Others*

[1999] TLR 100, he argued that Mary Joachim has interest in the proceedings of this case. In the light of that submission, Mr. Mahemba urged me to strike out the application for being supported by the affidavit which is incurably defective. Mr. Gervas vehemently opposed the preliminary objection. He argued that the provisions of section 7 of the NPCOA do not apply in the case at hand. Although Mr. Gervas admitted that he works in the same office with Mary Joachim, he contended that, the later has no interest in this case. The learned counsel fortified his argument by citing the case of *Amin Abdallah Kihundo vs Global Security Finance and Insurance*, Civil Case No. 220 of 2002, HCT at Dar es Salaam where the issue of mutual interest of an advocate was discussed at length. Mr. Gervas went on to submit that section 7 of the NPCOA does not bar advocates 2 working in the same firm to attest affidavit drawn by the same firm. He therefore asked me to overrule the preliminary objection on the reason that the affidavit was not defective. In rejoinder, Mr. Mahemba contended that the case cited by the counsel for the applicants was distinguishable from the circumstances of this case. He contended that, the issue of administering affidavit was not addressed in *Amin Abdallah Kihundo* (supra). Mr. Mahemba reiterated his argument that, the affidavit is incurably defective as Mary Joachim has interest in the proceedings at hand. I have carefully considered the Chamber Summons, supported affidavit and submissions made by both parties. The issue for determination is whether the affidavit in support of the application is incurably defective. Since the crux of the preliminary objection and submissions made by the parties is section 7 of the NPCOA, I find it pertinent to quote the said section. It provides that: "No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested." The above provision was interpreted by this Court (Makanja, J., as he then was) in *CALICO Textile Industries Limited* (supra) by stating the circumstances under which the Commissioner for Oaths is barred from administering oaths. The Court held that: "These provisions create two situations in which a Commissioner for Oaths is disqualified, namely:

- (1) . He/she shall not exercise any of his powers in any proceeding in which he is an advocate. 3

- (2) . He/she is also barred from exercising such powers in proceedings or matter in which he is interested." I associate myself to the above decision. The first situation does not apply in the circumstances of this case. As to the second situation, I find it necessary to look at the meaning of the word "interest". This word is defined by the Black's Law Dictionary, Eighth Edition at page 825 as: "A legal share in something; all or part of a legal or equitable claim or right in property..., distributively, it refers to any one right, privilege, power or immunity." In view thereof, I am of the considered view that, a firm or office drawing and filing the affidavit in the Court has interest in the proceedings thereto. For that reason, a Commissioner for Oaths working in the firm or office which drew or drafted the affidavit is disqualified from administering the oath. This stance was also taken in the case of Project Planning Consultants (Tanzania) v. Tanzania Audit Corporation [1974] L.R.T., No. 10 when this Court (Onyiuke J) held that: 7 hold that an officer of the Tanzania Legal Corporation cannot act as Commissioner for Oaths in any proceedings in which the Legal Corporation is advocate to any of the parties to the proceedings". The logic behind the above position is to ensure independence of the Commissioner for Oaths/advocate as an officer of court and avoid any possible kind of interest in the discharge of his duties as a Commissioner for Oaths. See the case of Project Planning Consultants (Supra). In the instant case, parties to not disputed that the affidavit in support of the application was drawn by Mr. Emanuel Gervas of the Centre for Widows and Children Assistance (CWCA- Musoma). It is on record that one, Mary Joachim administered the oath. Mr. Gervas does not dispute that Mary Joachim works with 4 him at CWCA-Musoma. Therefore, guided by the above position of law, she was disqualified from administering the oath/affidavit in this case where, WCAC- Musoma through Mr. Emanuel Gervas (advocate) represents the applicants. From the foregoing, I hold that the affidavit in support of the application is incurable defective for contravening section 7 of the NPCOA. Thus, the preliminary object is sustained. In the final analysis, this application is incompetent for being supported by an affidavit which is incurably defective. I have no other option other than striking out the present application for want of affidavit. In the interest of justice, the applicants are given leave to file a fresh application within 30 days from the date of this ruling if they are still interested in pursuing the matter. I make no order as to costs due to the circumstances of this case. Court: Ruling delivered this 27th day of January, 2021 in the presence of Mr. Emanuel Gervas for the applicants, first and 3rd respondent who appeared in person and in the absence of the 2nd, 4th and 5th respondents. B/C - M. Kimweri Present. E. S. Kisanya JUDGE 27/01/2021 5

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