

TANZANIA / JUDGMENT

nadds bureau de change limited and another vs y2k bureau de change ltd 2021 tzhccomd 3338 16 september 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM COMMERCIAL APPLICATION NO.8 OF 2021 NADDS BUREAU DE CHANGE LIMITED..... 1st APPLICANT NELSON DANIEL SWAI..... 2nd APPLICANT VERSUS Y2K BUREAU DE CHANGE LTD.....RESPONDENT Date of Last Order: 02/ 07/2021 Date of RULING: 16/09/2021

RULING

NANGELA, J.: This ruling is in respect of a Notice of Preliminary Objection filed by the Applicants. The application at hand was filed in this Court on 26th January 2021 by way of Chamber summons supported by an affidavit of the 2nd Applicant. Briefly, the applicants are requesting this Court to grant them an extended period within which they can lodge an appeal against the judgement of the Resident Magistrate Court of Dar-es-Salaam, at Kinondoni, in Civil Page 1 of 14 Case No. 175 of 2019 between the Respondent and the Applicants. On 1st March 2021, a date when the matter was called on for a mention in chambers, Mr James Bwana represented the Applicants while Mr Silvanus Miraji, a director of the Respondent, appeared in person. On the material date, Mr Bwana filed a Notice of Preliminary Objection to the effect that, the Counter-Affidavit filed by the Respondent was incurably defective for being attested by a Commissioner for Oaths who has interest in the matter, i.e., the Commissioner for Oath before whom the counter-affidavit was attested, was a witness in the suit and appeared as PW-2, as per annexure 3 of the Affidavit at page 17 thereof, hence a contravention of the provisions of section 7 of the Notaries Public and Commissioner for Oaths Act, [Cap. 12 R.E 2019]. On the same date, however, Mr Miraji, the Director of the Respondent, was not ready for the hearing but prayed to be granted time because he intended to engage an advocate who shall represent the Respondent in Court. I readily granted the prayer given that right to be represented by an advocate, in a Court of law, is a basic right of a litigant. Having granted the Respondent's prayer, the matter was scheduled for mention on 4th of June 2021. On the Page 2 of 14 material date, Mr Emmanuel Ally, learned advocate represented the Applicants in Court while Mr Hermus Mutatina, Advocate, appeared for the Respondent. Noting that the Applicant has raised a preliminary objection, the parties were directed to proceed by way of written submission and a filing schedule was issued. The parties

have duly complied with the directives of the Court and hence this ruling. Submitting in support of the application, the learned counsel for the Applicants submitted that, according to section 7 of the Notaries Public and Commissioner for Oaths Act, [Cap. 12 R.E 2019], (which I will refer to in short as "NPCOA") no commissioner for oaths shall exercise his powers in any proceedings or matters he is interested in. Mr Bwana contended that, as a matter of law, the provision creates two scenarios. One is that, a commissioner for oath is not allowed to exercise his powers in any proceedings in which he is an advocate and; two, he/she is also barred from exercising such powers in proceedings in which he is interested. He contended that, the second scenario is the one applicable here. Mr Bwana contended that, the advocate before whom the deponent of the Respondent's counter affidavit Page 3 of 14 in this matter was sworn, one Deogratus Godfrey, has interest in this same matter because, as per annexure 3 to the Applicants' supporting affidavit, the said Commissioner for Oaths was a witness (PW-2) in Civil Case No.175 of 2019 which was heard and determined by the Resident Magistrate Court of Dar-es-Salaam, at Kinondoni. Mr Bwana relied on the definition of what constitutes the term "interest" by referring to the Merriam Webster Dictionary to mean: right, title, or legal share in something, or participating in advantage and responsibility. In view of that definition, it was submitted that, since the respective Commissioner for Oaths was a witness to a suit whose Judgement and Decree is the subject of a process of appeal against the Applicants herein, the said Commissioner for Oaths participated in advantage/has legal share in the said suit, and therefore, is barred or disqualified in terms of section 7 of the "NPCOA", to attest/administer Oath to any of the parties to proceedings subsequent thereto, including the one at hand, as he is directly interested. In order to bolster his submission, Mr Bwana place reliance on the case of Monica Mabula and 3 others vs. Mwasi Amoni Warioba and 4 others, Civil Page 4 of 14 Revision No.7 of 2020, (unreported). In that case, this Court, his Lordship, E. S. Kisanya, J., was of the view that, an affidavit attested by the Commissioner for Oaths who has interest in the same matter is incurably defective at it will be a contravention of section 7 of the "NPCOA." The Court proceeded to strike out the entire application before it. In view of that, Mr Bwana urged this Court to strike out the Respondent's affidavit with costs. In a brief reply submission, the Respondent's learned counsel submitted that the said Commissioner for Oaths has neither an interest of financial nature in the matter at hand, nor any claim or proprietary right. It was argued in the alternative, that, if this Court makes a finding that the said Commissioner for Oaths has interest in the matter at hand, then, in the interest of justice the Court should struck out the counter affidavit with leave to file a fresh one. In his rejoinder submission, the learned counsel for the Applicants noted that the Respondent's reply does not object that in terms of section 7 of the "NPCOA" a Commissioner for Oaths (Deogratus Godfrey) is barred from attesting any matter for which he is interested. It was contended, and rightly so, that, the Respondent has not countered the fact that Mr Deogratus Godfrey, a Commissioner for Oaths, was also a witness appearing as Page 5 of 14 PW-2 in a suit at the Civil Case No.175 of 2019, heard and determined by the Resident Magistrate Court of Dar- es-Salaam, at Kinondoni, and which is the subject of the intended appeal to this Court. It was the submission of the learned counsel for the Applicants, relying on the case of Calico Textile Industries Limited vs. Zenon Investment Ltd and Others [1999] T.L.R 100, that, an affidavit sworn by the interested Commissioner for Oaths is incurably defective. The learned counsel submitted

that, allowing the alternative submission which was sought on the basis of interest of justice is to condone an abuse of the process of the Court since the course to be taken is to have it struck out. I have looked at the rival submissions and the cases relied upon by the learned counsel for the Applicants. I have as well looked at section 7 of the "NPCOA" and the affidavits filed by the respective parties herein. The issue which I am called upon to address is whether the counter affidavit is defective and if it is, whether I should strike it out with leave to re-file it. In the first place, let me state that I am indeed convinced, that, the advocate who attested the counter affidavit filed by the Respondent was a witness (PW-2) in the Civil Case No.175 of 2019, heard and determined Page 6 of 14 by the Resident Magistrate Court of Dar-es-Salaam, at Kinondoni, and which is the subject of the intended appeal to this Court. It is also clear that, in his reply submission, the Respondent has not offered a meaningful response to the argument raised by the Applicants' learned advocate. Section 7 of the "NPCOA" 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 an advocate or in which he is interested." As rightly submitted by the learned counsel for the Applicants, the key point that needs to be examined here is in relation to the second limb of the above provision regarding a prohibition that bars an advocate (as a commissioner for Oaths) from exercising his powers attesting in a matter in which he has interest. The question that follows, therefore, is whether in this particular application, Mr Deogratus Godfrey, who was a witness in the Civil Case No. 175 of 2019, heard and determined by the Resident Magistrate Court of Dar-es-Salaam, at Kinondoni, and who later attested the counter affidavit contesting an application for extension Page 7 of 14 of time to file an appeal against the same case (Civil Case No.175 of 2019), has an interest in it. Essentially, an interested witness is one who has a personal interest in the outcome of that case, a defendant, for instance, is an interested witness because they have an interest in the outcome of the trial. In the Indian case of *State of Kerala vs. Narayanan Bhaskaran and Others*, 1992CrimU 238, the High Court of Kerala in India had the following to say regarding independent and interested witnesses: "Expressions like 'independent witness and interested witness' must be understood in a reasonable perspective. What is a witness, expected to be independent of? He must be independent of bias, for or against the prosecution or the accused. He should be free of personal interest in the outcome of the trial. In *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54: (1952 Cri U

547) the Supreme Court described an independent witness, as one independent of sources, which are likely to be tainted, and in *State of U.P. v. Sughar Singh*, AIR 1978 SC 191: (1978 Cri LJ 141), the Court cautioned that there should be clinching material for classifying a witness, as Page 8 of 14 partisan. Whether a witness is independent or interested, is a matter of ascertainment from circumstances, by a process of evaluation, based on broad probabilities and sound forensic sense." In yet another Indian case of *Raju v. State of T.N.*, reported in (2012) 12 SCC 701, the Supreme Court of India was of the view and held as under:- "A witness may be called 'interested only when he or she derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one ... in the circumstances of a case cannot be said to be 'interested.'" I have laboured to discuss the above point at length because, as it might be

noted in the above cases, there must be evidence indicating that, indeed, the witness stands to benefit from the results of the case in which he/she stood appearing as a witness. As I said earlier, a defendant, for instance, has an interest in the outcome of the case. That is far from a normal or mere independent witness who is summoned to testify in court unless it is demonstrably shown to be standing as a beneficiary of the outcomes of the case for which he appeared as a witness. Page 9 of 14 In this particular application, I was referred to the case of Monica Mabula and 3 Others vs Mwasi Amon Warioba and 4 Others, (supra). I was urged by the learned counsel for the Applicants to follow the approach adopted by my learned brother Mr Justice Kisanya, J, and struck out the counter affidavit. In that particular case of Monica & 3 Others (supra), however, the facts were that, the advocate who attested the affidavit contested before the Court, hailed from the same office which drafted it. Consequently, and relying on the earlier decision in the case of Calico Textile Industries (supra), it was found that, that advocate had an interest to serve. In the case at hand, the advocate who attested the counter affidavit contested herein happened to be a witness for the Applicants in the case of which, its Judgement and Decree, is currently being sought to be appealed against by the Applicants. Although the facts in this case are, in my view distinguishable from those in Monica's case (supra), it has been argued that, the advocate has an advantage or legal share in the suit, and should therefore be disqualified as a competent person to attest the counter affidavit. However, it was not clearly demonstrated what that legal share was or the kind of advantage he obtained Page 10 of 14 from the outcome of the case for which he was a witness and which is now the subject of this application for extension of time. As it was stated in the Raju v. State of T.N., (supra), "a witness is Interested when he derives some benefit from the result of litigation; in the decree in a civil case, or in seeing an accused person punished." And, in the case of State of Kerala vs. Narayanan Bhaskaran and Others (supra), the Court cautioned "that there should be clinching material for classifying a witness, as partisan." My careful reading the submission made by the learned counsel for the Applicants, I do not give me any of such 'clinching materials' or any demonstrably convincing evidence that the witness, PW-2 was harbouring any interest in the case which was before the Resident Magistrate Court, other than that of telling the truth of what he was to testify before the Court. That being said, is it because PW-2 was an advocate and so afterwards he should be barred from attesting a document related to the case in which he was a witness? I have tried to find cases that have had discussion centred on section 7 of the "NPCOA", apart from those cited by the Applicant, and the close case I can rely on is that of David W.L Read and 50 Others vs. The National Page 11 of 14 Agricultural and Food Corporation and 50 Others- Civil Case No. 51 of 1997, High Court, at Arusha (unreported). In that case, a motion was moved that the advocate who was representing one of the defendants was a potential witness because he had attested a document forming part of the pleadings. However, it was not made clear who was going to put him in the witness box. In the course of arguments, reference was made to section 7 of the "NPCOA". The Court asked itself the question: "Assuming Mr Kisusi was exercising his power as a Commissioner for Oaths... would that occasion have constituted sufficient cause in law to bar him from acting for any of the parties to it in this suit?" The Court, agreeing

with the reasoning of Mroso,J in the case of M/s Shahins Ltd v Everwear Ltd Arusha, HC, Civil Case No.74 of 1987 (unreported), the Court stated as follows: "I understand the ban in section 7 cited above refer to a situation In which after proceeding of matter is before the Court, an advocate exercises his powers of Commissioner for oaths knowing that he is an advocate for a party in the Page 12 of 14 proceedings and (sic) matter. The section does not impose a ban on an advocate in respect of all proceedings, past, present or future, in which he was or will be an advocate." (Emphasis added) Considering those words (especially those which I have laid emphasis on) from an analogical perspective and, considering them in light of the present objection and the submissions made in support of it, I find that, even though Mr Deogratus Godfrey appeared in the Civil Case No.175 of 2019, not as an advocate but as a mere witness (PW-2) his later act of attesting the counter-affidavit after the case ended, cannot make the affidavit defective. I hold so, first because, in the Civil Case No.175 of 2019, his appearance was not as an advocate but a mere witness. And, as I said, had it been demonstrated that his being a witness in the case had an interest or gain afterwards, that fact would have made a difference. Secondly, since there is no any demonstration of clinching materials, other than that Mr Deogratus Godfrey was a witness in the Civil Case No.175 of 2019, a fact that would have made it possible to classify him as a witness who is partisan, I cannot buy the submission offered by the learned counsel for the Applicants. Page 13 of 14 It is for those reasons based on the discussion of the various cases shown here above, that, I find it difficult to agree with the submission made by the learned counsel for the applicants. In the upshot, I hereby dismiss the objection and order that the matter before this Court should proceed to its next stage of hearing. It is so ordered. DATED ON THIS 16TH SEPTEMBER 2021 » THE DEO JOHN NANGELA JUDGE Page 14 of 14

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