

TANZANIA / JUDGMENT

ruling Wilson Chakanga 1

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29 May 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF
MWANZA AT MWANZA MISC. CIVIL APPLICATION NO. 4072 OF 2024 (Arising from the decision
of the High Court at Mwanza in PC Civil Appeal No. 24 of 2020 by Hon. F.K. Manyanda, J) WILSON
CHALANGA.....APPLICANT VERSUS ALOYCE KITONGA BATILO
.....RESPONDENT

RULING

24th& 29th May 2024 CHUMA, J. On 28/02/2024 the applicant moved this court to determine the application for an extension of time to apply for a certificate on point of law. The application was made under Section 11(1) of the Appellate Jurisdiction Act, CAP 141 R.E. 2019, and was supported by the affidavit of the applicant. The respondent filed no counter affidavit. The facts giving rise to this application are easily comprehended from records. At Bulela Primary Court (hereinafter the trial court) the respondent in Civil case no. 27 of 2021 won against the applicant. The latter was ordered to pay the respondent the sum of Tsh. 3,000,000/- being compensation for crops destroyed by his animals. The Applicant had successfully through Civil 1 Appeal No. 02 of 2015 appealed at Geita District Court. The respondent further appealed to this court through PC Civil Appeal No. 24 of 2020 where the High Court quashed the proceedings, judgment, and orders of the 1st Appellate court, therefore, the orders and judgment by the trial court dated 28/01/2015 were upheld. Aggrieved by the decision of this court, the Applicant applied for leave and certificate on point of law in the Court of Appeal which was withdrawn on 07/02/2024. Being time-barred to apply for a certificate on point of law before this court, the applicant has now lodged this application. When the application was placed before me for hearing parties were represented by Barakael Nicholas L. Kweka and Chiwalo Nchai Samwel, both learned Advocates. This matter was argued by the parties through a written submission. Submitting in support of the Application the applicant, contended that, instead of applying for certification on point of law in this court on a matter that originated from the Primary court, he applied for leave and certificate on point of law to the Court of Appeal. In support of the affidavit Mr. Kweka for the applicant submitted that this amounts to technical delay as the applicant was in court corridors this whole time. He cited the case of 2 Fortunatus Masha vs. William Shija and Another (1997) TLR 154. And claimed that, the Appeal has a great chance of success and it won't prejudice the rights of the respondent. Mr Kweka further argued that, the proceedings of the trial court and the appellate court were tainted with illegalities and that illegality amounts to sufficient cause for extension of

time, he cited the case of *The Principal Secretary, Ministry of Defense and National Service vs. Devram Valambia* [1992] TLR 387. In response, Mr. Nchai argued that the applicant's whole affidavit is based on points of law therefore his points can be addressed even without an affidavit. He referred to the case of *William Getari Kegege vs. Equity Bank and Ultimate Auction Mart* Application No. 24/8 of 2019 (unreported). He went on to state that, the applicant's affidavit is defective as it contravenes Section 7 of Notary Public and Commissioner for Oath Act Cap 12 R.E 2019 (the Act) which forbids the commissioner for oath who administered oath to turn around and become a representative of the same party. That, Mr Kweka without warning himself of the consequences proceeded to do so which raises the question of conflict of interest, he referred this court to the case of *Joshua Samwel Nassari vs. The 3 Speaker of National Assembly of the United Republic of Tanzania and Another*, Misc. civil Cause No.22 of 2019 (unreported). He also pointed out that, an affidavit must be confined to facts but the applicant's affidavit in paragraphs 7 (i), (ii), (iii) contains phrases such as "...proceedings of the case of the primary court to the high court are tainted with illegality, which he claims such to be an argument, but also contains a phrase ...that has occasioned miscarriage of justice..." which is also a conclusion. He said that it is a practice in law that paragraphs in an affidavit that offends the law must be expunged therefore if expunged, the ground of illegality won't succeed, he cited the case of *Jaqueline Ntuyabaliwe Mengi vs. Abdiel Reginald Mengi and 5 others*, Civil Application No. 332/01 of 2021 (unreported). Arguing on the point of technical delay, Mr. Nchai submitted that, the applicant should not use the point of technical delay while it was his ignorance of procedure and should not be entertained, he referred this court to the case of *Modestus Daudi Kangalawe* (administrator of the Estate of the late Daudi Temaungi Kangalawe and Dominicus Utenga, Civil Application No. 139 of 2020(unreported) 4 On the ground of illegality, to him, the point in issue is devoid of merit since the affidavit of the applicant has not attached the said Primary Court Judgment therefore it does not form part of the affidavit. In the District Court, the judgment was attached but this court held that the same is not worth standing as a judgment. Having examined the party's affidavit and written submissions for and against this application, the crucial part that has to be determined is whether the application has merit. However, before determining this application on merit, and in the course of preparing the ruling I encountered some concern raised by the respondent in his written submission which the applicant never reacted via rejoinder which he opted not to file for the reasons known to himself. The very concern is that the applicant's affidavit is defective as it contravenes Section 7 of Notary Public and Commissioner for Oath Act Cap 12 R.E 2019 (the Act) which forbids the commissioner for oath who administered the oath to turn around and become a representative of the same party This court then found it pertinent to invite parties on 24th May 2024 to address me on a hearing conducted virtually and had the following to submit; 5 Mr. Barakael's advocate on his side stated that at the time of attesting the affidavit in issue, he was not ready engaged or instructed to represent his client in court. But also such an act does not render the affidavit defective and in no way it can be regarded as an interference with the party's interest. He went on arguing by bagging this court consider that this matter was argued by way of written submission and his client has the right of representation. It can even not prejudice the rights of the adverse party. He finally concluded that the submission of Mr.Chiwalo is then devoid of merit and has to be disregarded. In response Mr.Chiwalo Samwel at first prayed this court

consider his filed written submission and take note of the case of Joshua Nassary cited therein. The submission by Mr. Barakael that his attestation does not render the affidavit defective is baseless because it is impossible to separate the affidavit and attestation. If attestation contravened the law then the whole affidavit becomes defective. Even if he was not engaged but attended it, that act ethically he ought to withdraw himself from the representation role. But also attestation is an engagement. Mr. Chiwalo insisted his submission be considered and sustain his raised concern. In his brief rejoinder, Mr. Barakael's advocate insisted his submission in chief, that the present affidavit has no defect as it bears the name of his client and that he only attested it and appeared in court as an advocate and not as commissioner for oath. From the party's submission, no doubt both of them are in agreement that the referred affidavit was attested by the applicant's advocate who also appears for the applicant in this matter. As submitted by Mr. Nchai Section 7 of the Act stipulates 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" This court in the case of Aloyce Kissenga Mchili vs Erick Kuneza Rutakonya and 4 Others, Misc. Commercial Application No.43 of 2022, it was observed that the cited provisions of section 7 of Cap 12 RE 2012 have two scenarios; (1) when one acted as a commissioner for oaths, and (2) 7 when interested, for which it is clear that one may be interested after having acted as a commissioner for oaths. Also, in the case of Calico Textile Industries Ltd vs Zenon Investments Ltd and 2 others, 1999 TLR 100, Hon Mackanja J., (as he then was) clearly states that an advocate is barred from dealing in proceedings after he has acted as a commissioner for oaths for the same parties. In the same vein the Learned brother Hon Agatho, J. In the case of Salum Nassor Mattar {Administrator of the Estate of the late Mattar Rashid Mattar, the Plaintiff} vs Bharat Bhagwanji Laxman and Rohyt Bhagwanji Laxman, Land Case No 15 of 2017, had this to say. "it is immaterial whether it is a contract or an affidavit that an advocate has acted upon as a Commissioner for oaths... While time is of the essence as to when the advocate acted as a commissioner for oaths, the essence of estopping the advocate from representing a client to which he acted as a commissioner for oaths is that there is a conflict of interest, or the context of the case suggest that the advocate may be called as a witness in a case for which he attested/witnessed its pleadings." 8 Pursuant to the above-cited provision of law alleged to have been contravened and the cited case laws of this court, it is beyond doubt that an Advocate as the Commissioner for Oaths may administer oath or affirmation in respect of any affidavit to be used before the court in any judicial proceedings. But, as rightly explained by Mr. Nchai Samwel Learned counsel for the respondent he or she cannot turn around and represent the same party in the same proceedings in which he attested the affidavit. In his reaction, Mr Barakaeli Kweka Learned counsel for the applicant submitted that the attestation was done before being engaged to represent his client in court. But the question is what steps did he take after realizing or after instruction to represent his client in this application while knowing the existence of the attested affidavit? The record and submission reveal that he proceeded to represent his client on the document he did attest. In doing so Mr. Barakael Kweka went contrary to the dictate of Section 7 of the Notary Public and Commissioner for Oath Act Cap 12 R.E 2019 (the Act). See also the case of Calico Textile and Joshua Samwel Nassari (Supra). The essence behind the ban provided in section 7 of Cap 12 RE:2019 is that the affidavit in which

Advocate Kweka attested constitutes evidence 9 and will be used as evidence in the instant application, therefore Mr. Kweka Learned counsel might be required by the court to enter an appearance as a witness as the affidavit he witnessed constitutes the evidence on which the application is founded. Praying both two roles also offends the principle of natural justice in the sense that no one can act as a judge in his or her own cause. Having so observed, as correctly submitted by Mr.Nchai Samwel Chiwalo Learned counsel for the respondent, the attached affidavit in support of the instant application contravened the law requirement and renders the application remain without being supported by an affidavit as required by the law for being fatally defective. In this circumstance, the application is incompetent before the court. This point suffices to dispose of the matter without venturing into this matter on merit. Consequently, the incompetent application is struck out with cost. It is so ordered. DATED at MWANZA this 29th day of May 2024 W. M. CHUMA JUDGE 10 Ruling delivered in court before Mr. Barakael Nicholas, Advocate for the Applicant and Mr. Chiwalo Nchai Samwel, Advocate for the Respondent this 29th May, 2024. W. M. CHUMA JUDGE 11

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Prepared on 13 October 2026 · Esheria