

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 67 OF 1998
In the Matter of an Intended Appeal

BETWEEN

AFRICAN MARBLE COMPANY LIMITED, APPLICANT

AND

TANZANIA SARUJI CORPORATION. RESPONDENT

(Application for Certificate of Delay
from the decision of the High Court of
Tanzania at Dar es Salaam)

(Kaji, J.)

dated the 11th day of October, 1996

in

Civil Case No. 89 of 1989

R U L I N G

MFALILA, J.A.:

By notice of motion, the applicant, African Marble Company Limited, sought to move this Court to strike out the certificate of exemption dated 16 December 1996 issued by the District Registrar, Dar es Salaam District Registry, under Rule 83 (1) of the Rules of this Court. The notice of motion was supported by the affidavit of the Managing Director of the applicant company, one Mumba Mabu. In this affidavit, he listed several reasons why the Court should strike out this certificate, these included wilful concealment of facts and fraudulent tempering with these facts and that this was done by the respondent and its advocate. That this concealment and fraud was contained in the respondent's assertion that by 10/12/96, the respondent and its advocates were not yet in possession of the complete record of proceedings and hence applied for the same on 10/12/96, and that this is the letter which misled the District Registrar into issuing the certificate of exemption. Lastly, Mumba Mabu asserted in his affidavit that this concealment and fraud were achieved by wilfully concealing page 3 of the record of proceedings

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which [the page 3] was in any event irrelevant, he asserted.

In its counter affidavit opposing the application, the respondent company by its advocate Mr. Audax Kijana Kameja, denied the allegation of fraud and concealment and raised three issues in paragraph 3 of the affidavit about which he put the Court on notice that he would argue them as preliminary points at the hearing of the application. These issues were as follows:

3. That the Notice of Motion and the supporting affidavit are incurably defective and bad in law or otherwise incompetent on the grounds that:-

(a) That the Notice of Motion and the supporting affidavit were drawn and filed by an advocate who at the material time did not have the right to practice law before this Court as per the Chief Justice's Circular dated 30th November 1998, a copy whereof is exhibited hereto marked Exhibit A-K1.

(b) The Notice of Motion does not comply with the provisions of Rule 45 of the Court of Appeal Rules.

(c) The Notice of Motion is not an application for review of this Court's decision dated 18th August 1998 upholding the validity of the Registrar's certificate, a copy whereof is exhibited hereto and marked Exhibit A-K2.

and that matters set out in 3 (a), (b) and (c) above will be raised by way of preliminary objection at the hearing of the application.

In his reply to the counter affidavit, the applicant's Managing Director, Mumba Mabu replied paragraph 3 of the counter affidavit as follows:

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3. That the contents of paragraph 3 of Mr. Audax Kijana Kameja's (hereinafter referred to as "AKK") counter affidavit are denied and in answer thereto I contend assertively as follows:

3.1 As regards the contents of paragraph 3 (a) of the Counter affidavit of A-KK, it is, true that the Notice of Motion and the supporting affidavit were drawn and filed, by the Hon. Mabere Nyauchō Marando M.P., for the applicant. But the applicant contends that even if there was any irregularities about our advocate's practising certificate which fact at the material time was not known to the applicant, or to the Chief Justice of Tanzania, the well known principle of law namely the "indoor management rule" protects the applicant who dealt with the advocate.

Further, in any case, irregularity of the practising certificate of our advocate, if any, does not make the application of the applicant which is properly before the Court, to abate. The advocate is only an agent who can be hired and be fired at any time at the instance of the applicant.

Moreover, Hon. Mabere Nyauchō Marando, M.P. did not sign any documents concerning this application. They were signed by the Managing Director of the applicant on behalf of the applicant.

- 3.2 The contents of paragraph 3 (b) of AKK's Counter affidavit is denied. The application is substantially in form and style which the law has prescribed.
- 3.3 The contents of paragraph 3 (c) of the counter affidavit are denied. The applicant contends that the application before the court is a fresh application directed at the irregularity of the certificate of delay issued by the District Registrar of the High Court occasioned by his misfeasance, made possible by the laches of the respondent and its advocates. The principles of resjudicata or estoppel do not apply to this application. The application is also before the court following the special directions of the Ruling in Civil Reference No. 14 of 1999 between the same parties.

At the hearing of this application, Mr. Kameja, learned Counsel for the respondent Corporation, asked to address me on paragraph 3 of his Counter affidavit as a preliminary point. Paragraph 3 of the Counter affidavit has three sub-paragraphs named 3 (a) (b) and (c). In connection with 3 (a) Mr. Kameja submitted that Rule 45 (1) of the Rules of this Court, directs that all applications to this Court shall be by way of motion, but, he added, in this case the notice of motion and the supporting affidavit were drawn and filed by Mr. Marando learned counsel who was at that time, i.e. 9/10/98, unqualified to practice law because he is on the Chief Justice's list of advocates who had failed or neglected to renew their practising certificate for the year 1998. Therefore, Mr. Kameja went on, since at the time

Mr. Marando filed the notice of motion and the supporting affidavits. he was neither on the list of advocates nor in possession of a practising certificate, he was under Section 39 of the Advocates' Ordinance an unqualified person to practice law and under Section 41 of the Ordinance he was prohibited from acting as an Advocate or such advocate to take out any summons or other process or to commence, carry on or defend any action, suit or other proceeding in the name of any other person or in his own name in any Court. In the circumstances, Mr. Kameja concluded, the present notice of motion is not properly before this Court and should accordingly be struck out.

On 3 (b) Mr. Kameja submitted that assuming the Court finds that the notice of motion is validly before it, the same is invalid in some other respect, that is, it offends the provisions of Rule 45 (2). This rule requires the application to be substantially in Form A and that it shall be signed by the applicant or his advocate. However, he said, the notice of motion filed by the applicants was drawn and filed by advocate Marando who did not sign it, it was signed by the Managing Director of the applicant company on behalf of advocate Marando. This, Mr. Kameja stated, offended Sub-rule (2) of Rule 45. This is because, while Mr. Mumba Mabu could have properly signed on behalf of the applicant company if it had conduct of the case, the rule does not empower clients to sign documents on behalf of their advocates. Since therefore in Mr. Kameja's submission, the notice of motion was not signed by a competent person, it is invalid and invited this Court to strike it out.

Lastly, on 3 (c), Mr. Kameja submitted that the present application is not new, it is a duplication of Civil Reference No. 14/97 between the same parties and on the same subject i.e. the regularity of the certificate issued by the Registrar under Rule 83 (1). In both cases this depended on the answer to the question whether the respondent was

supplied with a complete record of proceedings by the registrar for the purpose of preparing the appeal. In that reference, the Court made a specific finding that the registrar had not supplied a complete record and upheld the validity of the certificate. In the circumstances, Mr. Kameja submitted, he did not see how a single judge can overturn the decision of the full Court. He therefore suggested that the only course open to the applicant was to apply to the Court to review its decision, and that therefore this application should be dismissed with costs.

In reply Mr. Marando dealt with grounds 3 (a) (b) and (c) in turn. With regard to (a) he conceded that at the time the notice of motion was drawn and filed, he was not in possession of a practising certificate, but he denied drawing and filing the notice of motion because he was quite clear in his mind that he could not practice law without a certificate. He added that during the material period, he was in Dodoma so he could not have drawn and filed the notice of motion, this he said, is supported by the fact that he did not sign it.

On 3 (b), Mr. Marando submitted that both the notice of motion and the affidavit appear to have been signed on his behalf, but he said that this could not render these documents incompetent.

Lastly on 3 (c) he said that this application was a completely new application unrelated to Civil Reference No. 14/97 and that therefore it is a valid independent application.

We shall deal with each sub-paragraph of paragraph 3 in turn. The guide posts in relation to 3 (a) are Sections 39 (1) and 41 (1) of the Advocates' Ordinance. These sections provide as follows:

S.39 - (1) Subject to the provisions of Section 3 and as hereinafter provided, no person shall be qualified to act as an advocate unless his name is on the Roll and he has in force a

practising certificate and a person who is not so qualified is in this part referred to as an "unqualified person".

And Section 41 (1):-

No unqualified person shall act as an advocate, or agent for suitors, or as such sue out any summons or other process, or commence, carry on or defend any action, suit or other proceeding in the name of any other person or in his own name in any court of civil or criminal jurisdiction, or act as an advocate in any cause or matter, Civil or Criminal.

By his own admission, Mr. Marando was not in possession of a practising certificate at the time the notice of motion was filed, he was thus by definition in terms of Section 39 (1), an unqualified person to practice law. This as indicated was conceded by Mr. Marando himself, that is why he said he could not have drawn and filed the notice of motion aware as he was that he was unqualified. Indeed he added quite emphatically that if indeed he did draw and file this notice of motion as alleged, Mr. Kameja's objections against the notice of motion would be valid.

I think Mr. Marando's denials are very weak in the sense that they contradict what is stated by his own client in his reply to the counter affidavit. It is clearly stated in reply to paragraph 3 (a) of the Counter affidavit that:

As regards the contents of paragraph 3 (a) of the Counter affidavit of AKK, it is true that the notice of motion and the supporting affidavit were drawn and filed by Hon. Mabere Nyauchio Marando M.P. for the applicant -----

I therefore do not see how Mr. Marando can deny from the Bar this assertion. The defence that the notice of motion and the supporting affidavit were not personally signed by Mr. Marando on his behalf cannot cure the irregularity, in fact in my view, it compounds the irregular nature of the notice of motion and its supporting affidavit. The position then is that Mr. Marando as an unqualified person at the time, acted as an advocate by taking out the notice of motion and instituting proceedings in the name of his clients, African Marble Company Limited. This action clearly contravened Section 39 (1) of the Advocates' Ordinance. The proceedings which he started in contravention of the law cannot be valid in this Court. Hence this Court was not competently and validly moved in this matter. Accordingly I uphold the objection in paragraph 3 (a).

With regard to paragraph 3 (b), Mr. Mumba Mabu clearly had no authority to sign for the applicant's advocate. Mr. Kameja's contention that the notice of motion must be signed by the applicant or his advocate is correct. Mr. Mumba Mabu as Managing Director of the applicant company could quite properly have signed for the company, but he could not sign the documents drawn and filed by the applicant's advocates. The notice of motion and its supporting affidavits were thus not validly signed. However, I think that if the notice of motion had been properly before this Court, I could probably have considered allowing the applicant to regularise the signatures on the notice and the affidavit and refrained from invalidating it on this ground.

Lastly on 3 (c), I am satisfied after going through the record that the present application is not different from the question dealt with by the Court in Civil Reference No. 14 of 1997, namely, the validity of the Registrar's exemption certificate. The only difference is that in the present application a different reason is given for impugning

the certificate, namely, fraud and concealment on the part of the respondent and its advocates. Accepting the Registrar's certificate as valid, the Court stated:

We have given the earnest consideration to Mr. Marando's arguments and in the end we are satisfied, for the reasons we have endeavoured to give, that Capt. Kameja is right in contending that there is no basis for faulting the learned single judge's decision. Accepting the Registrar's certificate, as we do, we hold that the record of the case was ready for collection when it (the record) was complete, that is on the date Capt. Kameja was informed by the registry that the documents his firm had asked for were ready for collection. In our opinion, therefore, there was no basis, as the learned single judge held, for striking out the notice of appeal.

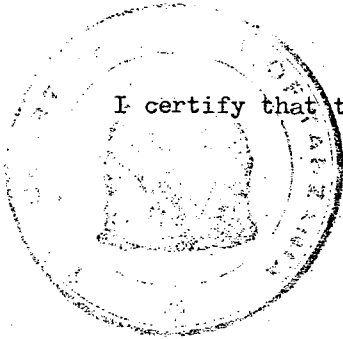
If after the Court had handed down the above ruling, the applicants had come upon new material indicating fraud and concealment on the part of the respondent and its advocate, the proper thing to do was for the applicants to file an application to the Court to review its ruling in the light of the new matter which was not known to them both at the time of hearing the application before the single judge and before the Court during reference. As it is, a single judge of this Court cannot overturn the decision of the Court however meritorious the application before him. For these reasons I uphold Mr. Kameja's submission in support of paragraph 3 (c).

Accordingly this notice of motion is incompetent and I strike it out with costs.


DELIVERED at DAR ES SALAAM this 21st day of May, 1999.

L.M. MFALILA

JUSTICE OF APPEAL



I certify that this is a true copy of the original.


(A.G. MWARIJA)

DEPUTY REGISTRAR