IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., RUTAKANGWA, J.A. And KIMARO, J.A.)

CIVIL APPEAL NO. 140 OF 2006

EDSON OSWARD MBOGORO ..... APPELLANT
VERSUS
DR. EMMANUEL JOHN NCHIMBI ..... 1ST RESPONDENT
THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Songea)

(Kaganda, J.)

dated the 27th day of April, 2006
in
Misc. Civil Cause No. 1 of 2005

RULING OF THE COURT

7 August & 20 September, 2007

MROSO, J.A.:

The appellant was a candidate in the Parliamentary Elections of 2005 for the Songea Urban Constituency. He was unsuccessful in those elections. He believed, however, that he lost because of certain irregularities and illegalities which were committed by the supporters of the winning candidate. Those irregularities and illegalities affected the results of the election to the advantage of the

successful candidate, he contended. He sought to challenge those results by lodging a petition in the High Court at Songea with a view to avoiding the results of the election:

Having lodged the petition he made application to the Court for extension of time to apply for exemption from payment of security for costs which is required under section 111 (2), (3) and (4) of the Elections Act, 1985 as amended from time to time. That application was dismissed following a Preliminary Objection to the effect that the court lacked jurisdiction to adjudicate on such an application. The court did not end there but proceeded to determine the entire petition. Aggrieved by that decision, the appellant lodged an appeal to this Court.

The first respondent has lodged a Notice of Preliminary Objection and, subsequently, a Supplementary Notice of Preliminary Objection to the appeal. Three grounds in all have been raised. **First,** that the appeal is incompetent because no leave to appeal was sought and obtained as required by Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. **Second,** that the appeal is incompetent

because the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal were drawn, signed, certified and lodged by an advocate who was not entitled to practice before the High Court and the Court of Appeal. **Third,** that contrary to the requirements of Rule 76 (1) of the Court of Appeal Rules, 1979, the Notice of Appeal was lodged in the Sub-registry of the Court of Appeal at Songea. Consequently, it is prayed that the appeal be struck out with costs. At the hearing of the Preliminary Objections the appellant was represented by Mr. Mpoki, learned advocate, whereas the respondents were represented by Mr. Mbamba, learned advocate, and Mr. Ng'wembe, learned Principal State Attorney for the first and second respondents respectively.

Mr. Mbamba chose to begin with the second ground of objection. He said from the bar that Dr. Wambali, advocate, who then acted for the appellant at the time he drew, signed, certified and lodged in Court the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal did not have a current practicing certificate as an advocate because he had defaulted to pay the annual subscription fees. It followed, according to Mr. Mbamba, that

there was no valid record of appeal before the Court for appeal purposes. Under section 39 of the Advocates' Act, Cap. 341, henceforth, the Advocates' Act, Dr. Wambali was an unqualified person who, under section 41 of the same Act was prohibited to act as an advocate. It was prayed that since there was no valid record of appeal before the Court, the purported appeal should be struck out with costs. Mr. Ng'wembe shared those views.

Mr. Mpoki conceded that Dr. Wambali was indeed an unqualified person at the time he filed those documents but posed the question, what would be the status of documents filed by an unqualified person? He argued that since the Advocates' Act was silent on that question resort had to be to sub-section (3) of section 2 of the Judicature and Application of Laws Act, Cap. 358 of the Laws. The *"reception clause"* in the Act allows the application of English law and the doctrines of equity which were in force in England on 22nd July, 1920. In that regard he cited various cases including **Sparling** v **Brereton** [1866] 31 LTR 64 and **Richard** v **Bostock** [1914] 31 LTR 70. He also referred to Halsbury's Laws of England, 4th Edition, Volume 446 (1) at page 222, paragraph 353. Other cases

to which he made reference were **Kajwang' v Law Society of Kenya** [2002] 1 KLR 846; **Jesse Gulyetondav v Henry Muganwa Kajura and 2 Others** and **Prof. Syed Huq v Islamic University In Uganda** [1997] IV KARL 26. Mr. Mpoki submitted that the tenor of all those authorities is that the client of an advocate who acted illegally should not be prejudiced although such advocate could be prosecuted for his illegal conduct.

Section 39 (1) (b) of the Advocates' Act stipulates:–

> 39 (1) Subject to the provisions of section 3 no person shall be qualified to act as an advocate unless
>
> (a) .....
>
> (b) he has in force a practicing certificate, ...
>
> (c) .....
>
> and a person who is not so qualified is in this Part referred to as an *"unqualified person".*

It is undisputed that on 9th May, 2006 when Dr. Wambaii, acting as advocate, filed the Notice of Appeal; on 14th December, 2006 and

15th December, 2006 when the same Dr. Wambali also acting as advocate lodged the Memorandum of Appeal and the Record of Appeal respectively, he was an unqualified person within the meaning of section 39 (1) (b) of the Advocates' Act.

It is further undisputed that the Advocates' Act is silent regarding the status of documents which are drawn or filed in court by an advocate who is unqualified to practice as such. But is it correct to say, as argued by Mr. Mpoki, that there is a lacuna in legal authorities in the country as to the status of such documents?

Mr. Mbamba could not cite any case law authorities to the effect that documents prepared and filed by an unqualified person ***ipso facto*** become invalid. His argument was that since there had been contravention of express statutory provisions by Dr. Wambali, this Court would be perpetuating an illegality if it accepted as valid the documents which were filed by him. In his view, the authorities which were cited by Mr. Mpoki referred to innocent clients of advocates who should not be prejudiced by irresponsible advocates who practiced as advocates when they were unqualified. In the case

before the Court Mr. Mbogoro, as the client of Dr. Wambali, was himself an advocate who should have known or had the means to know that Dr. Wambali was not a qualified person. Therefore, there was no need to be sympathetic with him.

We have tried to search in vain for case law in Tanzania specifically on the status of documents prepared and filed by an advocate at a time when he had no practicing certificate. We are constrained therefore to agree with Mr. Mpoki that resort may be necessary to English law as it was on the reception date, 22nd July, 1920. In that connection, there is the decision in **Sparling** v **Brereton** which Mr. Mpoki cited. In that case a solicitor who had not then taken his annual practicing certificate appeared for a defendant in court. The plaintiff in the case applied to court to have the appearance by the solicitor and the proceedings following therefrom to be set aside. The court declined to set aside the proceedings on the ground the solicitor's client's interests had not been improperly affected. It said:–

> "If clients were to be made responsible for any trifling irregularity in the formal qualifications of their solicitors or attorneys, much mischief might ensue, and their interests seriously affected".

It will be noted that the court in **Sparling** v **Brereton** found the irregularity trifling. The word *'trifling'* is defined in Chambers Twentieth Century Dictionary as of small importance, trivial. Trivial itself is defined in the same Dictionary as arising from an unimportant detail. But, with respect, the acts of an unqualified person are not treated as trivialities under the Advocates' Act, Cap. 341. They amount to a punishable offence.

Section 41 (1) of the Advocates' Act prohibits an unqualified person to act as advocate. Sub-section (2) of the section prescribes that any person who contravenes the provisions of the section would be guilty of an offence against the Act and of contempt of court and would be liable on conviction to a fine. So, we would say that the authority in **Sparling** v **Brereton** is distinguishable from the law in this country, which is statutory. The position in Uganda and Kenya can be gleaned in the following decisions:-

In the case of **Jesse Gulyetondav** v **Henry Muganwa Kajura and 2 Others** [1996] III KARL 44 an advocate who filed an election petition in the High Court in Uganda on behalf of a client and who commissioned the accompanying affidavit did not have a practicing certificate. The respondent in the petition made application to strike out the petition for being incompetent because the documents so filed were incurably defective. It was held by the High Court that lack of an advocate's practicing certificate did not invalidate proceedings initiated by documents filed by such advocate. The reason for so holding was that litigants would find it almost impossible to investigate the existence of the certificate before giving instructions to the advocate. It is not known to us if there was an appeal against that decision. Even so, again, in contrast to the present case, it can hardly be argued here that it was *"almost impossible"* for Mr. Mbogoro, the client, to investigate if Dr. Wambali had a current practicing certificate before giving him instructions to appeal to this Court.

The Supreme Court of Uganda [illegible] that of the High Court in the **Gulyetondav** case. In the case of **Syed**

Huq v **Islamic University In Uganda,** [1997] IV KARL 26 the appellant filed an employment dispute against the respondent. He lost and sought to appeal against the trial court decision. A preliminary objection was raised by the respondent claiming that the appeal was incompetent because the advocate for the appellant had no valid practicing certificate when he extracted the decree that formed part of the record of appeal. The majority decision of the Supreme Court was that an advocate who practiced without a valid practicing certificate after a grace period, practiced illegally and that all proceedings taken by such advocate and documents signed by him were invalid "*because to say otherwise would amount to a perpetuation of an illegality*".

The Supreme Court reached that decision after reviewing a number of previous Ugandan decisions on the point and also referred to the English decision in **Sparling** v **Brereton** (supra).

The minority opinion in the case (By Tsekooko, J.S.C.) was that the provisions of the Ugandan Advocates' Act did not render invalid pleadings drawn or prepared by an advocate who had no valid

practicing certificate. The rationale of that view was that the provisions of the Advocates' Act meant to punish an errant advocate, not to penalize an innocent litigant.

With respect, we find persuasion in the majority opinion of the Ugandan Supreme Court and we adopt it as good law in Tanzania as well. But even in the minority opinion, we find it distinguishable from the case at hand. Tsekooko, J.S.C. was referring to an innocent litigant, meaning presumably a litigant who could not be expected to know if the counsel he instructed did not have a current practicing certificate. That could not be said of the appellant before us for reasons which we already gave earlier in this ruling. The case of **Kajwang' v Law Society of Kenya** [2002] 1 KLR 846 also cited by Mr. Mpoki is a decision of the High Court of Kenya. A similar issue arose in that case whether court proceedings were invalid as a result of a prosecution by an advocate who did not have a proper practicing certificate. It was held therein that there was no specific legislation declaring proceedings invalid because the advocate did not have a proper practicing certificate. Consequently, the client could not be made to suffer for the mistake of the advocate. The object of the

penalties for practicing without a certificate was to punish the unqualified advocate and not the litigant.

We do not know if the decision in **Kajwang'** case was taken to the Court of Appeal for its opinion. But it would appear that the decision was grounded on the reasoning that although the advocate did not have a practicing certificate, he was still bound by the oath he took upon admission and that since the name of the advocate was still on the Roll of Advocates, he retained his privilege of a practicing advocate. That reasoning may be questioned where practice without a practicing certificate is declared illegal. Again, like in the Uganda High Court decision, the fact of the client being innocent and not being in a position to know if the advocate did not have a practicing certificate must have influenced the High Court of Kenya to reach the decision it did.

After considering the above decisions of those three Commonwealth countries, that is to say England, Kenya and Uganda, we can say that although there is no specific statutory provision on the point, if an advocate in this country practices as an advocate

without having a current practicing certificate, not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We also take the liberty to say that to hold otherwise would be tantamount to condoning illegality. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court by Dr. Wambali purporting to act as an advocate of the appellant were of no legal effect. Therefore, there is currently no competent appeal before this Court and we uphold the second ground of objection.

The first ground of objection relates to whether or not there was need for leave to appeal against the Ruling of the High Court. We think we can dispose of this ground fairly quickly.

Although Article 83 (4) of the Constitution (2002 Edition) provides for appeals as of right in election petition cases, this does not mean that every decision arising from an election petition is appellable as of right. This is the clarification which the Full Bench of this Court gave in **Freeman Aikaeli Mbowe And Another v Alex O. Lema,** Civil Appeal No. 84 of 2001. The Court gave guidance on

the kind of decisions to which sub-Article (4) of Article 83 extends. It said:-

> "We think that it extends only to those decisions where it is shown that the following conditions exist:
>
> (1) The case falls within one of the categories of cases specified in paragraphs (a) and (b) of sub-Article (1), namely, whether the election or nomination of any person as a Member of Parliament was lawful or otherwise, or whether a Member of Parliament has ceased to be such a member and his Parliamentary seat has consequently become vacant or not;
>
> (2) The case was first instituted and heard in the High Court, and
>
> (3) The High Court finally determined the matter.
>
> Where these conditions do not exist a party cannot invoke the Sub-Article and seek to appeal as of right".

Mr. Mbamba argued that the Order of the High Court which the appellant intends to challenge in the Court of Appeal does not come under Article 83 (1) (a) and (b) of the Constitution and, therefore, section 5 (1) (c) of the Appellate Jurisdiction Act, 1979 was applicable. That means leave of the High Court or the Court of Appeal was necessary. Since no leave was sought and granted, the appeal was incompetent and should be struck out with costs. The ruling of a single judge of this Court in **Kalunga & Co. v National Bank of Commerce Limited,** Civil Application No. 111 of 2003 was cited as supporting the submission.

Mr. Mpoki on the other hand argued that the appeal was lodged without seeking leave because Article 83 (4) of the Constitution allows a party to appeal to the Court of Appeal from a decision of the High Court in an election petition without the need to seek leave. In support of that argument he cited the case of **Leonsi Silayo Ngalai v Hon. Justine Alfred Salakana and The Attorney General,** Civil Appeal No. 38 of 1996 (unreported). According to Mr. Mpoki, this Court in that case held that there was a right of appeal against any decision of the High Court in election

petition cases. The decision of the High Court in the present appeal was such decision and there was no need to seek and obtain leave.

It will be recalled that the appellant had made application to the High Court for extension of time to apply for exemption from payment of security for costs or to pay such other sum as the court may consider appropriate. Although that application related to the requirement in section 111 (2) of the Election Act, 1985 (as subsequently amended), to make a monetary deposit of shillings 5 million before an election petition can be set down for hearing, it was not *"a decision of the High Court in respect of any case heard under the provisions"* of Article 83 of the Constitution. It may be helpful to quote here the provisions of Article 83 (1) to (4). They read:–

> "83. (1) Every case concerning determination of the issue –
>
> (a) whether the election or nomination of any person as a Member of Parliament was lawful or otherwise; or
>
> (b) whether a Member of Parliament has ceased to be such member and his

Parliamentary seat has consequently become vacant or not, shall be instituted and heard first in the High Court of the United Republic of Tanzania without prejudice to the provisions contained in sub-Article (2) of this Article.

(2) Whenever the Electoral Commission, in the exercise of its responsibilities pursuant to the provisions of Article 41 (3) of this Constitution, declares any member of Parliament to be duly elected as President, then the issue of whether that person's Parliamentary seat has become vacant shall not be inquired into by any court or other body.

(3) Parliament may enact a law providing for –

(a) the persons who may institute a case in the High Court for determination of any issue pursuant to the provisions of this Article;

(b) the grounds and time for instituting such a case, the procedure for

instituting and the requirements that have to be fulfilled in such a case, and

(c) the powers of the High Court in such a case and the procedure for its hearing."

(4) There shall be a right of appeal to the Court of Appeal of Tanzania against the decision of the High Court in respect of any case heard under the provisions of this Article".
(Our emphasis)

We have underscored the words *"in respect of any case heard under the provisions of this Article"* because therein lies the answer to the dispute now before us. The provisions of *"this Article"* means Article 83, in particular sub-Article (1) (a) and (b). A decision in an election petition deciding on issues relating to paragraphs (a) and (b) of sub-Article (1) of Article 83 may be appealed to the Court of Appeal without the need for leave as would otherwise be required under section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. An appeal against any other decision of the High Court in an election petition would require leave of the High Court or the Court of Appeal.

The words in the **Leonsi Silayo Ngalai** case that sub-Article (4) of Article 83 of the Constitution provide *"clearly for a right of appeal against any decision of the High Court in election petition cases"* were not a correct interpretation of the law. This Court in the Full Bench ruling in **Freeman Aikaeli Mbowe and Another v Alex O. Lema,** Civil Appeal No. 84 of 2001 conclusively departed from that holding as we indicated earlier in this ruling.

It emphatically said:–

> "..... the Court in **Ngalai's** case interpreted Article 83 (4) too widely."

It follows, therefore, that since Article 83 (4) of the Constitution was inapplicable to the purported appeal, the appellant ought to have sought and obtained leave to appeal as required by section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. That was not done and the appeal is also on this score incompetent and should be struck out.

Finally, there is the ground of objection in the Supplementary Notice of Preliminary Objection. It is not disputed that the Notice of Appeal appears to have been lodged in the Sub-Registry of the Court

Appeal was not lodged with the Registrar of the High Court but, in addition, there were other defects. The Notice had not been addressed to anyone at all and it was signed by a person of undisclosed identity, which the Court found to be grossly improper. It was for all those reasons that in **Loitiame** this Court struck out the Notice of Appeal. Mr. Mpoki asked the Court to administer substantive justice and overlook innocuous defects.

We would be willing to overlook the defect in the subject Notice of Appeal because it appears to have been the result of an oversight where it shows that it was sent to a Sub-Registry instead of District Registry of the High Court at Songea. As for the Court of Appeal Stamp on the Notice of Appeal, that was an error by the Court staff and should not be blamed on the appellant. However this Notice of Appeal, as already mentioned earlier is of no legal effect because it was drawn and filed by Dr. Wambali who was then an unqualified person.

For all the above reasons, the preliminary objections which were lodged by the First Respondent through his counsel are upheld.

There is no valid appeal before the Court and it is struck out with costs.

DATED at DAR ES SALAAM this 20th day of September, 2007.

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR