

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 297 OF 2017

**ALLIANCE INSURANCE CORPORATION LIMITED
APPELLANT**

VERSUS

**ARUSHA ART LIMITED
RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania
at Arusha)
(Mwaimu, J)**

**Dated 05th day of June, 2015
in
Civil Case No. 27 of 2012**

RULING OF THE COURT

12th & 14th December, 2018

MWARIJA, J.A.:

The appellant, Alliance Insurance Corporation Limited, was dissatisfied with the decision of the High Court of Tanzania Arusha District Registry, Mwaimu, J (as he then was) in Civil Case No. 27 of 2012. The respondent, Arusha Art Limited, who was the plaintiff in the case had claimed from the appellant a total amount of TZS.1,318,338,907.00. The claim arose from a fire outbreak at the respondent's premises thereby destroying its various

properties thus occasioning loss to it. The respondent held an insurance policy with the appellant, the latter having insured its properties against fire.

The appeal was met with a preliminary objection, the notice of which was filed on 7/12/2018. The respondent filed a notice of preliminary objection consists of three grounds as follows:

“(a) That the Notice of Appeal and the Memorandum of Appeal have been drawn and lodged in Court by an unqualified person contrary to sections 2, 39 (1) (a), (b) and (c) and 41 (1) of the Advocates Act, Cap. 341 R.E. 2002 and Order III Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2002.

(b) In the Alternative, that the Notice of Appeal and the Memorandum of Appeal drawn and lodged in Court by ENSAFRICA TANZANIA ATTORNEYS do not mention in legible characters, present names or the initials thereof and present surnames, the nationality of the partners in the firm contrary to the (sic) section 23 of the Business Names (Registration) Act, Cap. 213 R.E. 2002.

(c) That the Judgment and Decree in the Memorandum of Appeal are defective for containing clerical mistakes in respect of the name of the Appellant contrary to the law.

On 12/12/2018 when the appeal was called on for hearing, the appellant was represented by Dr. Alex Nguluma, learned counsel, while the respondent was represented by Mr. Albert Msando, also learned counsel.

Given the existence of the preliminary objection, as stated above, the Court had to deal with it first. In arguing the objection, Mr. Msando abandoned ground (c) and proceeded to submit on grounds (a) and the alternative ground (b). With regard to ground (a), the learned counsel based his arguments on S. 39 (a) - (c) or the Advocates Act [Cap. 341 R.E. 2002] (The Act) and the High Court decision in the case of **Mohamed Rajuu Hassan v. Salim Ally Al-Saad & Another**, Land Case No. 34 of 2013 (unreported). S. 39 (a) - (c) provides as follows.

“39 - (1) Subject to the provisions of section 3 no person shall be qualified to act as an advocate unless -

- (a) his name is on the Roll;*
- (b) he has in force a practicing certificate;*
and
- (c) he has a valid business licence,*

and a person who is not so qualified is in this Part referred to as an “unqualified person.”

S. 41 of the Act prohibits an unqualified person from acting as an advocate. It also provides for punishment for a person who breaches that prohibition.

The learned counsel argued that, since ENSAFRICA Attorneys is not a person contemplated under S. 39 (a) – (c) of the Act, it is not an advocate. For that reason, he argued that the notice and the memorandum of appeal have been drawn and lodged by an unqualified person. He thus urged the Court to find both the notice of appeal and the memorandum of appeal to be defective.

On the alternative ground, the respondent’s counsel argued that the memorandum and the notice of appeal contravene the provisions of section 23 of the Business Names (Registration) Act, Cap. 213. The provision states as follows:

“23-

- (1) *After the expiration of three months from the passing of this Act every individual and firm required by this Act to be registered shall, in all trade catalogues, trade circulars, showcards and business letters on or in which the business names appears, to mentioned in legible characters -*
- (a) *In the case of an individual, his present name or the initials thereof and present surname, any former name or surname, his nationality is not his nationality of origin his nationality of origin, and*
- (b) *In the case of a firm, the present names or initials thereof and present surnames, any former names and surnames, and the nationality and if the nationality is not the origin of all the partners in the firm or, in the case of a corporation being a partner being a partner the corporate name.*
- (2) *If default is made in compliance with this section the individual or, as the case may be, every member of th firm shall be liable upon conviction for each*

offence to a fine not exceeding one hundred and fifty shillings.”

In response, Dr. Nguluma argued that the points raised by the respondent's counsel are not pure points of law as the same require evidence to ascertain firstly, whether or not ENSAFRICA is a legal person or not. This, he said, is because a firm may not necessarily be a legal person. Secondly, the learned counsel argued that sections 39 - 41 envisage a natural person because a legal person cannot draw documents and so, it is an unqualified natural person who is prohibited from drawing documents for other persons. Dr. Nguluma went on to argue that, the notice and the memorandum of appeal were drawn by a natural person and for that matter, ascertaining whether or not that person is unqualified, is a matter of fact which requires evidence.

In the alternative, he argued that the documents were drawn by Dr. Alex Nguluma whose name appears in other documents in the record as the advocate for the appellant. He said therefore that, whether he is unqualified or not is a matter of fact. Citing the case of **George Humba v. James M. Kasuka**, TBR Civil

Application No. 1 of 23005 (unreported), the learned counsel argued that the persons who are targeted by the provisions of the law relied upon by Mr. Msando are lay persons not advocates because advocates have their specific procedure as far as regulation of their conduct is concerned.

On the alternative ground of the preliminary objection, it was Dr. Nguluma's argument that S. 23 of Cap. 213 is not applicable to preparations and filing of a notice and memorandum of appeal. This, he said, is because there are specific provisions of the Court of Appeal Rules, 2009 which regulate how the said documents should be drawn and filed in Court.

From the submissions of the learned counsel for the parties, the issue for our determination in ground (a) of the preliminary objection is whether or not that ground raises a pure point of law.

We agree with Dr. Nguluma that the same does not. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 699 which has often been cited as an authority on the proper way of raising a preliminary objection, Sir Charles Newbold, P. stated as follows:

*“A preliminary objection is in the nature of what used to be a demurrer. **It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion . . . “*

[Emphasis added]

In his preliminary objection, the respondent’s counsel contends that the notice and the memorandum of appeal have been drawn by an unqualified person. There is no dispute that although they are shown to have been drawn by ENSAFRICA, a juristic person, the documents have been signed. They could not have been signed by a juristic but a natural person. The issue whether or not the person who signed them is an unqualified person or not is a matter which requires evidence to ascertain. In the circumstances, the point raised by the respondent’s counsel does not qualify as a pure point of law.

With regard to S. 23 of Cap. 213, we are with respect, of the opinion that its application to drawing and filing of a notice and

memorandum of appeal is misconceived. The section applies to registration of business names. As argued by the appellant's counsel, it is the Court of Appeal Rules which govern the process of preparation and filing of the said documents. Even if the respondents counsel had meant that the ENSAFRICA, the firm of the appellant's counsel had contravened that provision, the contention would as well require to be ascertained. That would also disqualify the point raised by the respondent's counsel from being a pure a point of law.

For the foregoing reasons, we do not find merit in the preliminary objection. The same is hereby overruled. Costs to abide the outcome of the appeal.

DATED at **ARUSHA** this 13th day of December, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL