IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION No. 434/01 OF 2019

FATMA AMANI KARUME.....APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE JAJI KIONGOZI,
HIGH COURT OF TANZANIA ..... 2ND RESPONDENT

(Application for Revision from the decision of the High Court of Tanzania, Main Registry at Dar es Salaam)

(Feleshi, J.K)

dated the 20th day of September, 2019
in
Misc. Civil Cause No. 29 OF 2018

.....

RULING OF THE COURT

24th March & 27th June, 2023

KIHWELO, J.A.:

The central issue subject of the instant application concerns the decision of the High Court of Tanzania, Main Registry at Dar es Salaam (henceforth "the High Court") in Miscellaneous Civil Cause No. 29 of 2018 in which the High Court (Feleshi, Jaji Kiongozi, as he then was) (the learned J.K.) suspended from practice Ms. Fatma Aman Karume, the applicant herein, Roll No. 848 under section 22 (2) (b) of the Advocates Act, [Cap. 341

R.E. 2002] (the Act). He further, ordered the Registrar of the High Court to refer the applicant's matter to the Advocates' Committee for determination of the complained unethical conduct. The application has been sturdily contested by the respondents.

We find it crucial, at the outset, to preface our determination with brief facts which appropriately describes the genesis behind the present matter. The applicant was up until 20.09.2019 an advocate of the High Court of Tanzania and courts subordinate thereto save for primary courts. Apart from that, the applicant was enrolled as an Advocate of the High Court of Zanzibar and also a Barrister qualified at the Middle Temple.

The applicant was duly instructed to represent one Ado Shaibu in a Constitutional Petition, Miscellaneous Civil Cause No. 29 of 2018 between Ado Shaibu and the Attorney General and Two Others. As the respondents raised preliminary points of objection, the matter was set for hearing before the learned J.K. who ordered it to be disposed of by way of written submissions which the parties dutifully complied with.

The written submissions which were dully filed by the parties in compliance with the court's schedule are the basis of the current application

before the Court. The Attorney General, apart from rejoining the submission by the applicant, raised a very serious complaint against the applicant that, in her reply written submission she used unprofessional, disrespectful and abusive language which was full of personal vindication to the Solicitor General and the Attorney General. The Attorney General went further to pray that the applicant be reprimanded for such unethical style of arguments contained in the written submissions.

Consequently, the learned J.K., in the course of deliberation of the ruling on preliminary objection suspended the applicant in order to pave way for reference of the complained unethical conduct to the Advocates' Committee. The applicant is presently aggrieved by that decision and, in an effort to challenge it, she lodged the instant application which is predicated on section 4 (2) and (3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] (the AJA), and rule 65 (1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

It is, perhaps pertinent to observe at this juncture that, the application was based on 13 grounds which for the sake of clarity and for reasons to be apparent shortly, we will not reproduce them here, but essentially the main

ground is that the learned J.K. acted irregularly, improperly, illegally and incorrectly in suspending the applicant.

When the application was ripe for hearing on 24.03.2023, the applicant was represented by Dr. Rugemeleza Nshalla and Mr. Peter Kibatala, both learned advocates. On the adversary side, the respondents were represented by Ms. Debora Mcharo, learned State Attorney assisted by Mr. Ayoub Sanga and Mr. Yohana Marco, both learned State Attorneys.

Before hearing of the application could commence in earnest, Ms. Mcharo, prayed and was granted leave to raise, orally, four points of preliminary objection which according to her, the respondents came across in the course of preparing for the hearing of this application. The four points of preliminary objection are as follows:

1. *The applicant has brought before this Court different parties from those in the impugned decision;*
2. *The applicant has filed a notice of application for revision instead of notice of motion as required by law;*
3. *The application before the Court has been overtaken by events; and*
4. *The impugned decision is not amenable for revision.*

For the moment, it will suffice to observe that, for the sake of convenience and practicality, we allowed the parties to argue both the

preliminary objections and the application for revision, and the ruling on the preliminary objection would determine the fate of the application.

We wish to express our profound appreciation to all counsel who appeared in this matter for their commendable preparedness and their ingenuity as well as industry in addressing issues of contention before us.

Prefacing her submission regarding the first point of preliminary objection, Ms. Mcharo contended that, the applicant brought different parties to the instant application from those in the impugned decision delivered on 20.09.2019. Illustrating further, she argued that, the Jaji Kiongozi, High Court of Tanzania was not a party in the impugned decision while the other parties have been left out, and hence, they cannot defend their rights. She therefore, implored us to strike out the application for being incompetent, citing the case of **Salim Amour Diwani v. The Vice Chancellor Nelson Mandela African Institution of Science and Technology,** Civil Application No.116/01 of 2021 (unreported) to support the proposition that parties in the proceedings should at any given time appear as they did in the original proceedings.

In support of the second point of preliminary objection, Ms. Mcharo was fairly brief and argued that, the application before the Court was not

made in compliance with the law which is categorically clear on the form upon which any application before the Court should be made, citing rule 48 (1) and (2) as well as rule 65 of the Rules which both require every application to be made by way of a notice of motion supported by affidavit(s). She contended that, the application was incompetent since the applicant lodged a notice of application for revision in total contravention of the law. Reliance was placed in the case of **Gerald Kasamya Sibula v. Republic**, Criminal Application No. 5 of 2010 (unreported) to fortify her argument.

Ms. Mcharo further argued the third preliminary point of objection in that, the application before us has been overtaken by events. Elaborating, she contended that the suspension of the applicant was pending reference to the Advocates' Committee which has since determined the matter and its appeal was also decided by a panel of three Judges of the High Court in Civil Appeal No. 2 of 2020 which nullified and set aside the decision of the Advocates' Committee and ordered the Registrar of the High Court to transmit the complaint to the Advocates' Committee in the manner directed in the impugned order. Ms. Mcharo argued that, entertaining this application will be an abuse of the court process and will amount to pre-empting the

other pending matters especially bearing in mind that the first respondent has already lodged a notice of appeal challenging the decision in Civil Appeal No. 2 of 2020. We wish to interpose here and point out that, upon our prompting Ms. Mcharo was unable to demonstrate whether the said notice of appeal was before us to enable us deliberate on it.

Arguing the fourth point of preliminary objection, Ms. Mcharo submitted that the impugned decision is not amenable for revision in terms of section 5 (2) (d) of the AJA since the impugned decision was a preliminary or interlocutory decision which did not finally determine the matter and that the impugned decision was made pursuant to section 22 of the Act, and according to the nature of the order test, the applicant still had another remedy under section 22 of the Act. To facilitate an appreciation of her proposition, Ms. Mcharo cited to us our previous decision in the case of **Tanzania Posts Corporation v. Jeremiah Mwandi**, Civil Appeal No. 474 of 2020 and **Pangea Minerals Ltd v. Petrofuel (T) Limited and Two Others**, Civil Appeal No. 96 of 2015 (both unreported).

All in all, she urged us to strike out the application before us for being incompetent.

Conversely, in response, Dr. Nshalla prefaced his submission by starting with the third point of preliminary objection and very briefly argued that the complaint by the applicant is not overtaken by events as argued by Ms. Mcharo because the order suspending the applicant was imposed and to date the applicant is still under suspension. In his argument, the fact that the Advocates' Committee acted upon the impugned order, and the High Court in Civil Appeal No. 2 of 2020 nullified and set aside the decision of the Advocates' Committee and ordered the Registrar of the High Court to transmit the complaint to the Advocates' Committee in the manner directed by the impugned order, does not negate the fact that the applicant is still under suspension. Thus, he contended that, this preliminary objection has no merit.

In response to the fourth point of preliminary objection, Dr. Nshalla admittedly argued that, the applicant was not a party to the matter before the High Court which is the basis of the impugned decision, and it is on that account that she has preferred an application for revision before the Court as the only avenue available to her to challenge the impugned decision. He placed reliance in the case of **Jacqueline Ntuyabaliwe Mengi and Others v. Abdiel Reginald Mengi and Others**, Civil Application No.

332/01 of 2021 (unreported) for the proposition that, the only way for someone who was not a party in the matter before the lower court to challenge the decision, is by way of revision. Upon our prompting Dr. Nshalla argued that section 22 (2) (c) of the Act does not apply in the current circumstances since the applicant was not suspended under section 22 (2) (a) of the Act. He therefore, insistently argued that the applicant had no way out other than filing an application for revision, and that no remedy is provided in respect of the action taken under section 22(b) of the Act.

On his part, in further response to the fourth ground of the preliminary objection, Mr. Kibatala argued that, the principle of the nature of the order test which was recited in the case of **Tanzania Posts Corporation** (supra) is in favour of the applicant because the impugned order had life of its own in the sense that it finally determined the rights of the applicant and therefore, it was not interlocutory, and thus amenable for revision. He therefore submitted that this preliminary objection has no merit.

In response to the first point of preliminary objection, Mr. Kibatala argued that, it is true that parties in the impugned decision are not the same as those in the instant application and according to him the explanation was simple and straight forward. Illustrating, he contended that, the impugned

decision was twofold, the learned J.K. disposed of the matter before him by sustaining some of the preliminary objections, striking out the petition and went ahead to suspend the applicant under a different scheme. He further argued that, the learned J.K. clothed himself with the powers of the first respondent and ordered the Registrar of the High Court to transmit the complaint to the Advocates' Committee in the manner directed in the impugned order. Mr. Kibatala distinguished the case of **Salim Amour Diwani** (supra) which according to him, the circumstances are not the same. While the former case related to extension of time, the latter case dealt with the issue of failure to accord the applicant the right to be heard prior to suspension. He further relied on the case of **Judge-In-Charge, High Court at Arusha and Another v. N.I.N Munuo Ng'uni** [2004] T.L.R. 44 to bolster his argument.

In response to the second point of preliminary objection, Mr. Kibatala was fairly brief and admittedly submitted that, truly the applicant filed a notice of application for revision instead of notice of motion but everything else in the application refers to application for revision. He further contended that, even the notice of application for revision clearly indicated that it arose from Misc. Civil Application No. 29 of 2018. In his argument, if anything, it

is a mere slip which is inconsequential as there is no any prejudice to any of the parties. He referred us to the case of **Israel Malegesi and Another v. Tanganyika Bus Services,** Civil Application No. 172/08 of 2020 (unreported) for the proposition that failure to properly write the title of the notice of motion is a minor irregularity which does not render the application fatal and therefore incompetent. He thus, rounded of by arguing that, in the spirit of overriding objective principle, the anomaly is minor and therefore, it can be glossed over. He strongly submitted that this point of preliminary objection has no merit.

In a very brief rejoinder, Mr. Sanga argued in relation to the response about the second point of preliminary objection that, rule 48 of the Rules expressly states that every application will be made by way of notice of motion and not notice of application and that the remedy in the circumstances is amendment but not to ignore the anomaly.

In response to the reply in relation to the first point of preliminary objection, Mr. Sanga insistently submitted that, parties are not the same in the two matters before the Court and distinguished the case of **Judge-In-Charge, High Court at Arusha** (supra) with the current application before us in that, in the former case, the applicant filed a constitutional petition

while the matter before us is not a constitutional petition, and therefore, parties have to remain the same.

In response to the reply on the third point, the learned counsel insisted that the impugned decision was not final and to date there are issues still pending which makes the order interlocutory, not amenable for revision.

Having carefully examined the record and dispassionately considered the respective oral submissions of the learned trained minds in support and opposition to the preliminary points of objection, we should now address the contending issues and determine the preliminary objection.

Starting with the first point of preliminary objection, clearly it is apparent on the face of the record that the then petitioner and the second and third respondents before the High Court are not part of this application. However, we think that, this should not detain us much for the simple reason that, we find considerable merit in Mr. Kibatala's submission that the cited case of **Salim Amour Diwani** (supra) is distinguishable because the circumstances pertaining to the case before us are not the same as those in **Salim Amour Diwani** (supra). While in the former case the applicant joined the Attorney General who was not a party in the original proceedings as a

second respondent and without leave of the court, in the instant matter the applicant who was not a party in the original proceedings has come armed with an application for revision which as we earlier on stated in the case of **Jacqueline Ntuyabaliwe Mengi and Others** (supra), the law allows someone who was not a party to the matter to lodge an application for revision to challenge that decision. Truly, the applicant has left some of the parties in the case who would otherwise want to defend their rights, but as rightly maintained by Mr. Sanga, the remedy which we also associate ourselves with as the correct exposition of the law, if at all found necessary in the circumstances of this case, is to allow an amendment and not to declare the application incompetent and strike it out. All in all, as to the consequences of this anomaly, we shall reserve our final determination pending decision of the subsequent point of preliminary objection.

Next, we shall deliberate on the fourth point of preliminary objection in which the respondent has argued that, the impugned decision is not amenable for revision.

Our starting point will involve a reflection of the law that provides for disciplinary powers of Judges and the High Court to deal with misconduct or

offences by advocates. For the sake of clarity, we wish to reproduce the provision of section 22 of the Act which provides thus:

> *"22.-(1) Nothing in this Act contained shali supersede, or interfere with the powers vested in the Chief Justice or any of the Judges of the High Court to deal with misconduct or offences by advocates.*
>
> *(2) Without prejudice to the generality of the foregoing subsection, notwithstanding that no inquiry may have been made by the Committee-*
>
> *(a) the Chief Justice or the High Court shall have power, for any reasonable cause to admonish any advocate or to suspend him from practicing during any specified period or make an order of removing his name from the Roll;*
>
> *(b) any Judge of the High Court shall have power to* ***suspend any advocate*** *in like manner temporarily, pending a reference to,* ***or disallowance of such suspension by, the High Court;***
>
> *(c) any advocate aggrieved by any decision or order of the Chief Justice or a judge of the High Court made in pursuance to paragraph (a), may, within thirty days of such decision or order appeal-*
>
> *(i) in the case of a decision or order by a judge of the High Court, to the Advocates' Committee; and*
>
> *(ii) in the case of a decision or order of the Chief Justice, to the Court of Appeal:*

Provided that where the decision or order appealed against was made by a judge of the High Court nominated by the Chief Justice to be a member of the Advocates' Committee under section 4(1)(a) of this Act, such judge shall not sit at the hearing of the appeal by the Committee, and in such case, the Chief Justice may nominate another judge of the High Court as provided under subsection (3) of section 4 of this Act; and save further that in an appeal to the Court of Appeal against a decision or order of the Chief Justice the latter shall not sit to hear the appeal." [Emphasis added].

The issue that emerges from the above provision of the law is whether the impugned decision was amenable for revision. Before we answer that issue, we hasten to state at this juncture that, the provisions of section 22 of the Act, provides for a scheme under which disciplinary powers of Judges and the High Court can be exercised against an advocate who behaves in a manner considered to be professional misconduct or offences by advocates apart from inquiry by the Advocates' Committee in terms of section 13 of the Act which is a separate scheme.

Counsel are not at issue in as far as the scheme of section 22 of the Act is concerned, the real pith and marrow in the instant matter is whether the applicant having being suspended under section 22 (2) (b) of the Act

was justified to come before us by way of revision. While Ms. Mcharo argued that in terms of section 5 (2) (d) of the AJA the impugned decision is not amenable for revision because it was merely a preliminary or interlocutory one which did not finally determine the suit, Mr. Kibatala on his part contended that, according to the principle of the nature of the order test which was stated in the case of **Junaco (T) Limited and Justin Lambert v. Harei Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 (unreported) and recited in the case of **Tanzania Posts Corporation** (supra), the impugned order had life of its own and therefore it finally determined the rights of the applicant and thus it is amenable for revision because it was not interlocutory.

It is clear to us that, from the express wording of section 22 of the Act, section 22 (2) (b) is the most appropriate provision to address the issue in contention. In our considered and respectful opinion, the above provision is self-sufficient in that, it caters for both powers of the Judge of the High Court to suspend any advocate temporarily in like manner pending reference to the High Court and also powers of the High Court to disallow suspension of any advocate who has been suspended upon an application by that advocate. Mr. Kibatala urged us to find that the applicant rightly resorted to

come before us by way of revision. Admittedly, the argument is attractive but, to us, we find it inexpedient in the circumstances.

With due respect, we are of the finding and holding that, the applicant, having been suspended under section 22 (2) (b) of the Act, had an opportunity to move the High Court by employing the same provision of section 22 (2) (b) of the Act to seek disallowance of the order which suspended her. Trying as hard as we can to follow Mr. Kibatala's reasoning, we fail to understand why didn't the applicant resort to this avenue and instead opted to lodge an application for revision which, in our view, it was a misconception. To think otherwise, that, in our view, cannot have been the intention of the Parliament when drafting section 22 of the Act.

It is not insignificant to state that, this situation is not novel. We wish to take inspiration in the case of **Sabas William Kiwango v. The Attorney General**, Misc. Civil Application No. 17 of 2011, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported) in which, while deliberating on the preliminary objection in an application where the applicant sought to move the High Court to lift his suspension, that court decidedly held that section 22 (2) (b) of the Act is applicable to both cases of suspension of an advocate and also disallowance of any such suspension.

We venture to say that, for the foregoing reasons, that concludes our deliberations on the fourth preliminary point of objection which we uphold.

As the fourth preliminary point of objection alone suffices to dispose of the application, it will be hypothetical and a mere academic exercise to waste time deliberating on the rest of the preliminary points of objection. Consequently, we find and hold that, the instant application is incompetent and therefore, we strike it out with costs.

DATED at **DAR ES SALAAM** this 19th day of June, 2023

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 27th day of June, 2023 in the presence of the Mr. Peter Kibatala, learned counsel for the Applicant and Ms. Frida Mollel, State Attorney for the Respondents is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL