IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A. And MGONYA, J.A.)

CIVIL APPLICATION NO. 694/01 OF 2021

THE ATTORNEY GENERAL ..... 1ST APPLICANT
THE ADVOCATES COMMITTEE ..... 2ND APPLICANT

VERSUS

FATMA AMANI KARUME ..... RESPONDENT
[Application for Leave to Appeal Against the Decision of the High Court of Tanzania at Dar es Salaam]

(Maige, Nangela, Kakolaki, JJ.)

dated the 17th day of June 2021

in

Civil Appeal No. 2 of 2020

.....

RULING OF THE COURT

19th July & 11th September, 2023

GALEBA, J.A.:

This application is for leave to appeal to this Court in order to challenge a decision of three Judges of the High Court, Maige J. (as he then was), Nangela and Kakolaki JJ. It has been brought by the Attorney General and the Advocates Committee, the first and second applicants, respectively, after the High Court (Magoiga J.) had dismissed a similar application on 17th December, 2021.

The brief background as to how this matter found its way before us, is that Fatma Amani Karume, the respondent in this application, in exercising her statutory mandate as an admitted advocate, was engaged by a litigant, one Ado Shaibu (not a party to this application), to represent him in Miscellaneous Cause No. 29 of 2018. Certain points of preliminary objections were raised in that matter, and orders were made that the same be disposed of by way of written submissions.

In determining the objections, it appeared to the High Court, Feleshi, JK (as he then was), that the language and the expressions employed by the respondent in the written submissions, constituted professional misconduct. Thus, acting under section 22 (2) (b) of the Advocates Act, the High Court suspended the respondent from legal practice. In addition to the suspension order, the court made a judicial directive, that the written submissions which had been filed by the respondent, the rejoinder to them, and the ruling suspending her, be transmitted by the Registrar of the High Court to the second applicant for determination.

While the order of the High Court to transmit the dispute to the second applicant for determination was still pending, on 8th October, 2019, the first applicant approached the second applicant and lodged Application

No. 29 of 2019 complaining of not only the matters that the High Court had ordered to be transmitted to the second applicant by the Registrar of the High Court, but also for some other allegations of professional misconduct which were allegedly committed by the respondent subsequent to her temporary suspension. After hearing the latter application, the second applicant made orders permanently removing the respondent from the roll of advocates on Mainland Tanzania. Naturally, that indefinite order banning the respondent from legal practice, aggrieved her. She approached the High Court and lodged Civil Appeal No. 2 of 2020, challenging the permanent removal of her name from the roll of advocates. Allowing the appeal, the High Court, (Maige, Nangela and Kakolaki JJ), reasoned thus:

> *"In our humble judgment, the first respondent was bound either to wait until the complaint he initiated in the court proceedings is transmitted to the second respondent in the way and the manner therein directed, or else initiate a separate complaint not touching the subject of the complaint dealt with under the court order."*

Largely, based on the above reasoning, the appeal succeeded and Application No. 29 of 2019 in which the respondent had been permanently disbanded from legal practice was declared incompetent. Further, the High

Court made the same directive to the Registrar of the High Court to transmit the order suspending the respondent to the second applicant for determination. This finding aggrieved the applicants, who together lodged a notice of appeal on 22nd June, 2021. They also lodged Miscellaneous Civil Application No. 8 of 2021, seeking leave of the High Court to appeal to this Court, but on 17th December 2021, leave was refused as the application was dismissed.

On 31st December, 2021, this application was filed seeking leave of the Court on a second bite. In response to it, the respondent did not only lodge an affidavit in reply sworn by Dr. Rugemeleza Kamuhabwa Nshala, but also she filed a notice of preliminary objection, that the application is incompetent because the affidavit supporting the notice of motion is not attached with an order of the High Court refusing leave. The respondent's point being that, the omission to do so was in breach of rule 49 (3) of the Tanzania Court of Appeal Rules 2009, (the Rules). This preliminary objection, is the sole subject matter of this ruling.

At the hearing of this application, the applicants were represented by Mr. Erigh Rumisha assisted by Ms. Caroline Lyimo and Ms. Victoria

Lugendo, all learned State Attorneys, whereas the respondent had the services of Mr. Peter Kibatala, learned advocate.

Although the established practice of the Court, is that where a preliminary objection is raised, the same must first be heard and disposed of before proceeding to the substantive matter, in this application however, because of the nature of Mr. Rumisha's prayers, with consent of the parties' advocates we ordered that both the preliminary objection and the substantive application be heard, such that consideration of the substantive application will be dependent on the outcome of our decision in disposing of the preliminary objection.

After the above undertaking with counsel, it was Mr. Kibatala who was the first to take the floor. He briefly argued that as the affidavit supporting the notice of motion in this application was not attached with the drawn order of the High Court refusing leave to appeal, the application before us, was incompetent for non-compliance with rule 49 (3) of the Rules, which makes the requirement to attach the drawn order mandatory. In support of his argument, he relied on our decision in the case of **Grace Fredrick Mwakapiki v. Jackline Fredrick Mwakapiki and Another**,

Civil Application No. 51/6 of 2021 (unreported). Based on that point, he moved the Court to strike out the application with costs.

In reply, Mr. Rumisha first admitted that it was true that the drawn order of the High Court was not attached with the affidavit supporting the notice of motion, but he contested the relief prayed by Mr. Kibatala. He submitted on two points, one in alternative to the other. **First,** he argued that because what was missing in the record of the application, was the order of the court, this Court has to take judicial notice of the omitted document under section 59 (1) (a) of the Evidence Act, gloss over and disregard compliance with the mandatory requirement of rule 49 (3) of the Rules. Thus, he moved the Court to proceed with hearing of the application in that context. To support his contention, the learned State Attorney relied on two decisions of this Court, one of **Mwajuma Mbegu v. Kitwana Amani** [2004] T.L.R. 410, and another of **TPB Bank Plc (Successor in Title to Tanzania Postal Bank) v. Rehema Alatunyamadza and Two Others**, Civil Appeal No. 155 of 2017 (unreported).

Mr. Rumisha's **second** argument, if we would not agree with him on taking judicial notice of the drawn order, was that the omission to include the order in the application, was not intentional or negligent, but a lapse

which was just an accidental slip because the drawn order was mentioned at clause 15 of the affidavit, only that it was not physically attached to it. He implored us to invoke the overriding objective principle in the context of rule 56 (2) of the Rules, for the applicants to be allowed to access the court with the document so that the substantive matter can be heard on merit. In this alternative submission, Mr. Rumisha, prayed for an adjournment of the hearing, to provide time within which to comply with the order in case we agree with him.

In rejoinder, Mr. Kibatala submitted that section 59 (1) (a) cannot be relied upon because the order mentioned in that section is not a court order but an executive order. On the issue of overriding objective, he submitted that the principle was not enacted in our laws in order to circumvent mandatory Court rules of procedure, and insisted that the available legal remedy in the circumstances, was to strike out the application with costs.

Upon a careful consideration of the submissions by learned counsel, we think the issues for our due consideration in this application are twofold; the second becoming relevant only if the first fails. The **first** issue, in our view, is whether non-compliance with rule 49 (3) of the Rules can be cured, in the circumstances, by reliance on section 59 (1) (a) of the Evidence Act.

And the **second,** is whether, in the circumstances, this Court can invoke the overriding objective principle to permit the applicant to include the missing drawn order in the record of the application.

We will start with consideration of section 59 (1) (a) of the Evidence Act, sought to be relied upon by Mr. Rumisha. For a comprehensive grasp of the point we want to make, we think it is more appropriate to quote and to consider not only the contested section 59 (1) (a), but also, the sub heading to Part I of Chapter III and section 58 of the Evidence Act. It provides: -

"CHAPTER III

PROOF

PART I

FACTS REQUIRING NO PROOF

58. *No fact of which a court takes judicial notice need be proved.*

59.*-(1) A court shall take judicial notice of the following*

facts-

(a) all written laws, rules, regulations, proclamations, ***orders*** *or notices having notice the force of law in any part of the United Republic."*

[Emphasis added]

The disputed rule 49 (3) of the Rules, provides as follows:

> *"(3) Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal* ***and where application has been made to the High Court for leave to appeal, by a copy of the order of the High Court."***
> [Emphasis added]

We have reproduced more than what parties submitted upon in order to demonstrate, the difference in meaning and context between the purpose for enacting the Evidence Act and the motive behind promulgation the Rules of this Court.

Essentially, the Evidence Act and the Rules, each was enacted for a completely different procedural purpose from the other. On one hand, the Evidence Act was enacted to regulate the manner that parties to civil actions and criminal cases may prove their cases or disprove their counterpart's, in trial courts. In this respect, chapter III of the Evidence Act running from section 58 to 109 provides for the manner of adducing evidence, oral, documentary and physical exhibits. The chapter starts with

documents which do not need proof in part I. Those documents are provided at section 59 (1). According to section 58 of the Evidence Act, document which trial courts have to take judicial notice of, need not be proved.

Basically, to take judicial notice of, simply means to presume a fact as though proved without pursuing the routine procedure of admitting documents in evidence. Thus, all documents listed at section 59 (1) of the Evidence Act are supposed to be admitted in evidence without subjecting them to the normal processes of clearance before formal tendering and admission into evidence.

On the other hand, the Rules were originally enacted in 1979 but were substantially amended in 2009. They were made under section 12 of the Appellate Jurisdiction Act (the AJA), and the major reason for enacting them is provided for in the said section of the AJA. That section provides: -

> *"12. The Chief Justice may, either on his own motion or upon the advice of, and after consultation with the Chief Justice of Zanzibar,* ***make rules of court regulating appeals to the Court of Appeal and other matters incidental to the***

making, hearing or determination of those appeals."

[Emphasis added]

Briefly, the function that Mr. Rumisha wanted us to assign section 59 (1) (a) of the Evidence Act, was not at all that section's role. The matter before us was not a dispute at the trial, such that the issue was whether a document was supposed to be proved or not. Rather, the application before us was a completely different matter. It was in the first place not a trial where contents of documents were contemplated to be proved. It was an application for leave to appeal, which under section 12 of the AJA, is a process incidental to an appeal, in which case the appropriate procedural law is contained in rules 45 (b), 48 and 49 (1) and (3) of the Rules.

Mr. Rumisha also referred us to two cases; **Mwajuma Mbegu** (supra) and **TPB Bank Plc** (supra), arguing that this Court used section 59 (1) (a) of the Evidence Act, to take judicial notice of certain documents which otherwise needed to be attached with the notice of motion under the Rules. We will start with the case of **Mwajuma Mbegu** (supra). That case was in respect of a dispute over Plot No. 53 Ex Daya Esate in Ilala, Dar es Salaam. In granting the reliefs that it awarded, the High Court relied

on a report which had been prepared by the Principal Secretary, Ministry of Lands. Mwajuma Mbegu appealed to this Court faulting the High Court for placing reliance on that public document. In resolving the first and second grounds of appeal which were challenging the act of the High Court, this Court observed:

> *"It is true that certain matters need not formally be proved. The principal matters of which the court will take judicial notice of are contained in section 59 (1) of the Evidence Act, 1967 and the report cannot be said to be covered as well. There was therefore no justification at all for the Court to make findings of fact based on the report which was not before the court. In the event, we are satisfied that the first two grounds of appeal are justified."*

In the case above, the Court was deliberating on how the trial court was supposed to handle public documents and, in the process, it observed that the documents under section 59 (1) are the documents which have to be taken judicial notice of. So, respectfully, we do not find anything relevant in the context of the issue before us. In any event, in that case no document was missing which the Court took judicial notice of. Thus, we

cannot agree with Mr. Rumisha, for the authority he cited to us, is clearly distinguishable.

The other case that Mr. Rumisha made refence to, was the case of **TPB Bank Plc** (supra). This case was also a land matter, and its facts are not relevant. It suffices to refer to the part that Mr. Rumisha referred us to consider, which is the substance of that decision at pages 12 and 13 of that judgment. In that case, it was stated at pages 12 to 13 that: -

> *"Regarding the second issue, Mr. Bundala gave a long history of how the name of the appellant changed from the old name (TANZANIA POSTAL BANK)" to the current name (TPB BANK PLC). In essence he was of the argument that since the name of the appellant changed by the operation of law, the Court ought to have taken judicial notice of such change. With respect, we are not persuaded by that argument. We wish to state that the court might take judicial notice of any change brought by the operation of law, but this alone does not give the appellant an automatic right to waive her legal obligation to make an appropriate application to effect the change."*

This, authority is worse than the first. We do not find anything worthy commenting on. There was no document omitted in the record before the Court, and there was no dispute whether a document should be taken judicial notice of, or not. In our view, the authority was referred to us completely out of context, such that in the interest of politeness, we propose to leave it at that.

All in all, inviting us to apply section 58 and 59 of the Evidence Act in a manner suggested by Mr. Rumisha, would mean that this Court is now affirming a position that, where the Rules require that copies of orders of any court or tribunal be included in a particular document before lodging it with the Court, then compliance of such Rules is optional. Such a decision would have far reaching consequences and serious repercussions, not only in respect of rule 49 (3), but also on rules 11 (7) (b), 45A (3), 71 (2) (i), 96 (1) (h) of the Rules and many other rules which require attachment of court orders before certain proceedings can be lodged before the Court. So, we cannot take judicial notice of the court order of the High Court refusing leave which was required by the Rules to be attached with the affidavit in an application before us.

Lastly on this point, it would be recalled that hearing of the substantive application was conducted by recording parties' submissions, but with a consensus of the parties' advocates that such submissions would be considered only if Mr. Rumisha's arguments in respect of the preliminary objection would be legally sound to the extent of defeating Mr. Kibatala's preliminary objection. That caveat was endorsed by both learned counsel for the parties. Now that Mr. Rumisha has not been able to defeat his counterpart's preliminary objection, then the submissions in respect of the main application are rendered inconsequential as per the learned advocates' own joint consensus at the hearing. That said, we are in agreement with Mr. Kibatala that this application is incompetent, which conclusion paves our way to proceed to the second set of arguments of Mr. Kibatala on one hand, and Mr. Rumisha on the other.

Mr. Kibatala prayed that in case we agree with him that the application is incompetent, then the available remedy is to strike it out. To support his position, he relied on this Court's decision in **Grace Mwakapiki** (supra). On his part, Mr. Rumisha relied on the principle of overriding objective that we be please to permit the applicants to include the omitted

copy of the order in the record of the application, so that its merits be determined.

The issue before us for determination therefore, is whether we should strike out the application, or we should spare it and permit the applicants to lodge a supplementary affidavit in order to include in it the missing order by invoking the principle of overriding objective. We will start with the case of **Grace Mwakapiki** (supra) upon which Mr. Kibatala placed reliance.

The matter in **Grace Mwakapiki**, was an application for leave on a second bite and she had not attached the order refusing leave by the High Court, just like in this case. And as submitted by Mr. Kibatala we held, in that case, that the application was incompetent and for that reason we struck it out. However, there is a distinguishing feature, between that application and this one. The distinction is the fact that in the former application there was no prayer by the applicant to spare his application by placing reliance on the overriding objective principle. However, in this application, Mr. Rumisha pleaded with us to rely on the principle because the omission was unintentional and accidental. We must also remark that, the way we observed Mr. Kibatala forcefully arguing before us, is like he was impressing on us a point that in **Grace Mwakapiki's case** we made

a decision that overriding principle does not apply in the circumstances obtaining in that case. But that was not the case because, in that case there was no discussion on the principle at all. And, that is the distinction.

Notably, the practice has always been that every case must be decided upon its unique facts and arguments raised before the court, and not extraneous matters that were not before the court or arguments that were not made. So, it is not true that in **Mwakapiki's case** we abolished reliance on the principle of overriding objective in order to spare applications for leave on a second bite, where the order of the High Court is omitted in the record.

In this application, we have reviewed the affidavit of Mr. George Nathaniel Mandepo, and as Mr. Rumisha submitted, the deponent swears as follows, at clause 15: -

> *"15. That, the applicants filed an application for leave to appeal at the High Court and the same was refused hence the present application for a second bite on the grounds that:*
>
> *(i) to (iii) N/A*
>
> *A copy of the* ***ruling and drawn order of the High Court of Tanzania at Dar es***

Salaam between AG and Another vs. Fatma Amani Karume In Misc. Civil Application No. 8 of 2021 are attached *and marked collectively as annexure "OSG-5" and leave of the Court is craved to form part of this affidavit."*
[Emphasis added]

The above paragraph making reference to the drawn order as being attached to the affidavit, but then physically omitted, clearly shows that the omission to include the actual drawn order was an excusable accidental lapse. Thus, we hold that this is a fit case, to invoke the principle of overriding objective by injecting oxygen to the substantive application so that it is heard on merits as opposed to striking it out.

As we conclude, we feel constrained to make one observation. And this is in relation to Mr. Kibatala's strong drive of having this application struck out by all means. Despite his push, one significant fact remains real and outstanding; a careful study of the record, clearly reveals that what is at stake and whose status is screaming for urgent determination by the courts of law, is the fate of the respondent's right to work which has been on suspension for over four years. Four years is a long time when one has

a legal contest on whether he should be permitted to work or he should not. In this case there is that impasse, and the stalemate continues. A display of a larger picture of the matter shows that, striking out this application at this time, even if we were to do so, will not necessarily make any better Mr. Kibatala's side of the case, because doing so will not in law, end the legal wrangle. Rather, it will create a potentiality for a temporary losing party to start all over again by lodging a similar application after another one for extension of time will have been heard and determined. All this, if it is to happen, which is a likely eventuality, will certainly take longer and to the disadvantage of the respondent's side, unless Mr. Kibatala is insensitive of the amount of time which the whole issue has taken and is likely to take if we are to agree with him.

For the above reasons, under the provisions of section 3A and 3B of the AJA read together with rules 2 and 49 (2) of the Rules, the applicants are granted thirty days from the pronouncement of this Ruling within which to lodge a supplementary affidavit attaching with it an order of the High Court refusing leave to appeal, such that from then the application will be compliant with rule 49 (3) of the Rules and therefore ready for hearing.

In the meantime, under rule 38A (1) of the Rules, hearing of this application is hereby adjourned to a future session of the Court as it may be scheduled by the Registrar of the Court.

It is so ordered.

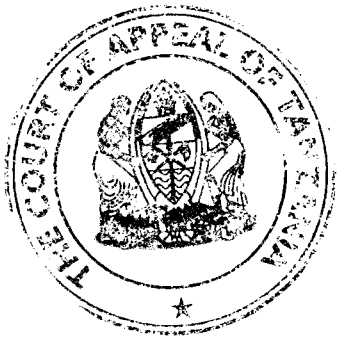
DATED at **DAR ES SALAAM**, this 8th day of September, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

Ruling delivered this 11th day of September, 2023 in the presence of Ms. Narindwa Sekimanga, State Attorney for the 1st and 2nd Applicants and Ms. Faith Mwakikoti holding brief for Mr. Peter Kibatala, learned counsel for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL