

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KOROSSO, J.A., MDEMU, J.A And MLACHA, J.A.)

CIVIL APPEAL NO. 144 OF 2023

SYLVIA MARITA BARNER..... APPELLANT

VERSUS

AHAMED ZHRAN SAID.....RESPONDENT

**(Appeal from the judgment and decree of the High Court of Zanzibar
at Tunguu)**

(Kazi, J.)

dated the 9th day of June, 2022

in

Civil Case No. 15 of 2022

.....

JUDGMENT OF THE COURT

24th April & 8th May, 2024

MDEMU, J.A.:

This appeal has its genesis from the decision of the High Court of Zanzibar which entered a default judgment against the appellant herein on 9th June, 2022 in Civil Case No. 15 of 2022. It is in the record of appeal that, on 16th March, 2022 the respondent filed a suit against the appellant for breach of terms and conditions of a deed of sale dated 20th August, 2020

executed between them. He thus prayed for a judgment and decree against the appellant as hereunder:

1. *An order directing the withheld 5% of United States Dollars twenty-five thousand (\$25,000) by the plaintiff to be an actual remedial compensation of the plaintiff.*
2. *An order directing the defendant to pay the plaintiff United States Dollars fifty-five thousand and two hundred and fifty (\$55, 250) as an amount he incurred during the refurbishment.*
3. *An order directing the defendant to pay the plaintiff 15% of the purchase price of United States Dollars forty-five thousand (\$45, 000) as a consequence for the deliberate breach of sale deed, despite being given remedial option to rectify but neglected.*
4. *An order directing the defendant to pay United States Dollars twenty thousand (\$20, 000) as a compensation for legal services, loss, mental and psychological trauma and incidental costs thereto.*
5. *Suit costs to be borne by the defendant.*
6. *Any other relief and remedy beneficial to plaintiff which this honourable Court deem fit to grant.*

Following the filling of the plaint, on 4th April, 2022 the High Court ordered the appellant to file the written statement of defence (WSD) by 20th April, 2022. The order was not complied with, thus on 5th May, 2022 an order for the default judgment was made, which judgment, as said, was pronounced on 9th June, 2022. Aggrieved by that decision of the High Court, four grounds of appeal were filed by the appellant. However, at the hearing, the learned counsel for the appellant abandoned the 1st, 2nd and 4th grounds of appeal. We reproduce the surviving third ground of appeal as hereunder:

"The respondent's legal representation before the trial court was tainted with gross professional misconduct which goes to the root of the respondent's claim which entailed collusion against his own client, he had acted by drawing the sale agreement, acting as a notary public for both parties and later choosing to act for and against his previous joint clients in the same matter,"

On 24th April, 2024 when the appeal came before us for hearing, Messrs. Senen E. Mponda and Rajab Abdalla Rajab, both learned advocates acted for the appellant whereas Mr. Jambia Said Jambia, learned advocate was for the respondent.

In his brief submission in support of the appeal, Mr. Mponda who was a lead counsel, submitted that, Mr. Said M.H. Mayugwa's representation of the respondent was tainted with gross professional misconduct and in fact, he was not supposed to make that representation at all. The reasons he advanced to us in that submission were as follows: **first**, referring us to page 9 through 13 of the record of appeal, Mr. Mponda argued that, Mr. Mayugwa prepared and witnessed the deed of sale between the parties herein. **Second**, Mr. Mayugwa prepared and witnessed the deed of acknowledgment appearing at page 28 through 29 of the record of appeal. **Third**, at page 30 through 31 of the record of appeal, Mr. Mayugwa participated in execution of the final payment on behalf of the respondent and **fourth**, as indicated from page 33 through 39 of the record of appeal, Mr. Mayugwa engaged and facilitated both parties in execution of their contractual relationship.

The foregoing series of events, to Mr. Mponda, is evidence that Mr. Mayugwa stands in fiduciary relationship to both the appellant and the respondent. As such, choosing one for a legal action in a court of law against the other is a professional misconduct, he argued, hence a conflict of interest, under the circumstances, is and may not be avoided. The learned

counsel thus referred us to the High Court of Tanzania case cited as **Mexons Energy Limited v. NMB Bank Plc**, Commercial Case No. 102 of 2021 and also in **UAP Insurance Tanzania Limited v. Akiba Commercial Bank Pic**, Civil Appeal No.135 of 2022 (both unreported) to bolster his argument that there was a conflict of interest on the act of Mr. Mayugwa to institute an action in the Court of law. Submitting on the way forward, the leaned counsel, banking on **UAP Insurance Tanzania Limited** (supra), urged us to nullify the entire proceedings.

In a reply submission, Mr. Jambia conceded by arguing that, it was improper for Mr. Mayungwa to pick and represent the respondent for an action on breach of a contract in a court of law while previously, the preparation and execution of the alleged breached contract was under his legal engagement. He thus urged us to spare him for costs in event we allow the appeal.

We have considered the record of appeal and submission by counsel in arguing this ground of appeal. The sole issue for our determination is whether Mr. Mayugwa's act to initiate Civil Case No. 15 of 2022 in the High Court of Zanzibar on behalf of the respondent in circumstances where,

previously, he had acted as a legal counsel for both parties in the drafting and execution of the contract, is an act amounting to professional misconduct and constitutes conflict of interest. This in fact is the gist of the appellant's complaint leveled in the reproduced survived ground of complaint.

At the outset, we take note of the concession by Mr. Jambia that, having acted as a legal counsel for both the appellant and the respondent, it amounted to conflict of interest for Mr. Mayugwa to choose and represent the respondent herein. Before we arrive in the affirmative or otherwise to that question, the term "conflict of interest" is defined in **Osborn's Concise Law Dictionary**, Eleventh Edition, 2011 at page 105 as:

"Refers to a situation when someone such as a lawyer or public official has a competing professional or personal obligation or personal or financial interests that would make it difficult to fulfil his duties fairly."

This is what this Court in **UAP Insurance Tanzania Limited** (supra) cited to us by Mr. Mponda, held; and we quote:

"Conflict of interest is defined under regulation 3 of the Advocates Etiquettes to include a situation that has a potential to undermine the impartiality of the advocate because of the possibility of a clash between the advocate's self-interests and the public interest. Regulation 45 (1) of the Advocates Etiquettes provides that, a conflict of interest is one that would be likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client. A conflict of interest also includes the duties and loyalties of the advocate to any other client, whether involved in a particular transaction or not, including the obligation to communicate information (regulation 45(3) of the Advocates Etiquettes Advocates Etiquettes)."

In the instant appeal, as alluded to above, Mr. Mayugwa prepared and witnessed the deed of sale between the parties; prepared and witnessed the deed of acknowledgment; participated in execution of the final payment on behalf of the respondent and engaged and facilitated both parties in execution of their contractual relationships. In the final undertaking, the said advocate was employed by the respondent herein to commence and initiate a suit for breach of contract by the appellant. As it is, Mr. Mayugwa is aware

and in fact, has all the necessary information about the cases of both sides in respect of the breach of that contract. Regarding such undertaking, in **Clemence O. Mbowe v. Donald A. Kimambo & Another**, Civil Appeal No. 240 of 2022 (unreported) where Mr. Zayumba, learned advocate who represented the respondents, had previously, as a chairman, determined the matter in the District Land and Housing Tribunal, the Court said that:

In this case, advocate Zayumba acted on the dispute when he was the chairman of the trial tribunal. By the advantage of being a judicial officer, he was able to procure information of the cases of both sides. Now that, he has been instructed and is representing one of the parties, it is a matter of common sense that he cannot strike a balance between his professional duty to uphold justice and his personal interest or interest of his client.

The courts in England regarding this position observed that, an advocate who initially acted for two common clients cannot later act on behalf of either party in a litigation in the courts of law when a dispute between such common clients concerning the transactions or the subject matter, as the case may be, which originally, he had acted as an advocate for both clients. See **Re: A Firm of Solicitors** [1992] 1 ALL ER 353.

Having that understanding, we take the view that, Mr. Mayugwa's act to draft a plaint and initiate Civil Case No. 15 of 2022 between the respondent (the plaintiff) and the appellant (the defendant) under circumstances of his prior engagement in drafting the contract and participating in its execution processes to both parties, with respect, was in breach of the duty to provide unbiased and professional legal services not only to the client (the respondent) he represented but also to the appellant herein to whom he previously rendered some professional legal services as we stated above. If the matter could have gone for trial, in such a case, for sure, Mr. Mayugwa is a prospective witness. In effect, he owed the fiduciary duty to both the appellant and the respondent and his act therefore of choosing to represent one is not without conflict of interest and is wholly unprofessional.

The next question we are called upon to determine is what is a remedy available to redress the anomaly. In **UAP Insurance Tanzania Limited** (supra) and **Clemence O. Mbowe** (supra) we rendered the proceedings a nullity given the said irregularity. We are alive that, the instant matter did not go for a full trial. As we demonstrated above, it ended at a default judgement stage. Mr. Mponda in this argued that, conflict of interest still

exists even in a default judgment because the said judgement cannot be pronounced unless the trial judge or magistrate reviews the entire pleadings prepared and filed by the party. We thus agree with him as revealed at page 100 of the record of appeal where the trial Judge observed that:

"Under the circumstances, therefore, since the defendant failed to present or file her written statement of defence as ordered by the court, I hereby pronounce the judgment in favour of the plaintiff Ahmed Zahran Said by granting all the prayers sought in the plaint except prayers (iv) which I find it not to be justifiable."

Again, had the case gone for a full trial stage, Mr. Mayugwa would have been a prospective witness, definitely, for the person to whom he drafted and filed the plaint. What about the appellant herein to whom he has the custody of all the necessary facts following his previous engagement? For sure, a conflict of interest is unavoidable.

In the end therefore, this appeal is hereby allowed. Accordingly, we nullify all the proceedings and pleadings in respect of Civil Case No. 15 of 2022 and set aside the default judgement and the resultant decree thereof.

Whoever is desirous to have an action in a court of law, remain at liberty to commence a fresh suit.

We do not make an order as to costs.

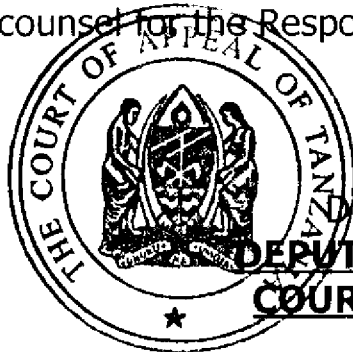
DATED at ZANZIBAR this 7th day of May, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2024 in the presence of the M/S Mwanaidi Abdalla Moh'd, counsel for the appellant and Mr. Jambia Said Jambia, counsel for the Respondent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL