

IN THE HIGH COURT OF TANZANIA
AT ARUSHA

MISC. CIVIL APPLICATION NO. 114 OF 2007

(C/F Civil Appeal No. 15 of 2006)

KUYA OLE SAYAEL: APPLICANT

VERSUS

1. ABDALAH SALUM 2. AFRICA B.C. TANZANIA LTD. 3. SAID BUS CO. LTD.	}	: RESPONDENTS
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EXPARTE RULING

9TH MARCH, 2009

SAMBO, J.

The applicant, Kuya Ole Sayalel, brought this application through his learned counsel, Mr. Nelson Merinyo, under the provisions of Section 95 of the Civil Procedure Code and Section 41(1) of the Advocates Act. The applicant is praying for orders that:-

- (a) Mr. Mbawalla Omari Ismail of P.O. Box 7372, Arusha, be disqualified to be the attorney of the respondents under purported authority of **A GENERAL POWER OF ATTORNEY CONCERNING LITIGATION FILED IN**

COURT in respect of **CIVIL APPEAL NO. 15 OF 2006**
between the parties hereto.

- (b) Cost of this application to be paid by the respondents.

This application is duly supported by an affidavit of the learned advocate, Mr. Nelson S. Merinyo. The counter affidavit of Mbawala Omari Ismail was filed in respect of the respondents.

This application was fixed for hearing interparties on the 1st day of December, 2008, in the presence of Mr. Merinyo, learned advocate, for the applicant and Mr. Mbawala, for the respondents. In the said date, Mr. Mbawala, did not appear and no information was brought to court as to why he failed to make attendance. On the request of Mr. Merinyo, learned counsel, it was ordered that the hearing proceed exparte on 5th December, 2008.

In his submissions, learned counsel, Mr. Merinyo, adopted his affidavit to be part of his submissions in respect thereof. In support of this application, under paragraph 5(a), the learned counsel states that Mr. Mbawala is an unqualified person and therefore can not act as an agent of parties and appear in Court. In paragraph 5(b), the learned advocate, submits to the effect that Mr. Mbawala is practicing law through a cover of power of attorney. In paragraph 5(c), he says the respective power of attorney has

been signed and donated by only one party, that's Said Bus Company Limited. The 1st and 2nd respondents have not donated the said power of attorney. The 3rd respondent can not assume the rights and obligations of the 1st and 2nd respondents.

The learned advocate, went on saying that the affidavit of Mr. Mbawala, dated 5th March, 2008, is proof of what he stated under the said paragraph 5(b) of his affidavit. As if that is not enough, in paragraph 6(2) of the counter affidavit, Mr. Mbawala is confirming his statement that he has been acting as an advocate since 1981 and gives his qualifications for practicing as a lawyer. Section 39(1) of the Advocates' Act, CAP 341 R.E. 2002, stipulates qualifications for a person to practice as a lawyer, anybody without such qualification, like Mr. Mbawala, is an unqualified person and not allowed to practice as an advocate.

Mr. Merinyo, learned advocate, submitted further that Mr. Mbawala is using the cover of powers of attorney, which can not authorize him as such given the decision in the case of **Julius Petro V. Cosmas Raphael [1983] TLR 346, at page 347.** The admission of Mr. Mbawala, that he has been appearing in the High Court and Courts subordinate thereto since 1981, is a fact to the effect that he is acting for parties for gain and one can not do so without remuneration. The respective power of attorney does not say how he

is related to the 3rd respondent, Said Bus Company Limited, a limited company which is not a natural person to be related naturally to Mr. Ismail Mbawala, and referred this Court to the case of **Naiman Moivo V. Nailejlet K.J. Zablon [1980] TLR 274**, at page 16, the 3rd paragraph. Based on his submissions herein above, the learned counsel prays that his application be granted.

Equipped with the reasoned submissions of the learned counsel, Mr. Merinyo, I carefully examined a general power of attorney concerning litigation donated by Said Bus Co. Ltd, dated 31st day of January, 2006 in respect of Civil Appeal No. 15 of 2006, as well as the one date 24th July, 2008, for the present application. Both are made under Order III rules 1 and 2(a), 6(1) (2) of the Civil Procedure Code, 1966, and Section 94 of the Evidence Act, 1967, as amended, and any other enabling provisions of the Law for the time being in force. It is not in dispute that under Order III Rule 1 of the Civil Procedure Code, CAP. 33 R.E. 2002, appearances of parties in Courts of Law, may be by recognized agents and Rule 2(a) of the said Order, define recognized agents to include persons holding powers-of-attorney, in the following words:-

- “2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are –

- (a) persons holding powers-of-attorney, authorizing them to make appearances or applications and to do such acts on behalf of such parties;”

The issue of recognized agents with powers of attorney under Order III of the Civil Procedure Code, was extensively dealt with by this Court in the case of **Julius Petro V. Cosmas Raphael [1983] TLR 346**, where it was held inter alia, that:-

“(ii) Section 33 of the M.C.A. governs appearance on behalf of the parties at the Primary Courts and District Courts (when hearing appeals) only but not the High Court; **appearances in the High Court have to be made either by the parties themselves or their advocates only and not “agents.”**”

(iv) **appearance by a recognized agent who works for gain by dint of agency is expressly prohibited by S. 41(1) of the Advocates’ Ordinance;** also, Section 70 of the Advocates’ Ordinance implies that representation on behalf of the parties is not prohibited altogether but permitted in certain circumstances only; these are given under Section 33 of the M.C.A. and in respect of the C.P.C; **where a “genuine” recognised agent represents a party in a suit; and not a professional agent who makes his living by representing clients in Court;**” (emphasis added).

In the instant matter, Mr. Mbawala, through his counter affidavit, has told the court categorically that in his **legal career** he has been in these Courts

from January, 1981, and gives his purported qualifications. It is highly probable that he has been appearing in Courts or represents parties under the cover of powers-of-attorney and doing so for gain. For a person whose work is to represent parties in Courts of Law as an agent for all the time since 1981, implies that he does not do so as a “genuine” recognized agent, but a professional agent who makes his living by representing clients in Courts of Law. Be it as it may, the position remains the same as it was held in the above quoted case that **“appearances in the High Court have to be made either by the parties themselves or their advocates only and not “agents”.**

Even if we were to hold that Mr. Mbawala is a “genuine” recognized agent representing the respondents in this matter who are appellants in Civil Appeal No. 15 of 2006, his representative capacity would be defective because the said power-of-attorney has been donated by only one party, that is, Said Bus Company Limited. The said Company purported to do so for and on behalf of the others, something which is not proper. The 1st and 2nd respondents each was expected to donate his own power of attorney if he really intended and wished Mr. Mbawala to represent him accordingly. There is nothing on record to indicate that the 1st and 2nd respondents

authorized the 3rd respondent to donate the alleged power of attorney for and on their behalf.

In view of what I have ventured to state herein above, I hold that **Mr. Mbawala Omari Ismail** is an unqualified person to represent parties in the High Court and not a genuine recognized agent at all. For this reason, I do grant the application as prayed and order that he is disqualified to be the attorney of the respondents under purported authority of **A GENERAL POWER OF ATTORNEY CONCERNING LITIGATION FILED IN COURT** in respect of CIVIL APPEAL NO. 15 OF 2006 between the parties hereto. The respondents to bear costs of this application.

SGD:
K.M.M. SAMBO
JUDGE
5/3/2009

Delivered in chambers this 9th day of March, 2009, in the presence of Mr. Merinyo, advocate for the applicant who was also present.

SGD:
K.M.M. SAMBO
JUDGE
9/3/2009

I hereby certify this to be the true copy of the original.


DISTRICT REGISTRAR

ARUSHA

22/5/09