IN THE HIGH COURT OF TANZANIA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 44 OF 2015

(Arising from Misc. Civil Cause No. 8 of 2015)

ALISTIDES A. KASHASIRA..... APPLICANT

VERSUS

1. **PROF. ANNA KAJUMULO TIBAIJUKA**
2. **THE RETURNING OFFICER MULEBA SOUTH CONSTITUENCY (.....RESPONDENTS**
3. **THE ATTORNEY GENERAL**

RULING

11/-15/12/2015

Khaday, J.

This ruling is based on a Preliminary Objection (P.O.) raised by the 1st respondent, Prof. Anna Kajumulo Tibaijuka against Application No. 44 of 2015, in which the present applicant one Alistides A. Kashasira is seeking for exemption from payment of security for cost in respect of Election Petition No. 8 of 2015 he has instituted against the said 1st respondent and 2 others.

The P.O. in question has been coached in the following wordings:-

1. *That the application is not buttressed by an affidavit from the Applicant as required by section 111 (3) of the National Elections Act Cap 343 RE:*

2015 and Order XLIII r. 2 of the

Civil Procedure Code Act Cap 33 RE: 2002;

2. *That the affidavit has been sworn by the Deponent without competence contrary to the requirements of section 111 (3) of the National Election Act Cap 343 RE: 2015;*
3. *That the affidavit contains legal arguments and conclusions, it is argumentative, and speculative contrary to the requirements of Order XIX r. 3 (1) of the Civil Procedure Code Act, Cap 33 RE: 2002.*

With the consent of both parties and leave of the court, the matter was argued by way of written submissions.

Parties were ably represented by legal counsel. While the present applicant/petitioner is being represented by Mr. Aaron Kabunga, learned counsel, the 1st respondent has the legal service of Mr. J.S. Rweyemamu and Mr. J. Matete learned advocates. Other two respondents; the Returning officer, Muleba South Constituency and the Attorney General are being represented by the Principal State Attorney in-charge of Bukoba Zone, Mr. Ngole. The latter two respondents have no role so far shown in this P.O.

In prosecuting the P.O, Mr. Rweyemamu combined grounds 1 and 2

and argued them jointly. In that, learned counsel submitted that the application (for security of costs) so filed by the applicant has gone against the requirement of the provision of Section 111 (3) of the National Elections Act, Cap 343 RE: 2015, and Order XLIII rule 2 of the Civil Procedure Code, Cap 33 RE:2002. He said that the provision of Section 111 (3) cited above, which is in mandatory terms, requires the petitioner *himself and not someone else on his behalf to make such application*.

Learned counsel further said that in our case, the chamber summons appear to have been taken out at the instance of Kabunga & Associates Advocates. He interpreted therefore that application in hand has been made by Kabunga & Associate Advocates and not by the petitioner himself. Learned counsel finds more anomalies with the matter. In that, he finds that even the affidavit sworn in support of the chamber summons has been made and filed by Kabunga & Associate Advocates and not by the petitioner himself. This he said, is also contrary to the provision of Order XLIII rule 2 of the Civil Procedure Code, Cap 33 RE: 2002.

Mr. Rweyemamu further submitted that Mr. A. Kabunga is not a petitioner but the petitioner's Attorney, thus he is not a competent person to

swear an affidavit to support the application. He called upon the court to find the application incompetently before this court, thence fit for dismissal with costs.

Learned counsel conceded that in law an advocate could swear an affidavit on a substantive or interlocutory application. However, he said that this can only be done on matters in which the advocate has personal knowledge and not otherwise. That, if an advocate receives information from another person and swears an affidavit, all that he is stating is hearsay. He has cited the decision of the Court of Appeal of Tanzania in the case of Lalago Cotton Ginnery and Oil Company Ltd vrs The Loans and Advances Realization Trust (LART), Civil Appeal No. 80 of 2003 to support his point on this aspect. Relating this to the position of the matter at hand, Mr. Rweyemamu has it that Mr. Kabunga had sworn an affidavit on matters that have not arisen in the course of these proceedings.

Learned counsel further said that Mr. Kabunga's affidavit does not meet the test enunciated by the Court of Appeal in Lalago's case (supra) because the counsel was simply briefed of the matters he had deponed in the said affidavit, and not that he had acquired the facts through his personal

experience. Mr. Rweyemamu reiterated and or insisted that Section 111 (3) of Cap 343 requires the application to be made by the petitioner, and that the same must be buttressed by an affidavit sworn by the petitioner himself and not by someone else. This he said, is because the petitioner has to give personal reasons in support of his application on his ability and disability to deposit the security for costs or total exemption from the requirement to effect payment.

With a support from the decision of the Court of Appeal in the case of Lalago (supra), Mr. Rweyemamu further submitted that Mr. Kabunga may swear an affidavit on matters which he has personal knowledge which are found under paragraphs 1-5 and 10 of his affidavit. He said however, learned counsel could not have personal knowledge on the matters he has stated under paragraphs 6, 7, 8 and 9, which are the heart of the application and the requirement of Section 111 (3) of the National Elections Act. Learned counsel further warned that even if the contents of paragraphs 6 - 9 were to be struck out, the remaining ones would be left with no substantive information to have proper support of the intended application. He said the decision of the Court of Appeal in Phantom Modern Transport (1985) Ltd vrs DT Dobie (T) Ltd, Civil Reference No. 3 of 2003 (Dar es Salaam unreported)

supports their point on the effect of the amended affidavit through expunging the offending part of it.

Similarly, on the 3rd limb of the P.O, Mr. Rweyemamu learned counsel contended that the application is incompetent for being accompanied by a defective affidavit. He clarified that the affidavit in question contains legal arguments, conclusions and it is speculative, hence contrary to the provision of Order XIX rule (3) (1) of the Civil Procedure Code Cap 33 RE: 2002. Learned counsel has the case of Uganda vrs Commissioner of Prison ex-parte Matovu (1966) EA 514, in which general rule of practice and procedure of use of affidavit in court were thoroughly expounded. In that, it was held that an affidavit being a substitute for oral evidence, should contain only a statement of facts and circumstances in which a witness deposes either of his personal knowledge or from information that he believes to be true, and that such affidavit should not contain extraneous matters by way of objection, legal arguments or conclusions.

Mr. Rweyemamu also submitted that this position of law has been referred to by the Court Appeal of Tanzania in countless times, Lalago's case inclusive. Learned counsel pointed out the offending part of Mr. Kabunga's

affidavit as paragraphs 6, 7, 8 and 9. He said the statements made under those paragraphs are not supposed to be in the affidavit.

In conclusion, Mr. Rweyemamu called upon the court to dismiss the application with costs for being in serious violation of the mandatory requirements of Section 111 (3) of the National Elections Act, Cap 343 RE: 2015, Order XIX rule 3 (1).and Order XLIII rule 2 of the Civil Procedure Code, Cap 33re: 2002.

On the other hand, the applicant/petitioner could not concede to the P.O. so raised, hence arguments leading to this ruling.

Acting for the petitioner, Mr. Aaron Kabunga learned counsel submitted that he could not see how the provision of Section 111 (3) of the National Elections Act could bar an advocate from filing an application on behalf of his client. He said the objector must have been reading and interpreting the law upside down and have decided to have their own misconceived interpretation of law. He further said that the National Elections Act should not be read in isolation of other laws that govern or regulate the hearing, practice and procedure in civil suits. He referred to the provision of Section 22 of the National Elections Act (Election Petitions) Rules, G.N. No 447 of 2010, which

imports the applicability of the CPC, Cap 33 RE: 2002 in election petitions matters.

Learned counsel further questioned how a mere interlocutory application like this one in hand could prevent an advocate from signing or swearing an affidavit for his client, while under Order VI rule 14 of Cap. 33, an advocate is authorized by a party to sign the pleadings for or on his behalf. He further said that under Rule 29 of the National Elections Act (Election Petitions) an appearance by an advocate is deemed to be an appearance by the party whom he represents. He said that from the analogy, an application duly signed or filed by an advocate for or on behalf of the party whom he represents would be deemed to be an application filed by the party. That in his affidavit, he had declared that he has been so briefed with all the material facts hence entitled to swear an affidavit on behalf of his client. He blamed the objector for raising the P.O. with intention of wasting time of the court and of the other parties. He has the same case of Lalago Cotton Ginnery (supra) to support his point on the competency of the affidavit sworn by an advocate on behalf of his client.

Again, on interpretation of Section 111 (3) of the National Elections

Act, and the relevancy of Lalago's case (supra), Mr. Kabunga submitted that there is nowhere in law that it has been provided that an advocate should not swear on some facts obtained from his client. He said that what the advocate is required to do is to make an averment that what he has deponed are the facts he believes to be true.

Mr. Kabunga further challenged the objector on the alleged contravention of the provision of Order XIX rule 3 (1) of Cap 33, which requires the affidavit to be confined to facts the deponent is able in his own knowledge to prove. Mr. Kabunga further said that the provision of the cited Order defeats the P.O. itself, since the said provision do not bar any facts deponed as of facts obtained from the other person, provided the grounds for such averment are explained or stated. This he said, has been strongly said in their verification clause that the facts found under paragraphs 6, 7, 8 and 9 are believed to be true, hence in compliance with Order XIX rule 3 (1) of Cap 33.

Regarding ground 3 of the P.O., Mr. Kabunga denied the allegation that paragraphs 6, 7, 8 and 9 contain arguments, extraneous matters or having conclusions. He said that he finds not even a single statement

offending the law that governs affidavits. He said that what is there is information obtained from the applicant and that what the advocate has done is just to report and swear on the facts as obtained from his client.

Learned counsel further submitted that all deponed issues and grounds with non-disclosure by the applicant would cause the application to be of no sufficient grounds for the court to consider application for security of costs or an alternative security.

As to the possible remedy for defective affidavit, Mr. Kabunga stated that a party may be given leave to amend his application. This, he relied on the decision made by the Court of Appeal in the case of DDT International Ltd vrs Tanzania Harbours Authority & 2 Others- Civil Application No. 8 of 2001 (Dar es Salaam, unreported). Learned counsel has another Court of Appeal case of The Attorney General vrs SAS Logistic Ltd, Civil Application No. 9 of 2011 (unreported), in which it was held that a court could even overlook the offending paragraph or could expunge the offensive part of it without affecting the whole application.

Learned counsel further submit that in any case, if this court would find a defective part of the affidavit, then it may grant them leave to amend the

same or it may in the alternative, overlook that part of the offending paragraphs. Mr. Kabunga went further and warned that this matter being of Public interest, should not be defeated on mere technicalities, and that the application is vital and it has the basis of setting pace to the hearing of the main Petition as envisaged in rule 29 (2) of the National Elections Act, (Election Petitions) Rules, and that the Rules are there to safeguard substantive justice against unnecessary legal technicalities intended to defeat justice.

Learned counsel further complained that the respondent/objector has no good intention with them since the remedy so prayed for is the dismissal and not for striking out of the application. He further referred to a Court of Appeal case of Tenende Budotele & Another vrs The Attorney General, Civil Application No. 4 of 2011, in which remedy for defective affidavit was thoroughly explained. He said the 1st respondent's ill-will can also be noted from the fact that the objector has no support from his other fellow respondents. He prayed the P.O to be overruled with costs so that the application is heard and determined on its merit.

In a rather lengthy rejoinder, Mr. Rweyemamu reiterated and or

revisited all points he had argued in his main submission. He attacked his counterpart on the interpretation of the provision of Section 111 (3) of the National Elections Act, vis a vis right or justification of an advocate to file a matter and or to swear an affidavit on behalf of his client. Learned counsel also referred to Order XLIII rule (2) of the CPC, Cap 33 and insisted that it is only Petitioner who should swear affidavit in support of the chamber summons. He emphasized that the Petitioner's advocate may swear affidavit in support of the matter raised in the petitioner's affidavit for which the advocate acquires personal knowledge in the course of the court proceedings. Mr. Rweyemamu further contended that when an advocate is representing his client, it does not mean that he becomes a petitioner or a respondent.

Furthermore, learned counsel challenged the applicant's counsel for his failure to cite any provision of Advocate's Act, Cap 341 or any article in our Constitution that supports his point on advocate swearing affidavit on behalf of his clients, (in all matters). He equally challenged his fellow advocate on application of the provision of Section 22 of National Elections Act (Election Petitions) Rules, GN No. 44 of 2010, which invites applicability of Cap 33 in hearing, practice and procedure of the Election Petitions matters. In that,

learned counsel said that much as he appreciates the position of the law, still the application in hand has violated Order XLII rule 2 of the CPC, Cap 33.

Mr. Rweyemamu further said that they also appreciate the position of the law under Order VI rule 14 of Cap 33 that allows the advocate to sign pleadings on behalf of his client. However, he argued that signing of the pleadings upon being authorized by a party is not as giving evidence as it is done when swearing affidavit on behalf of a client. He insisted that the two are separate and different type of fruits.

Equally questioned is an argument by Mr. Kabunga that under Rule 29 of the National Elections Act, (Election Petitions) Rules GN. No. 447, appearance of the advocate is deemed to be an appearance of his client, and that by analogy, the advocate can swear affidavit on behalf of his client. In this, Mr. Rweyemamu submitted that while the law allows an advocate to appear and to represent his client, it does not allow him to give evidence on behalf of his client. He cited the case of Zitto Zuberi Kabwe vrs The Board of Trustees of CHADEMA & Another, Civil Case No. 270 of 2013, (H/C, DSM unreported), in which it was held that it is unsafe to relay on the facts deponed on the basis of Advocate's own knowledge merely because he was

engaged by his client to represent him. Learned counsel related this decision of the High Court to that of the Court of Appeal in the case of Lalago Cotton Ginnery (supra).

On the 3rd ground of the P.O, Mr. Rweyemamu insisted that the contents of paragraphs 6, 7, 8 and 9 of Mr. Kabunga's affidavit contains legal arguments, extraneous matters and conclusions. He singled out as an example, paragraph 9, which says that *the exemption to pay cash deposit and any alternative form of security will enable the Petitioner to access and speed the hearing of the petition,* and its conclusion that *the Respondent will not be prejudiced at all.*

Relying on the decision made in the case of A.G vrs SAS Logistic (supra), learned counsel submitted that the speculations and conclusions found under paragraph 9 of the affidavit cannot be entertained. He prayed the same to be expunged from the record. Learned counsel further complained that the contents of paragraph 7 of the affidavit are not statements that could be made by Mr. Kabunga, but the same could have been made by the petitioner Mr. Kashasira. He further said that since Mr. Kabunga's assertion is not supported by an affidavit of Mr. Kashasira, the former's statement is rendered hearsay; hence fit to be stricken out as it was done in the case of

Zuberi Zitto's case (supra).

Mr. Rweyemamu is also against the suggestion advanced by Mr. Kabunga on possible amendment of the affidavit in the event the court finds the matter with material irregularities. In this, learned counsel for the objector said that the remedy is not available since one cannot amend a document, which in itself is incompetently before the court of law. He said that the gist of their complaint is on the legality of the document (for being sworn by a wrong person) and not part of it being defective in its contents. He said in DDT's case, what was there is a defective verification clause and not an issue of an advocate swearing the affidavit on behalf of his client.

On argument by the applicant's counsel that election petitions is of Public interest, (thus should not easily be defeated on technicalities), Mr. Rweyemamu, basing on the case of A.G. & 2 Others vrs Joseph Mwandu Kashindye, Civil Appeal No. 18 and 8 of 2013, (unreported) has it that non-compliance with the law cannot be 'fig leafed' by democracy enhancement claim. In Kashindye's case, the respondent defaulted payment of the security for costs order. It was argued by counsel that the matter should not be dismissed on that ground because Election Petitions are different from other cases since Elections are sources of Democracy. In that respect, the Court of

Appeal held that *payment of security for costs is a prerequisite for hearing of any election petition. Where there is noncompliance, the jurisdiction of the High Court to hear any election petition is ousted*.

Mr. Rweyemamu concluded that, since the applicant has failed to comply with the provision of law, the matter should be struck out regardless its importance to the public.

Despite long narration, I find only two issues to consider and to determine here. First, it is whether the affidavit sworn and filed by Mr. Kabunga or Kabunga & Associates Advocates on behalf of his client, one Alistides Kashasira is competently before this court. Second, it is whether the affidavit so filed contains legal arguments, conclusions, and speculations; thus contravening the requirements of Order XIX rule 3 (1) of Cap 33.

On the 1st part of the P.O, we have lot that has been said by both counsel. While the objector says that the application has contravened the provision of Section 111 (3) of National Elections Act, the other side says that the National Elections Act has never been offended, and that the law should not be read in isolation of other statutes that govern civil matters. Mr. Kabunga pointed out the CPC, Cap 33 as one of the statutes that should also

be observed when determining the matter at hand. At the same time, Mr. Kabunga could not explain the interpretation of the provision of Section 111 (3) in its strict meaning vis a vis the narrow meaning of the term *Petitioner*. Instead, he defended the principle of law that the petitioner or any client is of equal footing with his advocate when it comes to representation (and documentation) of the legal matters before the court of law.

The provision of Section 111 (3) of the National Election Act reads:

> *"The Petitioner shall within fourteen days after fling a petition, make an application for determination of the amount payable as security for costs, and the court shall determine such application within the next fourteen days following in that of filing the application for determination of the amount payable as security for costs."* (underline mine).

A pertinent issue here is as to who is a *Petitioner* to file and to swear affidavit in support of Chamber Summons when considering application for security of costs. In other words, can advocate file and swear affidavit on behalf of his client in the application for security of costs without offending the provision of Section 111 (3) of the National Elections Act.

It is unfortunate that we have no clear definition of who is a Petitioner under the National Elections Act. However, the provision of Section 111 (1) (a), (b), (c) and (d) of the same National Elections Act enables us to understand who is a Petitioner that are meant and or focused in our case.

The provision of Section 111 (1) (a) to (d) of the National Elections Act reads:

111 (1) *An Election Petition may be presented by one or more of the following persons, namely-*

(a) *A person who lawfully voted or had a right to vote at the election to which the petition relates;*

(b) *A person claiming to have had a right to be nominated or elected at such election;*

(c) *A person alleging to have been a candidate at such election; or*

(d) *The Attorney General.*

With the above provision of law, a simple question is as to who among Mr. Alistides Kasharasi and Mr. Aaron Kabunga worth a title of being a Petitioner, thus capable of instituting a Petition/Application. To be fair to both, there is no dispute that the former is the main actor in this case, while

the latter is a legal counsel who sees to it that his client follows a proper channel to fight and to get what he believes to be his right or entitlement. As rightly said by Mr. Rweyemamu, there is no point in time that the counsel changes his status from being a counsel to that of a party to a suit. The counsel remains a counsel throughout, unless he formally abandons his title and put himself to be a party. And this happens when the counsel like any other person, has a private and personal interest in the subject matter. In any rate, he cannot play both roles at the same time. As an answer to our question therefore, we can confidently say that Mr. Kabunga cannot replace Mr. Alistides in filling the petition or the application for security of costs. Similarly, he cannot swear affidavit relating to personal matters of Alistides. He will always remain a counsel to and or for his client.

Mr. Kabunga says that provided both the National Elections Act and the Civil Procedure Code do not prevent the counsel from filing an application on behalf of his client, there is nothing wrong with the application in hand. I find him wrong. The National Elections Act is specifically enacted to deal and or to govern all matters relating to Election matters. Of course, the procedure to conduct the election matters is to a greater extent, similar to the procedure for other civil matters that are governed by other laws, the Civil Procedure

Code being the main instrument. However, I find that the provision of Section 111 (3) in its unambiguous terms requires the petitioner himself to file the application for security of cost. As said by the counsel for the 1st respondent, and rightly so, that the petitioner is the one who is more conversant with all that has been stated or deponed in the affidavit. There is no reason why someone else should do the needful while the petitioner himself is there and available. After all, if the National Elections Act is adequately there to deal with the matter, why should we go for other statutes in search of remedy for otherwise offending act of a party against the relevant National Elections Act. This court once said in the case of Tanganyika Investment Oil & Transport Co. Ltd vrs Tanzania Revenue Authority, Mislc. Civil Application No. 262 of 2003 (DSM, unreported), that

> "...once *there is a specialized tribunal or court established by the law to cater for a specific issue, the Civil courts should always desist from entertaining those disputes even though they have unlimited jurisdiction under the Constitution*. "

With this in mind, I am of the considered view that Cap 33 is applicable in Petition matters only when Cap 343 has run short of the material so

required.

Back to our point, I am in agreement with Mr. Rweyemamu learned counsel that the affidavit accompanying the application is incompetent since it has not been made by the petitioner himself. Ground 1 and 2 therefore, are found in favour of the 1st respondent.

Regarding ground 3 of the P.O, a question is whether the affidavit in question contains legal arguments, conclusions and speculations.

Paragraphs so complained of are those against number 6, 7, 8 and 9. The contents of the paragraphs are as follows:-

6. *That, the applicant is an ordinary person whose economy is hand to mouth and he is totally incapable to raise the security for costs to the tune of Tshs. 5,000,000/= or any substantial part thereof.*

7. *That, the applicant hails from the young political party which has no any financial support to the applicant and that the meagre resources the petitioner (applicant) had were all spent in Election Campaigns which left the applicant totally incapacitated financially and has no any available remedy other than seeking*

exemption from this court.

8. *That, to pay any cash deposit to this court to comply with the Law wil inevitably cause considerable hardship and deny the applicant/petitioner his right to access justice in this court.*

9. *That, the exemption to pay cash deposit and any alternative form of Security will enable the Petitioner access justice and speed the hearing of the Petition as the Respondents will not be prejudiced at all.*

Without much repetition of what has been said on this, with due respect to Mr. Rweyemamu learned counsel, I find the sentences tolerable had other matters remain equal. The contents of the cited paragraphs may not be argumentative, conclusive or speculative. In that, counsel for the applicant simply lamented that the applicant has no sufficient funds to effect payment of Tshs 5m or even part payment of it, and that this is due to the fact that he spent all the money he had had during election campaign, and that to effect payment is to deprive him of his access to justice. To him that are plain facts of the situation.

Nevertheless, what is important for the determination of this matter at

hand is no longer the nature of the contents of the affidavit, but it is the legality of the affidavit as a document. It is who is supposed to swear on those particular aspects stated therein. Is the advocate a right person, or it is the petitioner himself who has to do the job. With this line of thinking, we revert to the answer we obtained from the consolidated grounds 1 and 2 of the P.O.

Having considered all that has been said by both parties, this court has come to its considered opinion and or conclusion that the P.O. so raised by the objector, in particular on grounds 1 and 2 has merit, hence worth upholding. In that, the Petitioner himself and not his counsel should swear affidavit in respect of his personal particulars in order to meet the requirements of Section 111 (3) of National Elections Act. The petitioner knows better than his advocate on how much he spent in the campaign and how far he is now broke.

Secondly, much as the CPC is applicable in Election matters, it does not allow an advocate to swear the affidavit on behalf of his client in all matters. Instead, he can only do the needful on matters, which came to his own knowledge based on the court proceedings as stated in Lalago's case.

Furthermore, the applicant is not even entitled to a remedy of amending the affidavit because the problem is not part of its contents, but the whole of the document being not made by a proper person.

Lastly, the court appreciates the facts that Election petitions are of public interest. Mr. Kabunga warns that the matters should not be dismissed on mere technicalities. However, like what we have noted in other decisions of the superior court, (A.G. & 2 Others vrs Joseph Kashindye's case inclusive), I am also with considered opinion that non-compliance of the law should not justify illegal procedure to prevail. Mr. Kabunga has to blame himself for his failure to observe the requirements of the law, thus his failure to give the case its due weight. His complaint has no basis at all.

At the end, the P.O. raised by the 1st respondent is hereby upheld. The application for security of costs is hereby struck out for being incompetently before this court. It lacks affidavit sworn by the Petitioner.

Costs in the cause.

It is so ordered.

P.B. Khaday

Judge

15/12/2015

Date 15/12/2015

Coram: ..... Hon. P.B.Khaday

Applicant ....Mr. Kabunga; advocate 1st Respondent...Mr. J.S. Rweyemamu & Mr J.P. Matete; Advocates

2nd Respondent .....Ms Chema Maswi; State Attorney 3rd Respondent

Ruling delivered in the presence of all parties

P.B. Khaday

Judge

15/12/2015