

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

Misc. Land Application No. 14 Of 2016

*(Arising from the Decision of the District Land and Housing Tribunal of Mtwara in Land
Case No. 08 of 201213)*

KASIMU AHMED BINGWE.....APPLICANT

VERSUS

MTEPA BAKARI.....RESPONDENT

18/10/2016 & 17/11/2016

R U L I N G

F. Twaib, J:

The applicant, Kasimu Ahmed Bingwe, has moved this court under section 42 of Land Disputes Courts Act, Cap. 216, R.E. 2002 and section 35 of Evidence Act, Cap 6, R.E.2002 praying to be heard on the following:

1. That the Court be pleased to take additional evidence.
2. Costs of the application.
3. Any other relief(s) and/or orders that the Honorable court may deem just and equitable to grant.

The application has been taken at the instance of Nyaroro & Company, Advocates, and is supported by an affidavit affirmed by the applicant Kasimu Ahmed Bingwe. The respondent filed a counter affidavit contesting the

application. He also raised a preliminary objection containing the following grounds:

- a) That the jurat is defective for having been affirmed by a person who is not the applicant.
- b) That the entire application is defective for having been drawn by an unauthorized entity.

Before me, the applicant was represented by Mr. Nyaronyo Kichere, learned Advocate, while the respondent used the services of Mr. Gide Magila, learned Advocate. On 19th July 2016, the respondent prayed to withdraw the first point of preliminary objection. The remaining ground of objection was argued by way of written submissions.

Submitting in support of the preliminary objection, the respondent's counsel argued that the substance of his argument rests on the fact that the applicant's application was drawn and filed by Nyoronyo and Company, Advocates. He submitted that section 2 and 39 (1) of the Advocate Act, Cap 341 R.E. 2002 distinguishes an advocate from a non-advocate, and it further refers to a non-advocate as an unqualified person.

He opined that the entity "Nyoronyo & Company, Advocates", which professes to have drawn and filed this application is not an advocate as it is not registered on the roll of advocates. He went on submitting that drawing or preparing an instrument for gain is privileged to persons who are registered on the roll of advocates. Those who are not registered (unqualified persons/entities) are prohibited by section 43 (1) of the Advocates Act and liable to be punished. He added that section 44 (1) makes it mandatory for a person who draws or

prepares any instrument to indorse his name and address on the instrument. The court is ousted by law to accept document which does not bear the name of the drawer. He referred to the court the decision of this court in **Omari Ali Omar v Registrar of Titles**, Misc. Land Application No. 90 of 2014 (unreported) which held:

"The endorsement of pleadings is an irregularity in procedure and so the pleadings endorsed by persons not enrolled as a legal practitioner or advocate renders such process/pleadings defective."

He pointed out that all the above authorities hold that pleadings which do not bear the name of the drawer are defective. Hence, it is counsel's view that the instant application having been drawn by an entity known as Nyaronyo and Company Advocates, which is prohibited by law to do draw documents because it is not on the roll of advocates. On that ground, he prayed for the sustenance of the preliminary objection, with costs in his client's favour.

Responding to the above submissions, the applicant's counsel admitted that in view of section 2 of the Advocates Act, an advocate means any person whose name is dully entered as an advocate on the roll of advocates. He expressed the view that a natural person dully registered and licensed to do business of advocacy and litigation, qualifies to act as an advocate through his business name. Nyaronyo and Company Advocates, he said, is a business name used by Nyaronyo Mwita Kicheere who is an advocate and whose name is dully entered on the roll of advocates. He also has a practicing certificate and therefore qualifies to prepare a legal document.

Counsel attacked the decisions of this court in **Omari Ali Omar v Registrar of Titles**, Miscellaneous Land Application No. 90 of 2014 (Unreported); **Lucas Nzengula (Son and heir of Zuhura John) v Isack Athumani and Royal Insurance (T) Limited**, Civil Appeal No. 66 of 2008 (Unreported) and **Ramadhani Sood Balenga v Hans Aingaya Macha**, Land Case No. 66 of 2013. This Court held in those cases that firms or partnership are not the legal practitioner or advocate recognized by the Advocates Act and thus are not persons entitled to practice as an advocate under the Advocates Act.

Counsel for the applicant was of the view that those decisions were reached in total disregard of the true interpretation of sections 39 (1), 43 (1) and 44 (1) of the Advocates Act. In his opinion, the provisions were meant to bar non-advocates, laymen for that matter, from practicing and drawing legal documents for gain. That was the proper interpretation of the said provisions as given by the Court of Appeal of Tanzania in **George Humba v James M. Kasuka**, TBR Civil Application No. 1 of 2005 where it was held:

"...the section deals with an unqualified person who prepares documents for gain, fee or reward which was not the case here. Surely, Mr. Kayaga could not be unqualified person for purposes of preparing the notice of motion and accompanying affidavit for filing in court."

In view of the above authority, the applicant's counsel argued that the fact that Advocate Nyaronyo Kicheere signed a legal document using his trade name does not affect the validity of the document. Using partnership names has been a practice immemorial, he argued, and that even the Business Name Registration Act allows advocates to practice law using their trade names, which do not

change their status as natural persons and therefore meets the requirement of the Advocates Act.

The learned counsel further referred to Article 107A (2) (e) which requires courts in dispensing justice not to be tied by legal technicalities. He finally prayed for the preliminary objection to be overruled with costs.

The issue is whether the applicant's application is incompetent for want of the name of the advocate who drew the document. The provision relied upon by the respondent's counsel is sections 39 (1) 43 (1) and 44 (1) of the Advocate Act which requires only a person who is registered on the roll of advocates to practice. The provisions also require the name and address of the advocate who drew the document to be inserted in the document. The law also prohibits unqualified persons to practice and thus provides punishment to that effect.

The respondent's counsel was of the view that a document which does not indicate the name of the drawer is incompetent and should not be received in court. In my view, the main import of sections 39 (1) 43 (1) and 44 (1) of the Advocates Act, is to prohibit unqualified persons from practising law. This interpretation was also taken by the Court of Appeal of Tanzania in **George Humba v James M. Kasuka** (supra). In that case, the document was drawn by a qualified advocate, but the name of that advocate was not shown in the document. The issue was whether the document was incompetent for want of the name and address of the advocate who drew the same. In interpreting the said provision the court said:

"...Assuming that section 44 (1) in the Advocate Ordinance Cap 341 of the Revised laws is the correct version and it refers to

*instruments as mentioned in s. 43 (1), we would then say that the section deals with unqualified persons who prepare those documents for gain, fee, or reward, which was not the case here.....In the present case, the notice of motion shows legible signature of Mr. Kayaga as an advocate for the applicant and that it was signed at Tabora on 9th May, 2005. **At any rate, Mr. Kayaga, as already pointed out, was not an unqualified person who is targeted person in section 43 of the Act, Cap 341 of the Revised Edition, 2002.** [Emphasis supplied]*

As stated in the above case, neither the advocate's name nor his business name was indicated as the drawer of the document. However, the Court of Appeal held that the purpose of requiring the drawer of the document to indicate his name aimed only at prohibiting unqualified person to draw document for gain or fees. Since it was revealed before the court that it was an advocate who drew the document the court found that such advocate was not a targeted person under the provision though he did not indicate his name. The objection to that effect was dismissed.

In the present case, it is beyond dispute that Mr. Nyaronyo, advocate for the applicant, has a practicing certificate and he drew the document in his business name, Nyaronyo and Company Advocates. Under the Business Names (Registration) Act, Cap 213 (R.E 2002) a firm, individual or corporation may carry on business under a business name. Restriction is only imposed on non-registered business names as provide for under section 14 of the Business Names (Registration) Act Cap 213 (R.E 2002).

In such a situation, therefore, the issue should not be the business name so indicated, but simply who drew the document. If it is clear from the document

that a qualified advocate drew the document then in terms of the interpretation in **George Humba v James M. Kasuka** (*supra*), such advocate is not a person targeted by the aforesaid provisions.

I took a similar position in the case of *Faith Mohamed Mtambo v. Zuberi Mohamed Kuchauka & 2 Others*, Misc. Civ. Cause No. 2 of 2015 (High Court, Mtwara Registry, unreported). I held, *inter alia*, that the omission to name the advocate concerned would not render the pleading incurably defective, such that the pleading would be liable for order striking it out. I opined that an order for amendment to indicate the name of the advocate would be more ideal. Comparing the shortcoming to the irregularity occasioned in respect of failure to sign verifications or pleadings, I saw no reason why the omission to mention the name of the advocate who prepared a pleading within the law firm cannot be cured by amendment while verifications and pleadings are amenable to amendments. In any case, I am now even more fortified by the decision of the Court of Appeal in **George Humba v James M. Kasuka** (*supra*).

Having observed as above, I would overrule the preliminary objection. I make no orders as to costs.

DATED and DELIVERED at Mtwara this 17th day of November, 2016.

F.A. Twaib

Judge