

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

CIVIL APPEAL NO. 4 OF 2020

(Arising from Civil Case No. 16 of 2018 of Mbinga District Court)

CHINA HENAN INT. COOPERATION

GROUP CO. LTD (CHICO) APPELLANT

VERSUS

MORNING GLORY CONSTRUCTION COMPANY RESPONDENT

Date of last Order: 01/12/2020

Dated of Ruling: 03/12/2020

RULING

I. ARUFANI, J

This ruling is in respect of the point of preliminary objection raised orally by the counsel for the respondent in this appeal that, the appeal is incompetent as it was drawn and filed in the court by an unqualified person. The counsel for the appellant prayed the said point of preliminary objection to be argued by way of written submissions. The prayer was granted and the court ordered the written submission by the respondent to be filed by 17th November, 2020, the reply by the appellant to be filed by 24th November, 2020, rejoinder if any to be filed by 1st December, 2020

and the matter was fixed to come for mention on 1st December, 2020 for fixing a ruling date.

When the matter came for fixing a ruling date on 1st December, 2020 the court found it is only the submission by the respondent which was filed in the court on 17th November, 2020 as ordered by the court and there is no reply filed in the court by appellant. Mr. Zuberi Maulid, learned advocate who appeared in the court for the respondent told the court they have not been served with reply from the appellant. He urged the court that, if the appellant has not filed a reply in the court, a necessary order be issued.

As there is no written submission filed in the court by the appellant to reply the submission filed in the court by the respondent and as there is nobody from the appellant or their advocate appeared in the court to state why the appellant has not filed in the court a reply to the submission filed in the court by the respondent as ordered by the court, the court has found the appropriate order to make in the matter is to continue to determine the gist of the point of preliminary objection raised by the counsel for the respondent by using the submission filed in the court by the counsel for the respondent.

The court has arrived to the above finding after seeing that, our courts have stated in number of cases that, failure to file written submission in the court as ordered by the court is as good as failure to prosecute or defend the matter in the court. The requirement to comply with the order of the court to file written submission in the court was elucidated in the case of **Ivan Mankobrad V. Miroslavan Katik & Another**, Civil Case No. 321 of 1997, HC at DSM (unreported) where the court stated as follows:-

"... they are meant to command parties to act within a time frame fixed by the court. If there are total disregard to those orders then the court business will be rendered uncertain; and that will not be good for the efficient administration of justice."

The consequences of failure to file written submission in the court within the time given by the court was also considered by the Court of Appeal of Tanzania in the case of **Allan T. Materu V. Akiba Commercial Bank**, Civil Appeal No. 114 of 2002 and the Court of Appeal stated that:-

"Inability or failure by the applicant's counsel to file the written submission within the time and/or subsequent failure to apply for enlargement of time is not a slight lapse or mere inadvertence. Counsel here was obviously not diligent in

handling the case. I find counsel lapse here to be serious and fundamental in nature."

The Court of Appeal of Tanzania had another occasion to deal with submission filed in the court out of time in the case of **National Insurance Corporation of (T) Ltd and Another V. Shengena Limited**, Civil Application No. 20 of 2007 which was cited with approval in the case of **Godfrey Kimbe V. Peter Ngonyani**, Civil Appeal No. 41 of 2014, CAT at DSM (unreported) and it stated that:-

"The applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

While being guided by the position of the law stated hereinabove the court has gone through the submission filed in this court by Mr. Eliseus Ndunguru, learned counsel for the respondent and found he has stated in his submission that, section 39 (1) (a), (b) and (c) of the Advocates Act, Cap 341 R.E 2019 provides for qualification of a person to act as an advocate to be as follows; his name is required to in the roll of advocates, he is required to have in force a practicing certificate and is required to have a valid business licence.

He argued that, a person who is not equipped with the qualifications stated hereinabove is referred as an unqualified person. He argued further that, section 41 (1) of the Advocates Act prohibits unqualified person to act as an advocate in any matter whether is civil or criminal. He stated that, the appeal at hand was drawn and filed in the court on 30th March, 2020 by Mr. Gaudence Ndomba who was acting as an advocate for the appellant. He submitted that, when the appeal was filed in the court Mr. Gaudence Ndomba had not renewed his practicing certificate.

It is the argument by the counsel for the respondent that, the Wakili data base (TAMS) shows the mentioned advocate renewed his practicing licence on 3rd June, 2020 which means when he prepared and filed the appeal of the appellant in the court he was not qualified to act as an advocate. He argued that, as Mr. Gaudence Ndomba was not a qualified person to act as an advocate, the documents he prepared and filed in the court to initiate the appeal of the appellant are required to be struck out as were prepared and filed in the court by an unqualified person.

To support his argument he referred the court to the case of **Edson Oswald Mbogoro V. Dr. Emmanuel John Nchimbi & Attorney General**, Civil Appeal No. 140 of 2006, CAT at DSM (unreported) where it

was stated that, if an advocate in this country practices as an advocate without a current practicing certificate, not only does act illegally but also whatever he does in that capacity has no legal validity. He argued that, the appellant was required to make an inquiry about the status of Mr. Gaudence Ndomba through TAMS before engaging him as their advocate.

He submitted that, the court to accept the documents drawn by unqualified person and filed in the court to initiate the appeal of the appellant will be perpetuating illegality and it will open Pandora box for unqualified persons to act as advocate. At the end he prayed the court to strike out the appeal of the appellant with costs for being incompetent.

Having carefully considered the submission made by the counsel for the respondent and after going through the provisions of the law cited in the submission of the counsel for the appellant the court has found the issue to determine in this matter is whether Mr. Gaudence Ndomba was unqualified person when he prepared and filed in the court the appeal of the appellant. The court has found section 39 (1) of the Advocates Act provides for qualifications which a person is required to possess to enable him to act as an advocate which among other requirements as I stated earlier is required to have in force a practicing certificate. Besides, section

41 (1) of the same law prohibits an unqualified person to act as an advocate in any court of civil or criminal jurisdiction.

There are several decisions which have been made by this court to disapprove an unqualified person to act as an advocate. The said decisions can be seen in the cases of **Ahmed Jamal V. Yeslam Said Bin Kulaib**, Civil Appeal No. 312 of 2004, HC at DSM and **Islam Ally Saleh V. Akbar Hameer & Another**, Civil Case No. 156 of 2016, HC at DSM (both unreported). To the view of this court development of technology has made the issue of knowing a person is qualified or not to act as an advocate in our country is now very simple as you can just search for the same through the www.tams.judiciary.go.tz website. That website will show you whether an advocate has renewed his practicing certificate or not and if it is renewed from when it was renewed.

The above cited website shows clearly that, Mr Gaudence Ndomba paid for his practicing certificate from 1st January, 2019 to 31st December, 2019. The same website shows that, from 1st January, 2020 to 2nd June, 2020 Mr. Gaudence Ndomba did not renew his practicing certificate. As rightly argued by the counsel for the respondent Mr. Gaudence Ndomba renewed his practicing certificate from 3rd June, 2020 to 31st December,

2020. That means for the period starting from 1st January, 2020 to 2nd June, 2020 Mr. Gaudence Ndomba had no qualification of acting as an advocate.

As the memorandum of appeal filed in this court to initiate the appeal of the appellant was drawn by Mr. Gaudence B. Ndomba and filed in the court on 30th March, 2020 it is crystal clear that, as rightly argued by the counsel for the respondent the documents used to initiate the appeal of the appellant were drawn and filed in the court by an unqualified person pursuant to sections 39 (1) of the Advocates Act. The effect of documents drawn and filed in the court by a person who is unqualified was stated in the case of **Edson Osward Mbogoro**, (supra) where the Court of Appeal of Tanzania states at pages 12 & 13 of the typed ruling of the court that:

"If an advocate practices as an advocate without having a current practicing certificate, not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We also take the liberty to say that to hold otherwise would tantamount to condoning illegality."

In view of the above holding it is crystal clear that, the memorandum of appeal drawn and filed in this court by Mr. Gaudence Ndomba purporting to act as an advocate of the appellant while in actual fact he

was not qualified to do so have no legal effect. That makes the court to find that as rightly argued by the counsel for the respondent it renders the appeal incompetent which its consequences is for the appeal to be struck out. Therefore the appeal of the appellant is hereby struck out for being incompetent and the costs to follow the event. It is so ordered.

Dated at Songea this 3rd day of December, 2020



I. Arufani
I. ARUFANI

JUDGE

03/12/2020

Court:

Ruling delivered today 3rd day of December, 2020 in the absence of the appellant and in the presence of Mr. Awalu Nchimbi from the respondent's company and Mr. Zuberi Maulidi, learned advocate for the respondent.



I. Arufani
I. ARUFANI

JUDGE

03/12/2020