

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT MUSOMA
MISCELLANEOUS LABOUR APPLICATION NO 6 OF 2020

BETWEEN

BARAKA OWAWA_____ **APPLICANT**

VERSUS

TANZANIA TEACHERS' UNION_____ **RESPONDENT**

RULING

Date of last order; 03.06.2020

Date of Ruling; 04.06.2020

GALEBA, J.

This application was filed in this court under a certificate of urgency on 01.06.2020 by the applicant moving this court to grant the following orders;

"1. THAT this honourable court be pleased to set aside the decision of the Respondent dated 28.05.2020, to strike off my name from the list of members vying for the post of Deputy Secretary General for reasons that are unconstitutional and in violation of court orders.

2. THAT the honourable court be pleased to direct the Respondent to restore my name for the post of Deputy Secretary General of the Union at the election expect to be conducted on 5th June 2020.

3. THAT in the alternative, the Respondent be restrained from conducting the election specifically that of Deputy Secretary General until pending (sic) hearing and determination of this application.

4. THAT the court be pleased to grant any other relief it may deem just and fair to grant.

5. THAT costs be in the cause."

Following the need of the urgency that this court noted on the record of the application it became imperative that parties be called for orders in order to put in place necessary modalities of handling the matter in an expedited way as the contested elections were to take place on Friday June 5, 2020 of the same week we were into. So we issued orders that parties appear on 03.06.2020 for necessary orders.

However, this court noted that advocate **GOODLUCK RAPHAEL LUKANDIZA** with roll no. 7925 is the person who attested the signature of **BARAKA OWAWA** in order to support the present application. It turned out that official information downloaded from the Tanzania Advocates Management System (TAMS) platform revealed that his photo installed in the system had a red background with the following comments; **"Hajahuisha Leseni ya Uwakili 2020"**. I therefore made up my mind that this court will put that issue to the advocates when they appear for orders in order to establish whether this application is valid and competent in the eyes of the law.

When the matter was called on 03.06.2020, I therefore required Mr. Ludovick Joseph learned advocate for the applicant and Mr. Erick Kahangwa learned counsel for the respondent to address the court on that issue before we could proceed to the substance of the

application. Mr. Joseph prayed for an adjournment so that he could contact **MR. GOODLUCK RAPHAEL LUKANDIZA** on his practicing status. The matter was adjourned for half an hour and upon reconvening Mr. Joseph came up with a completely new and surprising story. He submitted that in actual fact **MR. LUKANDIZA** is not even a practicing advocate. He submitted that he was either a law officer or a state attorney employed by Musoma Town Council. He submitted that because he is a law officer or a state attorney he has mandate under **section 17A (3) of the Office of the Attorney General (Discharge of Duties) Act [Cap 268 RE 2002]** (the OAG Act) to attest signatures. He submitted that according to that section, law officers and state attorneys have mandate to practice as, such subject to the guidelines to be issued by Hon. the Attorney General. Mr. Joseph was quick to add that under section 17A (4) of the OAG Act the Attorney General has not issued any such guidelines which must be gazette once issued.

In further justifying **MR. LUKANDIZA's** acts of attesting the signature of the applicant, Mr. Joseph submitted that there are public officers who, although not advocates but they have mandated under **section 10(2)(a) of the Notaries Public and Commissioners for Oaths Act [Cap 12 RE 2002]** (the NPCO Act) and he submitted that **MR. LUKANDIZA** is one of such officers. In other words, if I understood the advocate well, he was of the view that **MR. LUKANDIZA** had powers to attest the applicant's signature not only under section 17A (3) of

the OAG Act but also he had such powers under section 10(2)(a) of the NPCO Act. He finally moved the court to either proceed and hear the application as it is with the affidavit as attested because **MR. LUKANDIZA** had authority to do what he did or alternatively, if this court will be of the view that the affidavit is defective, then it be please to permit the applicant to file a fresh affidavit taking into account the spirit of overriding objective.

In reply to those submissions, Mr. Erick Kahangwa submitted that the law that regulates attestation of signatures and administration of oaths is the NPCO Act. He submitted that section 3(1) of that Act provides for persons who are competent to practice as notaries public and commissioners for oaths. He submitted that there are two categories of such individuals; one is composed of advocates and the second is composed of persons who have qualifications to practice as notaries or commissioners for oaths in England, Scotland or Northern Ireland. According to Mr. Kahangwa, **MR. LUKANDIZA** is an advocate within the meaning of the above section of the NPCO Act, and therefore for him to be able to attest a signature as he did, he had to be in possession of a renewed Practicing Certificate. He submitted that if **MR. LUKANDIZA** was a law officer or state attorney as submitted by Mr. Joseph, he could not have acted upon the affidavit because there are no guidelines in place to regulate that practice. Mr. Kahangwa moved the court to strike out the application for being incompetent.

At this juncture this court is comfortable to deal with the above submissions of counsel in order ultimately to come up with a plausible conclusion whether the application is competent or it is not in the circumstances.

First, frankly, the issue that **MR. GOODLUCK RAPHAEL LUKANDIZA** is not an advocate but a law officer or a state attorney was a pure unsupported allegation raised from the bar by Mr. Joseph. However, according to the rubber stamp that **MR. LUKANDIZA** affixed to the affidavit of **MR. BARAKA OWAWA**, he holds three titles. The rubber stamp goes; "GOODLUCK RAPHAEL LUKANDIZA Advocate, Notary Public & Commissioner for Oaths P. O. BOX 877 MWANZA". The rubber stamp did not state that, he was a law officer or that he was a state attorney.

The submission therefore of Mr. Joseph is not the position held by **MR. LUKANDIZA** as he identifies himself to the whole word in his rubber stamp. As far as records before the court are concerned the version maintained by **MR. LUKANDIZA** is the only authentic information in respect of his offices and mandates that he has. The other factual version and averments that **MR. LUKANDIZA** is not an advocate but a law officer or a state attorney, as advanced by Mr. Joseph from the bar, to the court, without any kind of documentation from the said **MR. LUKANDIZA** to justify Mr. Joseph's versions, amount to no more than theories or fiction. See **MISCELLANEOUS CIVIL APPLICATION NO 27 OF 2019; GODWIN BENARD KAGARUKI VERSUS THE PRESIDENT OF**

THE UNITED REPUBLIC OF TANZANIA AND 5 OTHERS (HC), CIVIL APPLICATION NO 86 OF 2015; TINA & CO LTD AND 2 OTHERS VERSUS EURAFRICA BANK (T) LTD (CA) and CIVIL APPLICATION NO. 102 OF 2016; MADAM MARY SILVANUS QORRO VERSUS EDITH DONATH KWEKA AND ANOTHER (CA) all unreported.

Even if we were to assume that Mr. Joseph is right in his submission that **MR. LUKANDIZA** is a law officer or a state attorney within the meaning of the OAG Act and he is not an advocate within the meaning of the **Advocates Act [Cap 341 RE 2002]** or the NPCO Act, did he exercise his mandate under section 17A (3) the OAG Act procedurally? First we will quote the whole of section 17A the OAG Act with side notes ***"restriction to practice as advocate"***. That section was introduced in that Act by **section 44 of the Written Laws (Miscellaneous Amendments) (No. 4) Act No. 11 of 2019**. That section provides as follows;

"17A.-(1) A Law Officer or State Attorney shall not, for the whole period of service as a Law Officer or State Attorney, practise as an advocate.

(2) Notwithstanding subsection (1), the Attorney General may, upon application by a Law Officer or State Attorney or, where in his opinion he considers it necessary, exempt a Law Officer or State Attorney from the application of the provisions of subsection (2).

(3) Without prejudice to subsection (2), a Law Officer or State Attorney may, subject to the guidelines prescribed by the Attorney General, administer oaths or attest documents as a commissioner for oaths or as a notary public; Provided that such attestation or administration shall not have potential conflict of interest with his employer.

(4) The Attorney General shall, by order published in the Gazette, issue guidelines to-

- (a) facilitate the implementation of subsection (3); and*
(b) prescribe modality for application of exemption referred to under subsection (2)."

Although Mr. Joseph submitted that even without the guidelines of the Attorney General referred to at subsection (4) above, the powers to act as commissioners for oaths provided for under subsection (3) above may be exercised, but that is not a correct construction of the law. That interpretation is wrong because, in order to facilitate the implementation of subsection (3) the guidelines need to be in place as required by section 17A (4) (a) of the OAG Act. In other words, section 17A (3) provides for substantive mandate to law officers and state attorneys to administer oaths, but the procedure to carry out such mandate must be traced from the guidelines that ought to be made and gazetted under section 17A (4) (a) of the OAG Act. In other words, if Mr. Joseph is right in submitting that the guidelines are not in place, he must have been submitting in the same breath that implementation of the powers to act as a commissioner for oaths were prematurely exercised by **MR. LUKANDIZA**. It is therefore right in view of this court that, exercising the mandate contained at section 17A (3) of the OAG Act any time before gazetting of the guidelines is to act prematurely and illegally.

To be clearer to Mr. Joseph and all other stakeholders in this matter, if **MR. LUKANDIZA** acted under 17A (3) of the OAG Act, he so acted

without mandate of the Attorney General and such acting was illegal and unlawful.

The other point argued and raised by Mr. Joseph was **MR. LUKANDIZA** also, had mandate under section 10(2)(a) of the NPCO Act. This court will not get into this because we already held that there is nothing on record to show that **MR. LUKANDIZA** is not advocate under the NPCO Act.

To summarize, according to the way **MR. LUKANDIZA** introduces himself in the rubber stamp he affixed to the affidavit of MR. BARAKA OWAWA, the officer is an advocate under the NPCO Act and he attested the signature of **MR. OWAWA** without having a renewed practicing certificate as confirmed over the official TAMS platform in court on 03.06.2020 and as confirmed by Mr. Joseph. Mr. Joseph confirmed that the advocate did not also have a certificate permitting him to act as a commissioner for oaths, but still he attested the affidavit of the applicant. Legally that has two meanings. **First** is that the advocate has breached section 4 of the of the NPCO Act which provides that;

"4. Enrolment and granting of certificates

(1) Any person mentioned in section 3 who is entitled to practise as a notary public and commissioner for oaths shall, on application to the Registrar of the High Court and payment to him of the prescribed fee, and upon signing a roll to be kept by the Registrar, be granted a certificate in the form in the Second Schedule, which certificate shall, subject to the provisions of section 5, entitle him to practise as a Notary Public and Commissioner for Oaths in Mainland Tanzania so long as it is in force.

(2) Every certificate shall cease to be in force after the 31st December next following the date of issue, unless it is renewed.

(3) Every certificate shall be renewed, by endorsement, upon the application of the holder and payment of the prescribed fee.

(4) The granting of a certificate under this section and its renewal shall be recorded in the roll.

(5) When a certificate granted under this section is lost, destroyed or mutilated it shall be replaced by a fresh certificate upon the application of the person entitled to it and payment of the prescribed fee."

Breach of the above provision legally mutates an advocate from being an advocate and assumes the title of an **"unqualified person"** as defined under section 39 (1) of the Advocates Act and the behavior is punishable with a fine and imprisonment under section 6(1) of the NPCO Act which provides as follows;

"6. Penalty for unlawfully practising

(1) Subject to the provisions of section 10, any person who holds himself out to be a notary public or commissioner for oaths or receives any fee or reward as a notary public or commissioner for oaths, unless he holds a valid certificate granted under this Act, shall be guilty of an offence and liable to a fine not exceeding one thousand shillings and for a second or any subsequent offence to imprisonment for a period not exceeding six months or to a fine not exceeding two thousand shillings or to both."

Secondly, whatever documents prepared endorsed or work done by an unqualified person does not have legal value in courts. The reasons are not far to find, first such work is a result of criminality and deceit, secondly the work or document lacks legality. **REVISION NO 296 OF 2017 BETWEEN MOHAMED SHABAN AND 6 OTHERS VERSUS TANZANIA ELECTRIC SUPPLY COMPANY LTD (LABOUR DIVISION AT DAR ES SALAAM)(UNREPORTED)**, this court, Hon. Mashaka J, expunged the

document drawn by an unqualified person and struck out the application. This court shall not depart from that established rule that a document which has been attended to by an unqualified person has to be expunged. The affidavit of **MR. BARAKA OWAWA** is hereby, for the above reasons, expunged from the record. But that is not all, because it leads yet to another point; the status of the application.

Rule 24(3) of the Labour Court Rules 2007, GN 106 of 2007 (the Labour Court Rules) which rules provide for one crucial qualification for a application to be acted upon by this court. It provides as follows;

"24(3) The application shall be supported by an affidavit, which shall clearly and concisely set out:-

(a) The names, descriptions and addresses of the parties,

(b) A statement of the material facts in a chronological order, on which the application is based,

(c) A statement of the legal issues that arise from the material facts and

(d) The reliefs sought."

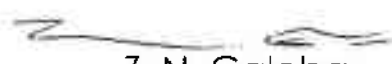
According to the above rule, for an application to be valid in this court, that application must be supported by an affidavit, which in this case, has been expunged. Mr. Joseph prayed that instead of striking out the application let the same remain on record and the applicant be permitted time to make a proper affidavit and file it in observance of the principle of overriding objective. The response to that prayer is not only legal but also logical. This court has already held that the affidavit stands expunged, now in such circumstances; can we say that there is an application then which can wait even

for a minute for a new affidavit? The point that this court is trying to drive and ensure that it reaches home is this; once there is no affidavit even for one second, there cannot remain any application to wait for the better affidavit to be brought. Putting it legally, an application without an affidavit accompanying it is not an application within the meaning contemplated under **Part III** of the Labour Court Rules. Put differently, even if this court would have wanted to grant the prayer by Mr. Joseph, common sense, logic and most of all law stand in its way. There remains one option, to strike the application, for the same is incompetent which is a polite way of saying that, "**it is not there**".

Overriding objective is not applicable in the circumstances of this case. The principle is not aimed at being a nursery within which to fertilize and lead to germination and growth of illegal and criminal practice of law. It can be used may be in any other scenarios but not to condone criminality in legal practice.

In the circumstances, this application is struck out for being incompetent and since this application seems to trace origin from an industrial relationship, this court makes no orders as to cost.

DATED at MUSOMA this 4th June 2020


Z. N. Galeba
JUDGE
04.06.2020

Court; This ruling has been delivered today the 4th of June 2020 in the absence of parties but with leave not to enter appearance following the corona virus outbreak and the medical warning to maintain social distance between individuals.

Order; Sufficient copies of this ruling and drawn orders be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.



Z. N. Galeba
JUDGE
04.06.2020