

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 56 OF 2020.

(From the Decision of the Land and Housing Tribunal for Mbeya, at Mbeya in Land Appeal No. 123 of 2018, Originated in Utengule Usongwe Ward Tribunal, in Land Case No. 19 of 2018).

SIMON ASAJILE MBOGELA.....APPLICANT

VERSUS

JUMA NJATE.....RESPONDENT

RULING

18.02 & 29.04.2021

UTAMWA, J.

This is a ruling on a preliminary objection (PO) raised by the respondent, JUMA NJATE against the application at hand. The applicant, SIMON ASAJILE MBOGELA did not concede to the PO. In the application, the applicant is seeking for an extension of time to appeal against the decision of the District Land and Housing Tribunal for Mbeya, at Mbeya in Land Appeal No. 123 of 2018.

The application is preferred under section 38 (1) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 (Now R.E 2019). It is supported

by an affidavit sworn by the applicant himself. The respondent objected the application through a counter affidavit sworn by himself. He also lodged the notice of the PO as shown above.

The PO was based on the following two limbs:

- 1) That, the applicant's application is incompetent for contravening section 44 (1) of the Advocates Act.
- 2) That, the applicant's application is incompetent for misapprehension and confusion of the names of the deponent.

Both parties were not legally represented. However, they prayed to dispose the PO by way of written submissions. The prayer was granted and the submissions were duly filed.

Submitting in support of the PO, the respondent argued in regard to the first limb that, the application is incompetent for contravening the provision of section 44 (1) of the Advocate Act, Cap. 341 R.E 2002. The section requires the drawer of a document to indicate his name and address. In the application at hand however, the documents (chamber summons and affidavit) show that, they were drawn gratis by "Haki za Raia na Msaada wa Ushauri wa Kisheria". To him, the drawer is a legal person who is not a qualified person capable to draw an instrument. He further argued that, the application is therefore, liable to be struck out. He substantiated his contention with the decision by the Court of Appeal of Tanzania (CAT) in the case of **Ashura Abdukadri v. The Director Tilapia Hotel, Misc. Civil Application No. 2 of 2005, CAT at Mwanza** (unreported).

Regarding the second limb of the PO, the respondent argued that, the application is incompetent for misapprehension and confusion of the

name of deponent. In the chamber summons the applicant is named "SIMON ASAJILE MBOGELA" while the affidavit refers to him as "SION" and "SAIMON ASAJILE MBOGELA." To him, these contradictions are serious since the affidavit need be certain as to the deponent. He further contended that, the said uncertainty of names offends the provision of section 12 (2) of the Notaries Public and Commission for Oaths Act, Cap. 12 R.E. 2019. Owing to these arguments the respondent prayed for this court to strike out the application for being incompetent.

In his replying submissions, the applicant argued that, the documents indicated the name and address of the drawer. They did not therefore, offend any law. According to him, the documents were drawn by a person known as "Haki za Raia na Msaada wa Ushauri wa Kisheria". He further argued that the law only requires the name of the drawer without specifying if that person is a natural or legal person. He added that, the drawer of the document is the legal person capable of suing and being sued. It was a further contention by the applicant that, even if the drawer is not a person as per the Advocate Act, the omission did not go to the root of the application. It did not thus, render the application incompetent. To buttress his contention he cited the decision by the CAT in the case of **OTTU on Behalf of P.L Assenga and 106 Others & 3 Others v. Ami Tanzania Limited, Civil Application No. 35 of 2011 CAT at Dar es Salaam** (unreported).

Regarding the second limb, the applicant argued that, the same is not a point of law worth for being a PO, instead it is a matter of fact. He also contended that, the difference is due to the typing error which could not render the application incompetent. He further argued that, this court should not rely upon procedural rules if do not go to the root

of the application as it was held in the case of **Mwaitenda Ahobokile Michael v. Interchick Company Ltd, Civil Application No. 218 of 2016** (unreported). Owing to those arguments he urged this court to overrule the PO for demerits.

In his rejoinder submission, the respondent argued that, the term “person” referred to under section 44 (1) of the Advocates Act is only a natural person. The term “person” does not include legal persons. It follows thus, that, the person indicated as the drawer of the applicant’s documents in the present matter offends the law. He added that, the applicant himself concedes on the confusion of names appearing in the affidavit. That, the same are serious defects, he thus, insisted his prayer for striking out the application.

I have considered the submissions by the parties, the record and the law. I will now resolve the first limb of PO. Regarding this limb, it is not disputed that, the provisions of section 44 (1) of the Advocates Act set the requirement mention above. It is couched thus, and I quote it for a readymade reference;

“Every person who draws or prepares any instrument in contravention of section 43 **shall endorse or cause to be endorsed** thereon **his name** and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings.” (Bold emphasis added).

It is also not disputed that, the applicant’s documents mention above show that, they were drawn by a legal person i.e “Haki za Raia na Msaada wa Ushauri wa Kisheria”. Now the issues to be determined by this court are:

- i) Whether or not a person referred to by the Advocate Act includes a legal person like the one who signed the applicant's documents under discussion.
- ii) If the answer in the first issue is negative, then whether the application at hand is competent.

The respondent argued that, the person referred to by the Advocates Act is a person whose name is not in the Roll of advocates, has no live practicing certificate and has no valid business license. Indeed, I subscribe to this particular argument by the respondent. The unqualified person referred to under section 44 (1) of the Advocate Act does not include a legal person. This is because, the Roll of Advocate does not include legal person. This also means that, a legal person cannot be an Advocate, but can be constituted by advocates. In addition to that, as rightly argued by the respondent, a legal person cannot draw a document, but advocates constituting it can do so. It is thus, my opinion that, the phrase "every person who draws or prepare any instrument" appearing in the first line of section 44 (1) of the Advocates Act (quoted above), does not include any legal person. The first issue posed above is therefore, answered negatively.

Now, regarding the second issue of whether the application at hand is competent, I do not think if the answer will be positive. This is due to the fact that, this court is barred from accepting or recognizing any instrument which contravenes section 44 (1) of the Advocates Act, like the applicant's documents under discussion; see section 44 (2) of the Advocates Act. The **Ashura Case** (supra) also held that, since section 44 (1) of the Advocate Act is couched in mandatory term, the drawer of the document was supposed to indicate his name. Under

these circumstances, and since I have already ruled that, the documents filed by the applicant contravened the law, i.e the Advocates Act, the second issue is therefore, negatively answered that, the application at hand is incompetent.

Owing to the findings I have made hereinabove; I hereby sustain the first limb of PO. I will not thus, test the second limb of the PO since the findings I have made in relation to the first limb are capable enough to dispose of the entire matter. I consequently strike out the application for above reasons. The applicant shall pay costs to the respondent because, costs follow event unless there are good reasons to decide otherwise. However such good reasons do not exist in the matter at hand. It is so ordered.


J.H.K. UTAMWA
JUDGE
29/04/2021

29/04/2021.

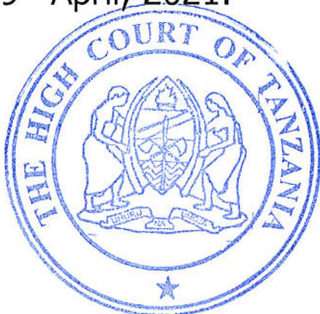
CORAM; JHK. Utamwa, J.

Appellant: present.

Respondent: absent.

BC; Ms. Patrick Nundwe, RMA.

Court: ruling delivered in the presence of the applicant, in court, this 29th April, 2021.




JHK. UTAMWA.
JUDGE
29/04/2021.