

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MAIN REGISTRY
AT DAR ES SALAAM**

MISC. CIV. APP NO 4 OF 2021

(Arising From Consolidated Application No 3 and 4 Of 2019)

BETWEEN

DR. HAMISI SAIDI KIBOLA..... APPELLANT

VERSUS

- 1. ANTHONY GOODLUCK SHUMA.....1st RESPONDENT**
2. HADIJA TATI.....2nd RESPONDENT
3. THE ADVOCATES COMMITTEE.....3rd RESPONDENT

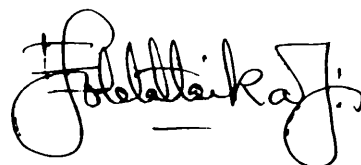
RULING

Date of Last Order: 9/11/2021

Date of Ruling: 14/12/2021

LALTAIKA, J.

This is a ruling on preliminary points of objection raised by Counsel for the 2nd Respondent Mr. Godwin Nyaisa. Briefly, a historical backdrop leading to the present application is that on the 19th March 2020 the Advocates Committee (Hon. N.N. Kilekamajenga, J.-Chairperson, G. Kato, Advocate, - Member and E.E. Longopa, Deputy Attorney General, -Member) ruled in favour of the respondents in the Consolidated Application No 3 and 4 Of 2019. In the said applications, the applicant, Dr. Hamisi Saidi Kibola alleged

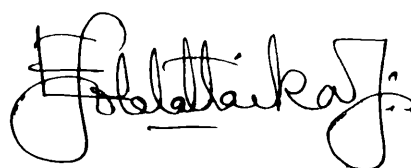


professional misconduct against Mr. Anthony Goodluck Shuma (advocate with Roll No 1888) and Ms. Hadija Hassan (advocate with Roll No. 5786). He prayed for orders of removal of the respondents from the Roll of Advocates due to unethical conduct. Aggrieved by the decision of the Advocates Committee, the applicant filed a petition of appeal. The petition was presented for filing in this court on the 18th day of October 2021 (now Misc. Civil Appeal No. 4 of 2021).

When this matter was called for hearing on the 9th November, 2021 Mr. Godwin Nyaisa submitted before the court (Mgeta, Maruma and Laltaika JJJ) that he had raised two preliminary objections and prayed that they are disposed of first before proceeding to determine the appeal on merit. These preliminary points of objection are that:

1. *The applicant has no right of appeal in terms of Section 24A of the Advocates Act, Cap 341 RE 2019.*
2. *The appeal is hopelessly time barred in terms of Section 24A of the Advocates Act, Cap 341 or Item 2 of Part II of the Schedule of the Law of Limitations Act, Cap 89 RE 2019.*

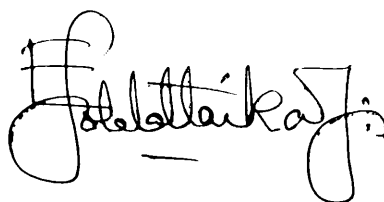
Pursuant to procedural practice in our law that whenever a preliminary objection on a point of law is raised the same must be disposed of first (See the following unreported cases of the Court of Appeal of Tanzania CAT to



that effect; **Meet Sigh Bachu vs Singh Bachu**, Civil Appeal No 144/02 of 2018, **Godfrey Nzowa Vs. Selemani Kova and Tanzania Building Agency**, Civil Appeal No. 3 of 2014 and **Yazidi Kassim t/a Yazidi Auto Electric Repairs Vs. The Attorney General**, Civil Application No. 552/04 of 2018) the date of hearing for the purposes of disposing of the preliminary objection was scheduled for the 19th November 2021.

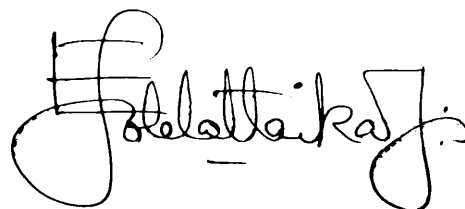
When the matter came up for hearing Friday 19th November 2021 14:00 hours onwards as earlier on scheduled, Mr. Zakaria Daudi appeared for the Appellant, Ms. Anita Bandoma and Mr. Anaseli Lesika represented the 1st Respondent and Mr. Godwin Nyaisa fended for the 2nd Respondent. The third Respondent was absent. Counsels for the first respondent indicated their unwavering support of the points of objection raised whereas counsel for the applicant vehemently opposed the same.

Submitting on the first limb of the preliminary objection, Mr. Nyaisa contended that the applicant has no right of appeal or what he termed *locus standi* to appeal against the decision of the Advocates Committee. Expounding on his argument, Mr. Nyaisa averred that it is a settled principle of law that the right to appeal is a creature of statute, not inherent nor an



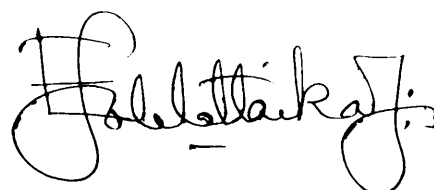
automatic right. He cited the case of **Ludovica K. Mbona v. BC** 1997 TLR 29.

The learned counsel asserted that the decision upon which this appeal lies was pronounced by the **Advocates Committee**. The committee, Mr. Nyaisa opines, is governed by **The Advocates Act Cap 341 RE 2019** and the Advocates **(Disciplinary and Other Proceedings) Rules of 2018**. Mr. Nyaisa invited this court to have a look at Section 24A of the Act contending that the section provides for the right to appeal to an Advocate. Mr. Nyaisa went on to argue that section 2 of the Act defines an Advocate as **"any person whose name is dully entered as an advocate upon the law."** (Emphasis mine). It is Mr. Nyaisa's submission that upon perusal of the **Roll of Advocates** he couldn't find the name of the appellant one HAMISI SAIDI KIBOLA. To this end, the learned counsel observed, since the name of the appellant does not appear in the roll, he lacks locus to appeal. Mr. Nyaisa is of a firm view that although the right to appeal is a constitutional right, it is not automatic. To buttress his argument, the learned counsel cited the case of **Hamisi Mwinyijuma and Another versus MIC Tanzania Ltd** Misc. Civil Application No 374 of 2019.



Mr. Nyaisa contended further that in his opinion, section 24A (1) is clear and leaves no ambiguity. Borrowing a leaf from canons of statutory interpretation, the learned counsel submitted that enactment of the Advocates Act was geared towards regulating the conduct of Advocates thus, the learned counsel averred further, the Act does not render reliefs to non-advocates. The learned counsel emphasized that the Act is specific to the legal profession and should be interpreted narrowly as such. To buttress his point Mr. Nyaisa referred this court to a printout of a **Georgetown University Law Center's article "A Guide to Reading, Interpreting and Applying Statutes"** (The Writing Center at GULC, 2017) particularly in a discussion on **intentionalism** where the authors expound on a principle that **"interpretative task ends with plain meaning."** In concluding his submission on the first limb of the preliminary objection, the learned counsel maintained that the appeal is incompetent and the same should be struck out with costs.

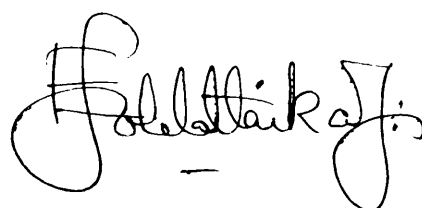
Moving on to the second limb of the preliminary objection, the learned counsel hinted that he intended to argue this particular point just in case the court finds that the appellant had a right of appeal. To this end, Mr. Nyaisa is of a firm opinion that the appeal is time barred.



Replying to the arguments put forth by Mr. Nyaisa on the first PO, learned counsel for the appellant Mr. Zakaria Daudi contended that the right to appeal is a constitutional right under **Article 13(1) and (6)A of the Constitution of the United Republic of Tanzania of 1977** and that, any person who has been aggrieved by the decision of a lower court has a right to appeal or to seek for any other remedies available to the higher court without any discrimination.

Mr. Daudi averred that Section 24A of the Advocates Act does not restrict appeals from non-advocates. Expounding on his point, the learned counsel submitted that the section provides for a right of appeal to any person who has been aggrieved by the decision of the Advocates Committee. Mr. Daudi is of a firm belief that there is no word or wording, in the section, which restricts the right to appeal to non-advocates.

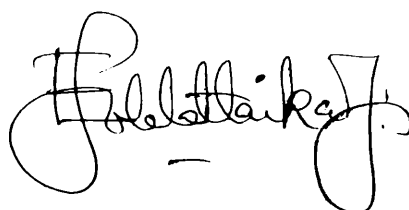
Mr. Daudi submitted that the Advocates (Disciplinary and Other Proceedings Rules) of 2018 made under section 14(1) of the Advocates Act specifically Rule 17(1) provides for the right of appeal to a PERSON. The learned counsel stressed that the wording of that rule is **"a person who has been aggrieved"**. The learned counsel is of a firm opinion that under this provision, the right to appeal of the appellant has been embodied.



Concluding his submission countering the first limb of the preliminary objection, Mr. Daudi submitted that the same is devoid of merit and should be dismissed with costs.

Moving on to the second limb, Mr. Daudi submitted that he is partly in agreement that with Mr. Nyaisa that Section 24(1) of the Advocates Act provides for the right of appeal to Advocates who have been aggrieved by the decision of the Advocates Committee. Mr. Daudi submitted further that his client, the appellant in this matter, does not purport to be an advocate. Therefore, the learned counsel so reasoned, that provision is not applicable to the appellant. Mr. Daudi is of a firm belief that The Advocates Act and the Advocates Disciplinary Rules do not provide for the time limit within which to file an appeal pursuant to **Rule 17(1)** of the Disciplinary Rules. The learned counsel pointed out that in the absence of such a provision, the fallback position is the **Law of Limitations Act Cap 89 RE 2019** specifically part 2 item 2 to the schedule of the Act.

Mr. Daudi submitted that he is aware that under Rule 17(3) of the Disciplinary Rules, the Secretary is required to certify the ruling, drawn order and proceedings and to supply the same to the parties. The learned counsel submitted further that he is equally aware that under Rule 17(2) of the



inadequacy. To buttress his argument, the learned counsel referred this court to the Court of Appeal decision in **Mediterranean Shipping Co. (T) Ltd v. Afritex Civ. App 165 Court of Appeal of Tanzania 2017**

Mr. Daudi also opined that the case of **Ndwela (supra)** cited by the learned counsel for the second respondent in his submission is distinguishable to the matter at hand because while under section 90(1) of the Court of Appeal Rules the Registrar is not a party to the proceedings, under Rule 17(4) of the Advocates Disciplinary Rules, the secretary is a party to the proceedings. Building on the holding of this case, Mr. Daudi pleaded with this court not to dismiss the application at hand, as prayed for by counsel for the second respondent, but rather, strike it out without cost, should it find that the affidavit filed pursuant to the advice given by the Secretary to the Advocates Committee was inadequate or even that the appeal is time barred.

Pleading further that this court makes no order for costs, the learned counsel opined that his client had a genuine case, not a frivolous or vexatious one and that the appellant is struggling to meet justice after being aggrieved by the decision of the Advocates Committee. Mr. Daudi strongly emphasized that should the court find that the appeal is time barred as



argued by counsel for the second respondent, the same shouldn't be regarded as the appellant's fault but rather misdirection on the side of the Secretary to the Advocates Committee. Mr. Daudi concluded his submission by a humble prayer that that this court finds the two preliminary objections devoid of merit and allow the appeal.

No sooner had the learned counsel for the appellant concluded his submission than the appellant, who was keenly following the proceedings, prayed to address the court with the intention of highlighting some aspects of his appeal that he believed, had escaped the attention of his lawyer. This rather unexpected occurrence in my chamber necessitated consultation with counsels for both parties whereupon a consensus was reached to allow a short adjournment during which Mr. Daudi could consult his client and address the court, on his behalf, should he find it prudent to do so.

Upon consultation with his client, Mr. Daudi submitted that it was not disputable that his client had no right of appeal in terms of Section 24A of the Advocates Act. He further submitted that his objection is misconceived because 24A of the Advocates Act has no application to this Appeal and should not be applied at all. The learned counsel asserted that the appellant had not said that he was appealing pursuant to the cited provision of the

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Advocates Act. Mr. Daudi emphasized that it was his client's belief that section 24A of the Advocates Act **is discriminatory and it goes against the principle of equality** before the law as enshrined under Article 13(1) and (2) of the Constitution of the United Republic of Tanzania of 1977 which provides that no discriminatory law shall be made by any authority in the country.

Expounding on the nature of discrimination occasioned by the law, Mr. Daudi asserted that had it been the complainant was an advocate he could have been permitted to appeal. In the contrary, the learned counsel opined, doors are locked for his client simply because he is not an Advocate. The learned counsel submitted that under Rule 17 and Section 24A of the Disciplinary Rules and the Advocates Act respectively, there are two persons namely an Advocate and a person.

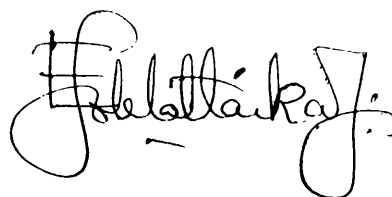
Mr. Daudi is of a firm stand that since counsels for the first and second respondents had submitted that they checked the Tanzania Advocates Management System (TAMS) and informed this court that the complainant's name was not on the Roll, there was no dispute that he had no right of appeal. Having so admitted, albeit contrary to his earlier submission, the learned counsel went on to assert that such disparity amounted to



the decision was determining the rights, duties and conduct of Advocates hence it is those persons who are affected by that decision who can appeal against it.

Mr. Nyaisa submitted further that Article 13(1) and (2) of the Constitution of the United Republic of Tanzania must be read in tandem with Article 13(6)(a). The key message of the articles, the learned counsel contended, is a directive that such a right be directed to a person whose rights and duties have been determined. Mr. Nyaisa emphasized that the Advocates Act does not determine any right, duties or conducts of non-advocates. To this end, the learned counsel submitted that the Advocates Act is properly enacted in the purview of Article 13(6)(a).

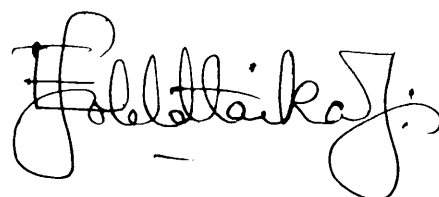
Faulting Mr. Daudi's interpretation of the word "person" as used in Rule 17(1) of the Advocates Disciplinary Rules Advocate Nyaisa contended that the meaning of the word person in the rules has to be sought from the parent Act. Mr. Nyaisa went on to provide that even if this rule is taken to mean any person can lodge a notice of appeal, the same does not offer the right but rather the procedure of lodging an appeal. It is Mr. Nyaisa's firm opinion that the rules cannot override the Principal Act. To buttress his argument,



Mr. Nyaisa cited **Section 36(1) and 38(1) of the Interpretation of Laws Act Cap 1 RE 2019.**

With regards to assertion by the appellant that the Advocates Act is discriminatory, Mr. Nyaisa submitted that the question of discrimination does not arise because the said law is only meant for a particular section of the society. He stressed that because this particular statute has guaranteed rights to a person affected by the decision of the Advocates Committee that means the law is constitutional. To this end, the learned counsel reiterated his submission in chief that the appellant has no right of appeal under this statute and this makes the appeal untenable in law and should be struck out with costs.

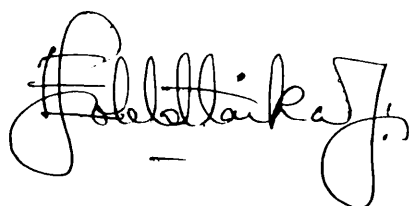
Moving on to the second limb of the preliminary objection, Mr. Nyaisa's rejoinder was rather brief. He faulted Mr. Daudi's attempts geared at seeking refuge to what he termed misdirection by secretary to the Advocates committee. He submitted that had it been that the secretary who advised the appellant on the course he took, he was supposed to file an affidavit to that effect. Mr. Nyaisa emphasized that such information should have appeared in the applicant's affidavit rather than merely coming from the bar. Mr. Nyaisa submitted further that a person whose advise was relied upon to



arrive to a decision of filing an erroneous document must file an affidavit to that effect. To buttress his argument, the learned counsel cited the case of **Sahara Media Group versus Board of Trustees of NSSF Misc. Civ. App. No 27/2020**

Mr. Nyaisa strongly contested the assertion that the appellant is a layperson who acted upon advice by the learned secretary to the Advocates Committee hence should not be punished. He averred that the appellant had enjoyed the services of the same counsel (Advocate Zakaria Daudi) at the committee level as well as before this court. Mr. Nyaisa went on to submit that the appellant had all the resources at his disposal and even if that wasn't the case, the learned counsel reminded this court that "Ignorance of law is not a defence."

Responding to Mr. Daudi's prayer that this court takes cognizance of overriding objective principle, Mr. Nyaisa is of a firm belief that overriding objectives do not apply where rules of procedure have been breached. He stressed that time limitation goes to the root of the matter as it touches upon jurisdiction of the court.



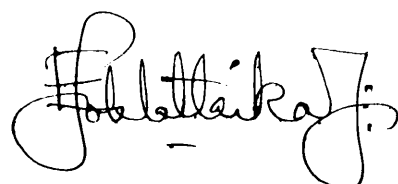
With regards to the first subtask namely the right to appeal from the decision of the Advocates Committee, it goes without saying that appellate remedies are an important ingredient in the protection of fundamental rights. According to a researcher on the role and significance of appellate remedies (See Cassandra Burke Robertson "The Right to Appeal" 91 N.C.L. REV. 1219 p. 1225)

*"Legal scholars have identified a number of different functions that a robust appellate system serves including **correcting legal and factual errors, encouraging the development and refinement of legal principles, increasing uniformity and standardization in the application of legal rules and promoting respect for the rule of law.**" (Emphasis supplied)*

Premised on the importance of appellate remedies, the Constitution of the United Republic of Tanzania of 1977 places particular emphasis on the right of appeal against the decision of any court or tribunal affecting any person in the country. For avoidance of any doubt the relevant article is reproduced bellow:

"6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

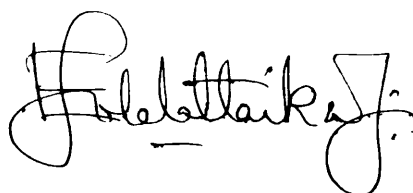
(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other

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legal remedy against the decision of the court or of the other agency concerned."

The idea for appellate remedies, as comforting as it sounds, it is, unfortunately, not automatic See **Paul A. Kweka & Hilary P. Kweka Vs. Ngorika Bus Service and Transport Company Limited**, Civil Appeal No. 129 of 2002, CAT at Arusha (Unreported). I find Mr. Daudi's argument that his client has a constitutional right to appeal to be too general to assist me in the instant matter. On the other hand, I agree with the reasoning of Mr. Nyaisa that this court has repeatedly held that the right to appeal is a creature of statute and subject to provisions of that particular statute. It is, indeed, subject to statutory provisions both substantive and procedural. See **Attorney General Vs Shah** (1971) EA 50.

Admittedly, it is tempting to think of the right to appeal as an automatic, constitutionally guaranteed right. Unfortunately, this is not the case not only in Tanzania but also in many if not most other common law jurisdiction with which we share the legal tradition. The Supreme Court of the United States of America, for example, has repeatedly been called upon to recognize the right to appeal as an automatic right but it has maintained 19th and 20th century dicta to the contrary. See for example **Cobbledick v. United States**, 309 U.S. 323, 324-25 (1940) for persuasive purposes,

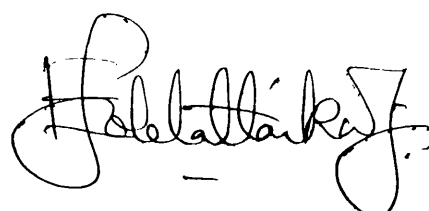


where I intend to find out whether this restrictive interpretation (that excludes non-advocates) is discriminatory as alleged by the applicant.

It is with great interest that I pursued the point of discrimination as raised by the appellant upon consultation with his counsel Mr. Daudi. This is partly due to the fact that the appellant is a layperson and respondents are learned counsels in their own right who also double as officers of this court. Their duty includes assisting this court in dispensing justice.

The Oxford Dictionary of Law 5th Edition (Oxford University Press 2011) defines **discrimination** as "Treating one or more members of a **specified group** unfairly as compared with other people." The key phrase here is "members of a specific group". In the instant matter at hand, the appellant (non-advocate) and respondents (advocates) are not members of a specific group. The issue of discrimination would only have arisen where the law discriminates against advocates in their own group or non-advocates such as the applicant in their specific group.

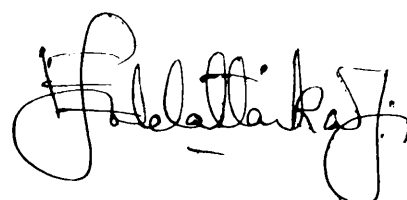
In my view, when a Parliament enacts a piece of legislation to regulate a particular section of the social, economic or political endeavor, it is not engaging in an act of discrimination. I am in agreement with Mr. Nyaisa that



laws that focus on a particular profession are many in this country. They include but not limited to laws regulating members of the Medical Profession, Engineers, Laboratory Technicians and even the Police, to mention but a few. These laws confer some rights to members of the profession being regulated to the exclusion of everyone else. These are called legal rights. In the field of Jurisprudence, a respected jurist **Wesley Newcomb Hohfeld** (1879–1918) attempted to cure the misconception of the concept of right by showing how the term right could refer to eight different concepts. This is not a place to embark on the highly technical Hohfeldian Analysis. Suffices it here to clarify the concept of legal rights. In a persuasive decision of the Supreme Court of India **State of Rajasthan vs Union of India**, 1984 AIR 1675, 1985 SCR (1) 700 the court stated that

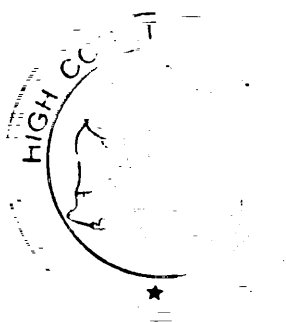
"Legal rights in strict sense are correlatives of legal duties and legal rights are defined as the interests which the law protects by imposing duties on other persons. But the legal rights in the strict sense means right in the immunity from the legal powers of another."

There are several ways of looking at the parameters of a right including but not limited to human rights, legal rights and contractual rights, to mention but a few. By way of an illustration human rights are universal to all human beings, they apply to any one simply because he/she is human.



of the fact that he had enjoyed the services of the learned counsel Zakaria Daudi since commencement of the proceedings at the committee. I also agree with Mr. Nyaisa that the applicant can pursue other remedies such as Judicial Review because, as we have seen, the current law is not designed to move the court to grant his prayer. The constitutional provisions cited also are open to other remedies. This is the way to go.

In my view, ardent citizens like the applicant Dr. Hamisi Saidi Kibola are important in ensuring that frontiers of our jurisprudence are continuously enlarged far and wide to address and protect fundamental legal rights beyond those envisioned during enactment of a particular statute. Nevertheless, enthusiastic citizens like the current applicant need to be properly guided on both substantive and procedural aspects of our law. Having sustained the first point of the preliminary objection, this application is hereby dismissed. I make no order as to costs.



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E.I. Laltaika
Judge
14.12.2021