

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CIVIL APPLICATION NO.9 OF 2021

(Arising from the High Court of Tanzania at Songea in Civil Case No.2 of 2020)

PHILIP SAMSON CHIGULU T/A

PHILIP SAMSON CHIGULU AGENT.....APPLICANT

VERSUS

MARKET INSIGHT LTD1ST RESPONDENT

VIDYA SAGAR2ND RESPONDENT

LIGINIKO M. CHARLE.....3RD RESPONDENT

NIMIT HAMBARDIKER.....4TH RESPONDENT

ELISHA C. MWINUKA.....5TH RESPONDENT

RULING

10.04.2022 & 15.06.2022

J. E. Madeha, J.

The Applicant has raised four (04) points of Preliminary Objections which are none other than: -

- 1. That Advocate Angel Massessa is not allowed to act on any transaction on behalf of the first and the second Respondent who have conflicts of interest with the parties.*

- i. *That the Applicant prays to this Court to order that the Advocate Angle Massesa withdraws herself to act for the first and second Respondent for having conflicts of interest to the parties for the first and second Respondent's own choice and costs.*
- ii. *That the Applicants prays that the first and the second Respondent to pay five hundred (500,000,000) million Tanzanian shillings each as compensation for causing a delay from November up to date and for employing the Advocate who has interest or conflict to the parties and for pleading verification by the second Respondent illegally for the Respondent's own choice and costs.*
- iii. *That the Applicant prays to this Court to use its power and authority vested to this Court under section 22 (1) of the Advocates acts Cap 341 to suspend or write off the names of the Advocate Angela Massessa from the Advocate role. For she committed professional misconduct. For committing herself to do the acts prohibited to be done by the law which*

relates to the professional misconduct to be done by Advocate Angela Massessa for her own choice and costs.

2. *That the second Respondent is not allowed to plead the verification clause on behalf of the first Respondent Advocate without being proved to be appointed and instructed by the special power of attorney or company's board resolutions by other directors. Regarding order 1 Rule 12(1) (2) of the Civil Procedure Code Cap 33 R.E.2019.*
3. *That the first and the second Respondent's counter-affidavit is incurably defective for being prepared and filed by Advocate Massessa who has conflict and interest with the second and the first Respondent.*
4. *That the first and the second Respondent without complete the requirements required to do so by the same second Respondent, for the first and second Respondent's own costs.*

As a matter of fact, and in a view of the Preliminary Objections raised they (all) boil down to two issues which are: **-Firstly**, whether there is any conflict of interest between the Applicant and the Advocate Angela Massessa, whether Advocate Angel Massesa should be withdrawn from representing

the first and second Respondents and if Advocate Angela Massessa should be removed from the Advocates role if there is the issue of conflict of interest between her and the Applicant. **Secondly**, whether the 2nd and 3rd Respondent's Advocate obtains allegations concerning conflict of interest and she signed the verification clause of the Respondent, then the counter affidavit may have a defective verification clause.

During the hearing of the preliminary objection. The Applicant appeared in person whereas Mr. Lazaro Simba (Holding brief for Advocate Angela Massessa) represented the first and second Respondent, Mr. Melkioni Mpangala, learned counsel represented the third Respondent. The 4th and 5th Respondents were absent.

To begin with the issue of conflict of interest, the Applicant submitted that the first (1st) and second (2nd) Respondents filed counter-affidavits through Advocate Angela Massessa who was not allowed to do or involve herself in any transactions. On his thought he supported his argument to the legal direction of *Section 7 of the Notaries Public and commissioner for oaths Act Cap 12 R.E 2019 and Regulations 35 (1) (2) of the Advocates (Professional Conduct and Etiquette) Regulation 218 (G.N 118)* which clearly directs that:

"Section 7 no commissioner for oaths may exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is an advocate to any of the parties or in which he is interested.

Regulation 35(1) An advocate shall not act for the client when the interest of the client and the personal interests of the advocate or, the interests of any person in his firm are in conflict.

Regulation 35(2) An advocate shall not enter or continue a business transaction with a client where it is reasonably obvious that a contentious issue between them may arise or that their interests will diverge as a matter of progress."

The Applicant averred further that Advocate Angela Massessa is not allowed to act or perform any transactions on behalf of the second (2nd) Respondent who has a conflict of interest with the parties. He argued further that, the Respondent Advocate in the civil case No. 14 of 2020 continued to be the Advocate of the same case when the same Advocate was sued by the Applicant in Misc. Civil No. 23 of 2021 as the 8th Respondent in the High

Court of Tanzania Dar es Saalam main Registry whereby it is proved by the Court order which is annexed as Annexure A. He submitted further that, Angle Massessa who was introduced as the 8th Respondent had engaged the four (4) Advocates acting on behalf of her. the Applicant was aggrieved by the same ruling and as a result, he filed a notice of appeal to the Tanzania Court of Appeal on 10th November 2021. The Applicant insisted that Advocate Massesa has a conflict of interest. He stated that Advocate Angela Massessa being the eighth (8th) Respondent in the same case has to inform the first (1st) and second (2nd) Respondents that she has no right to appear as she has a conflict of interest. In addition, the action of the Advocate to refuse to withdraw herself while knowing very well that she has an interest or conflict of interest with the parties caused the first (1st) and the second (2nd) Respondent to be objected to the counter affidavit. The Applicant finally stated that Advocate Massessa is therefore supposed to compensate the first (1st) and second (2nd) Respondents for the inconvenience she has caused together with costs.

On the other hand, the reply by Ms. Angle Massessa who submitted in reply that; - the Preliminary Objection raised by the Applicant is frivolous and is intended to delay justice on the part of the first (1st) and the second (2nd)

Respondent and hence should be dismissed. Ms. Angela Massesa further submitted that it comes as no surprise that, the Preliminary Objections all together do not qualify to be a Preliminary Objection since the evidence and exhibit have to be tendered so as to ascertain and prove the facts alleged by the Applicant who is in conflict of interest. To back up his argument she supported her argument with the case of **Mukisa Biscuits Manufacturing Company limited v. west End Distributors Ltd** (1969) EA 696, which states that:

"a Preliminary Objection was said to consist of a point of law which has been pleaded or arises by clear implication out of the pleadings, and which is argued as a Preliminary Objection that may dispose of the suit.

Preliminary Objection raises a pure point of law which is argued on the assumption that all the facts pleaded by other sides are correct. It cannot be raised if any facts have to be ascertained or what is excessive of judicial discretion."

Adding to it, she made reference to the case of the **National Insurance and another v. Shengena Limited**, Court of Appeal of

Tanzania at Dar es Saalam, Civil Application No. 20 of 2007 where the Court dismissed the Respondent's preliminary objection which was subject to proof of some material facts.

She emphasized that, the first (1st) and the second (2nd) Respondent counsel has a conflict of interest with the parties and the Applicant. Being their counsel in civil case No. 2 of 2020 does not bar representing the first (1st) and the second (2nd) Respondent. She added, the issue of the conflict of interest is at a premature stage as the Applicant was supposed to raise it during the main suit. Categorically, this is an application for the restoration of Civil Case No. 2 of 2020 Songea High Court Registry. Finally, she alleged that the pleading of this objection does not support the allegations stated by the Applicant.

Mr. Melkioni Mpangala, the learned Advocate for the 3rd Respondents argued that concerning the first (1st) and the second (2nd) Preliminary Objections, the counter affidavit is much concerned with the written submissions, together with the Preliminary Objections raised by the Applicant in civil case No. 02 of 2020 in the High Court of the United Republic of Tanzania, Songea District Registry. On the other hand, the Preliminary

Objection should be raised on pure points of law which should need an exhibit to be tendered so as to support the said Preliminary Objections.

I find that the Applicant is submitting about an existing conflict of interest with the second (2nd) and third (3rd) Respondent's counsel, I agree and concur with him on the provision of the law that is;- an Advocate should not have a conflict of interest with the person representing.

However, in this case, the Applicant has failed to prove to the Court that there is a conflict of interest between him, the second (2nd) Respondent in accompanying the third (3rd) Respondent. Additionally, it is not stated clearly what is the cause of the conflict of interest, he failed to prove the presence of the conflict of interest facing the first and second Respondent Advocates. this is an application for the restoration of Civil Case No. 2 of 2020 Songea High Court Registry.

Thus, I find that the argument on whether there is a conflict of interest unconfirmed. On the same note, the Applicant should properly review the analysis of that conflict of interest. It is true that the Court cannot simply assume that there is a conflict of interest that has not been legally established. To sum up, I find that the issue of conflict of interest between

the Applicant, the second (2nd) together with the third (3rd) Respondent counsel has not been substantiated. Hence I hereby dismiss the first issue in respect of the Preliminary Objection.

As for the second question, that is in relation to the defective verification clause of the first (1st) and second, (2nd) Respondents, which stems from the second (2nd) and third (3rd) Respondent Advocate signing of the affidavit where she had been assumed to have a conflict of interest with the Applicant or his clients. This Court finds that there is no evidence showing conflict of interest so far, so all the Preliminary points of Objections raised by the Applicant has to die a natural death.

For the foregoing reasons, the Preliminary Objections raised are eventually meaningless, I hereby dismiss all the Preliminary Objections raised. Costs be in the cause.

DATED and **DELIVERED** at **SONGEA** this 15th day of June 2022.


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U. E. MADEHA
Judge
15/06/2022

