

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TABORA DISTRICT REGISTRY  
AT TABORA**

**MISC. CIVIL APPLICATION CASE NO. 34 CF 35 OF 2021**

**RAMADHAN NASSOR MKUTU &  
IDDI SAID KALUKANYA.....APPLICANTS**

**VERSUS**

- 1. THE BOARD OF TRUSTEES OF AGRICULTURAL FUND**
- 2. THE MINISTRY OF AGRICULTURAL INPUTS TRUS FUND**
- 3. THE ATTORNEY GENERAL .....RESPONDENTS**

**RULING**

*Date of Submissions: 06/07/2022*

*Date of Delivery: 06/07/2022*

**AMOUR S. KHAMIS, J.**

Following consolidation of Misc. Civil Application No. 34 of 2021 and Misc. Civil Application No. 35 of 2021 involving parties herein, the learned counsel for the respondents drew attention of the Court to a pending notice of preliminary objection challenging validity of the consolidated application.

The notice of preliminary objection filed in both matters before were consolidated was to the effect that the applications were bad in law for contravening Section 7 of the Notaries Public and Commissioners for Oaths Act, Cap 12, R.E. 2019.

In support of the objection, Mr. Lameck Merumba, learned Senior State Attorney for the respondents, contended that in disregard to Section 7 of the Notaries Public and Commissioners for Oaths Act, Mr. Hassan Kilingo, advocate, witnessed deponents of the

affidavits in support of the application, namely: Ramadhan Nassor Mkutu and Idd Said Kalukanya.

The Senior State Attorney asserted that subsequent to witnessing the applicants in their respective affidavits, Mr. Kilingo went ahead to lodge the present matters on their behalf.

He contended that in witnessing the applicant's affidavit, Mr. Kilingo became interested in the matter and could not competently act for the applicant as he did.

The learned counsel further asserted that Mr. Kilingo acted improperly and rendered the application defective.

He drew attention of the Court to **CALICO TEXTILE INDUSTRIES LTD V ZENON INVESTMENT LTD & 2 OTHERS, MISC. CIVIL CAUSE NO. 10/1998** (Unreported) and Uganda case of **KASAJJA ROBERT V NASSER IGA & ABDU NGOBI, HCT - 04 - CV - MC - 004 - 2014** (Unreported) in which the legal position stated in Section 7 of the Notaries Public and Commissioner for Oaths Act were reflected.

Mr. Merumba urged this Court to struck out the application with costs.

On the other hand, Mr. Kashindye Lucas, learned advocate of this Court, sharply differed with the respondent's counsel.

He referred to Regulation 35(1) of the Advocates (Professional Conducts and Etiquettes) Regulation, G.N. No. 118/2018 when read together with Section 7 of the Notaries Public and Commissioners for

Oaths Act, which he contended, banned an advocate to represent a client in Court after acting on his behalf as a commissioner for oaths and to represent a client in a matter in which he is interested.

The learned advocate contended that the cases relied upon by the respondent's counsel were distinguishable in view of the position taken by this Court in **NADDS BUREAU DE CHANGE & ANOTHER V Y2K BUREAU DE CHANGE LTD, COMMERCIAL APPLICATION NO. 8/2021 (Unreported)** and **M/S SHAHINS LTD V EVERWEAR LTD ARUSHA HC, CIVIL CASE NO. 74 OF 1987 (Unreported)**

Mr. Lucas further drew attention of the Court to Section 9 of the Oaths and Statutory Declarations Act, Cap 34, R.E. 2019 asserting that irregularities do not affect validity of oaths.

Finally, Mr. Lucas sought refuge in the overriding objectives of the Civil Procedure Code and implored this Court to overrule the preliminary objection raised.

By way of rejoinder, Mr. Lameck Merumba reiterated his earlier submissions and asserted that Section 9 of the Oaths and Statutory Declarations Act related to irregularities in affidavits whereas the issue before the Court centred on competency of the advocate who drew and presented pleadings in Court on behalf of the applicants.

I have carefully considered the rival submission by the learned counsel as stated above. The issue is whether the application is defective for contravening Section 7 of the Notaries Public and Commissioner for Oaths Act.

At the center of the parties' rival submissions, Section 7 of the Notaries Public and Commissioner for Oaths Act, Cap 12, R.E. 2019 was repeatedly cited. The relevant provision reads.

*"No Commissioner for oath shall exercise any of his power as commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested".*

An interpretation on the above reproduced provision was given by this Court in **THE PROJECT PLANNING CONSULTANTS (TANZANIA) V TANZANIA AUDIT CORPORATION 1974 LRT NO 10**, wherein it was held that:

*"The purpose of this Section (section 7 of Cap 12 R.E. 2019) is to ensure the independence of a commissioner for oath as an officer of Court and to avoid any possible clash of interest in the discharge of his duties as commissioner for Oaths. The history of Commissioner for oaths is given at page 417 in Volume I of the Dictionary of English Law by Earl Jewitt. According to his book, Masters Extraordinary in Chancery acted in very early times as commissioner to administer oaths to persons making affidavits before them concerning Chancery suit and Judges of the Common Law Courts were authorized under Statute by Commissions to empower persons to take affidavits for a fee concerning common law actions. The Commissioner for Oaths Act 1889 which amends and consolidates twenty four enactments on the subject enacts S.1 that the Lord Chancellor, may from time to time by commission signed by him to appoint practicing solicitors or other*

*fit and proper person to be Commissioner for oaths with power in England or elsewhere, to administer oath (sic) or take any affidavit for the purpose of any Court in England but it is provided that a Commissioner may not act in any proceeding in which he is solicitor to any of the parties to the proceeding or in which he is interested. This latter provision has been reproduced in S. 7 of our Notaries Public and Commissioner (sic) for Oaths Ordinance .....*”

The above reproduced position was adopted by this Court in **CALICO TEXTILE INDUSTRIES LTD V ZENON INVESTMENTS LTD, REGISTRAR OF TITLES AND NBC HOLDING CORPORATION MISC. CIVIL CAUSE NO. 10 OF 1998** (Unreported) wherein Makaanja, J (as he then was) at page 23 thereof ruled that:-

*“.....Since the words employed in Section 7 of the Notaries Public and Commissioners for Oaths Ordinance are not entitled to introduce a foreign meaning to that statute for in doing so the intention of parliament will be rendered absurd.*

*Hence the affidavit in question is fatally defective and nothing can be done that will save it. ....”*

In the case of **R V SECRETARY FOR STATE FOR INDIA (1941) 2 ALLER 546** , a similar legal issue was canvassed and the Court held that:-

*“It is trite law that an advocate should not act as counsel and witness in the same case.”*

Distinction on the role of an advocate as counsel and witness was well elaborated by the High Court of Uganda in the case of **KASSAJJA ROBERT V NASSER IGA & ABDU NGOBI, HCT - 04 - CV - MC - 004 - 2014** (unreported) wherein at page 5, it was ruled that:

*“M/S Ngereko – Mukalezi & Co Advocates appear as the counsel who prepared the affidavit. 1<sup>st</sup> respondent affidavit in paragraphs 39, 40, 41 thereof depones that, the contents of the deponents information in part of his affidavit are advice given (to) him by the same Ngereko – Mukalazi & Co. Advocates. The import of this is that this firm holds vital information as witnesses for the respondents. This offends Regulation 9 above. It also offends Rule 7 of the Commissioner for oath Rules (schedule) which as argued by applicant requires a commissioner for oaths before taking oaths to satisfy himself that the person named as the deponent and the person before him are the same. This requirement makes a commissioner for oaths potential witness should any issue arising requiring his / her clarification in Court orally on what transpired before him as commissioner while administering oath .....*”

Upon scanning the disputed documents filed in this case, namely: the certificate of urgency, chamber summons and two affidavits affirmed by Ramadhan Nassor Mkutu and Idd Said Kalukanya, I noticed that the deponents were witnessed by Mr. Hassan Kilingo on 15<sup>th</sup> day of December 2021. The same counsel drew the disputed documents filed in Court which reads:



**“Drawn by:**

*KILINGO HASSAN,*

*Advocate for the Applicants*

*P.O. BOX 556,*

*TABORA*

*Mobile: 0763 86.....(Retain only for drawing)*

*The jurats of the affidavits reads:*

*“AFFIRMED at Tabora by the said RAMADHAN NASSOR MKUTU who is known to me personally/ identified to me by .....the letter being known to me personally / known to me in my precence this 15<sup>th</sup> day of 12 .....2021.*

**BEFORE ME:**

*Name: KILINGO HASSAN*

*Signature .....(Sgd)*

*Address: P.O. Box 556 TABORA*

*Date:15/12/2021*

*Qualification: Commissioner for oaths*

**(Sgd)**

**DEPONENT**

Section 8 of the **NOTARIES PUBLIC AND COMMISIONERS FOR OATHS ACT** (Supra) provides that every Notary Public and Commissioner for Oaths before whom an oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.



There is no doubt that while discharging his duty under Section 8 of Cap. 12 R.E. 2019, the Commissioner for Oaths is bound to satisfy himself /herself that the person named as the deponent is the same person who appears before him. This is buttressed by use of the words. "who is known to me personally/identified to me by .....the latter being known to me personally/known to me ....."which are commonly used in the jurat.

In so doing, a commissioner for oaths become conversant with the factual issues relating to the oath taken before him and thus become a potential witness in case of a dispute relating to that oath.

At this juncture, I am reminded of a cardinal rule of legal ethics thus:

*"It is never proper for a lawyer to represent client with conflicting interest no matter how carefully and thoroughly the lawyer discloses the possible effects and obtains consents"*

In my view, apart from infringing the express provisions of Section 7 of Cap 12, R.E. 2019, the advocate's act of representing a party for whom he acted as a commissioner for oaths in respect of the same matter goes a long way to throw suspicion on the advocacy which may entail loss of respect for the profession as a whole and diminish public confidence in the purity of administration of justice.

My reasoning is not far fetched. Regulation 35(1) of the **ADVOCATES (PROFESSIONAL CONDUCT AND ETIQUETTE) REGULATIONS, 2018 (G.N NO. 118 OF 2018)** provides that an advocate shall not act for a client when the interest of the client and





the personal interest of the advocate, or the interest of any person in his firm are in conflict.

In my view, and for the reasons stated above, upon acting as a commissioner for oaths in respects of the affidavits affirmed by the Ramadhani Nassor Mkutu and Idd Said Kalukanya, Mr. Hassan Kilingo became a potential witness for the applicants and thus incompetent to take up a brief on their behalf.

Since Mr. Kilingo was incompetent to act for the applicants, it follows that the pleadings filed in this case were null and void abinitio as stated by the Kenyan Court of Appeal in **PUSHILEE LTD V RABAI ROAD ESTATE LTD, CIVIL CASE NO. 2336 OF 1994** (unreported).

Further in **GEOFREY ORAO – OBURA V MARTHA KARAMBO KOOME CIVIL APPEAL NO. 146 OF 2000 (2001) EA 175** the Kenyan Court of Appeal held that:

*“A Memorandum of Appeal signed by advocate who is not entitled to appear and conduct any matter in the Court is incompetent”*

For the reason stated above, I am not persuaded by Mr. Kashindye Lucas’s contention that the present application can be rescued by Section 9 of the Oaths and Statutory Declarations Act, Cap 34 R.E 2019 which relates to irregularity in administration of an oath in respect of judicial proceedings or by the oxygen principle.

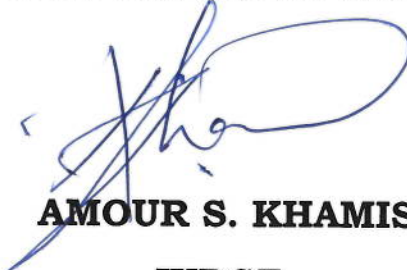
The **CAMBRIDGE DICTIONARY** defines irregularity to mean the quality of not being regular in shape or form. In the present case, the dispute is not on the form of an affidavit or oath but on

competency of the advocate who drew the pleadings and thus touches on substance of the application.

On the same note, cases cited by the counsel for the applicant are distinguished from the present case which has to be decided on its own facts.

In the upshot, the preliminary objection is sustained and the application is hereby struck out with no order for costs.

It is so ordered.




**AMOUR S. KHAMIS**  
**JUDGE**

**6/07/2022**

**ORDER**

Ruling delivered in presence of Mr. Lameck Merumba, Senior State Attorney for the respondents and Mr. Kashindye Lucas, learned advocate for the applicants.

Right of Appeal explained.



**AMOUR S. KHAMIS**  
**JUDGE**

**6/07/2022**