

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND CASE NO. 15 OF 2017

SALUM NASSOR MATTAR (*Administrator of the Estate of the Late*

Mattar Rashid Mattar, the Plaintiff).....**PLAINTIFF**

-VERSUS-

BHARAT BHAGWANJI LAXMAN.....**1st DEFENDANT**

ROHYT BHAGWANJI LAXMAN.....**2nd DEFENDANT**

RULING

Date of Last Order: 05/05/2022

Date of Last Ruling: 13/05/2022

AGATHO, J.:

This ruling is prompted by the Preliminary Objection raised by Advocate Senguji for plaintiff to effect that Mr. Sangawe, defendant counsel who stepped into the shoes of Mr Mramba who withdrawn himself from representing the defendant is barred by the law from representing the said defendant because he had attested the affidavit and other pleadings in this very same matter before the Court. To resolve the controversy the Court invited the learned counsel to submit on the P.O. Both parties agreed to dispose the PO by oral submissions.

Mr. Senguji was flanked by Mr. Henry Kitambwa who began his submission by stating that advocates are governed by several laws including Advocates

Act, and Notary Public and Commissioners for Oaths Act. He said the latter law is an important law governing the advocates. He submitted that these laws stipulate practice as to what the advocates should do. On this point Mr. Kitambwa referred to section 7 of the Notary Public and Commissioners for Oaths Act [Cap 12 R.E. 2002] which provides:

"No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is and advocate to any of the parties or in which he is interested."

Referring to the quoted provision he submitted that the law has given two alternatives regarding the advocate, one in which he is a commissioner for oaths and two in which he is interested. He argued that advocate Sangawe in the matter at hand has once been a commissioner for oaths. For instance, in the counter affidavit of 22/11/2021 in Miscellaneous Application 37 of 2021 arising from Land Case No. 15 of 2017. That counter affidavit was attested by Mr. Sangawe. Again, in counter affidavit of the first respondent dated 12/10/2021 in Misc. Application No. 32 of 2021. In this too Mr. Sangawe attested.

At this point the Court asked Mr. Kitambwa to show the Court and Mr. Sangwe both counter affidavits. He did so. And Mr. Sangawe conceded he indeed attested them.

Mr. Kitambwa continued to submit that when they were praying for extension of speed track Mr. Sangawe once again was a commissioner for oath for one of the parties. The learned counsel for plaintiff was of the view that both applications are part parcel of this proceedings.

He then turned to the use of the word "shall" in the provisions of Section 7 of the Notary Public and Commissioners for Oaths Act. He argued that the word "shall" has been interpreted by the CAT. He rightly opined that when the obligation has been stated using the word "shall" then that has to be complied with. In the case of **Alex Thomas v Republic, Criminal Appeal 217 of 2007 CAT** where the CAT held that where in the legislation the word shall has been used to represent obligation the same has to be complied with.

He prayed that Mr. Sangawe has been barred by the law from representing the parties in this case. He added that, since Mr. Sangawe attested the pleadings, it means he is interested. He should be barred from prosecuting this case.

In his reply to Mr. Kitambwa's submission, Mr. Sangawe submitted that in this case Mr. Kitambwa claims that he should be barred from representing his client because he is interested. And his ground of objection is various counter affidavits (attested by Sangawe) of the applications heard by this court. Mr. Sangawe was of the view that since the said applications though they are part and parcel of this matter, they have been conclusively determined.

The learned counsel went on submitting that Section 7 of Cap 12 R.E. 2002 cannot be read in isolation of the rules of professional conduct and etiquette of Tanganyika law society, that has been replaced by Advocates Professional Conduct and Etiquette regulations of 2018 G.N. 118 of 2018.

Mr. Sangawe stated that the principle is clear that an advocate (commissioner for oath for that matter) is only barred where there will be conflict of interest. He opined that the intent and purpose of provision of section 7 is to prevent conflict of interest of advocates in representing their clients.

He submitted further that first of all Mr. Kitambwa ought to show that Mr. Sangawe will be required to testify as a witness. Second, the learned counsel was required to show when he will be called as witness, he should excuse himself to avoid conflict of interest. Mr. Sangawe vehemently

rejected any presence of conflict of interest. And he assuredly argued that in representing his client in this case he does not see how conflict of interest would arise, and how the law under section 134 of the Evidence Act [Cap 6 R.E. 2019] will be breached. On the latter provision of the law, he submitted that it requires the communication to the client not to be divulged to the other party. He was of the view that what Mr. Kitambwa submitted do not suffice to bar him from representing 1st and 2nd defendants.

He argued that by any stretch of imagination, he cannot be called either on cross examination or as a witness to extent that he will be causing a conflict of interest. To hammer the nail to its heard, he invited this court to consider the case of **Amiri Abdallah Kilindo v Gobal Securities Finance and Insurance Ltd Civil 220 of 2002 High Court of Tanzania** where by his Lordship Justice Mihayo held that it is not all the time where an advocate has appeared as a commissioner for oath attesting any document will be barred to appear to represent a party to that case. In that case, similar objection was raised by Mr. Tundu Antipas advocate that the late Kisusi advocate cannot act for one of the parties in that case because he had attested and witnessed the document known as chattel transport. Mr. Justice Mihayo could not subscribe to Mr. Tundu's PO that mere attestation of the client's documents will cause the breach of confidentiality as protected by the law. Your lordship the chattel transport Mr. Kisusi

witnessed and attested the document where both appeared in that document. But Justice Mihayo said a mere attestation and witnessing of that document per se without showing that the advocate will be required to testify in that case will not suffice to bar that advocate from representing the client.

Mr. Sangawe stated that he does not believe that the documents (counter affidavits) which have been referred by learned friend suffices to indicate that he will be required as a witness and therefore causing conflict of interest. The intent and purpose of the law is to prevent jeopardy of divulging information received from the other party in case he is required as a witness in court. In the case **Amiri Abdallah Kilindo** at page 4, Justice Mihayo was of the view that there is no hard rule that a counsel who acted for this party cannot act for the opposite part on a subsequent litigation. Mr. Sangawe submitted that it should be remembered that he acted for Mr. Laxman and not for Mattar Rashid Mattar. Therefore, the probability of breaching the law in case he will be called as a witness does not arise at all.

Mr. Sangawe argued that he would like also to refer the Court to the rules of Tanganyika Law Society for Professional Conduct and Etiquette rule 36 which has been replaced by G.N. 118 of 2018 Advocates Professional Conduct and Etiquette Regulations (regulation 96(1) and (2)).

He added that it has not been shown that he will be called as witness. He argued that the advocate right to defend a client is both a professional right and a constitutional right. He said if they want him to be barred they should show that he will be required to testify, and on what so that the court may be in position to decide whether he (advocate) should be barred or not. For what has been referred does not suffice to preclude him from representing his client. It should be noted that representing a client apart from being a professional one but it is also a constitutional one, which cannot be lightly be removed by mere speculation, and prevent a party to be defended by an advocate of his own choice.

He concluded his submission by praying that the PO raised that I should not be sustained on the account of the decision of Justice Mihayo and other relevant authorities in that decision.

He then turned to submission on the CAT decision interpreting the word "shall". He said it is known that where the word shall have been used it is mandatory. But it is not always the case. Under section 7 of Cap 12 R.E. 2002 has used the word shall but as he has said it cannot be read in isolation of regulations of G.N. 118 of 2018 Advocates Professional Conduct and Etiquette Regulations and the provisions of the principal Act. They have to be read together.

He was quick to submit that one may be tempted to say since the decision of justice Mihayo is High Court decision, then this court is not bound by that decision under the doctrine of stare decisis. He agreed that this Court is not bound by that decision. But it is highly persuasive on the ground that the co-judge in the case the **Tiganga and Associates and Gold Mining Company Ltd v Universal Gold N.L. [2002] TLR 129** where the presiding judge was of the opinion that "it is desirable that decisions of courts on similar situation should not be in conflict and should avoid giving false impression that results of cases in courts of law perhaps depend more on the personality of judges than the law of the land. So the judges should not lightly dissent from the considered opinion of his brother or sister. "

He ended his submission by praying on account of the decision of justice Mihayo of which he believe to be the right position in law the PO raised by his learned friend is not meritorious and should be rejected, and he be allowed to proceed defending the constitutional rights of his client.

In his rejoinder Mr. Kitambwa submitted that the circumstances of the case of **Amiri Abdallah Kilindo** is different from the case at hand. He rejoined that in **Kilindo's case** it was about witnessing a chattel transfer deed which is a mere contract. What is before this Court is the affidavit and Mr. Sangawe (advocate) being a commissioner for oath. He reiterated that Section 7 is clear. He reminded the court that one cannot use interpretation

of one law to disapply the application of a particular law. He said so because Mr. Sangawe was using the regulations to exclude the Act. Even if he is asking the court to use both laws in parallel, it means the regulations are incomplete law. Mr. Kitambwa argued that Cap 12 R.E 2002 is complete and is clear. If one has attested as commissioner for oath, then he is barred from representing that client. And, in attesting the counter affidavit he is interested.

He recited the provision of section 7 that is clear it has used the word shall. It means he has been barred from representing the client. He then wondered the mentioned Section 134 the Evidence Act [Cap 6 R.E. 2019]. That provision has nothing to do with the case at hand.

Mr. Kitambwa also referred to the already cited case of **Tiganga and Associates and Gold Mining Company Ltd v Universal Gold N.L. [2002] TLR 129** where the presiding judge was of the opinion that "it is desirable that decisions of courts on similar situation should not be in conflict and should avoid giving false impression that results of cases in courts of law perhaps depend more on the personality of judges than the law of the land. So the judges should not lightly dissent from the considered opinion of his brother or sister. "

He submitted that the case at hand is distinguished from **Tiganga's case** because the present case is about counter affidavits while the former, **Tiganga's case** was about contract (chattel transfer deed). Looking at the whole submissions of Mr. Sangawe, he was requiring Mr. Kitambwa to show conflict of interest. Mr. Kitambwa emphasized that Cap 12 R.E. 2002 has provided for two scenarios, (1) when one acted as commissioner for oath, and (2) when interested. But one may be interested by acting as commissioner for oath. The plaintiff's counsel submitted that the issue of conflict of interest should be discarded because the law is clear on the issue. There is no need for proving conflict of interest as it is unrelated with the case at hand. The basis of Mr. Kitambwa's argument is Section 7 of Cap 12 R.E. 2002. This being a court of law, and since Section 7 is clear, it should be given plain interpretation in the context of this case. He closed his rejoinder by praying that Mr. Sangawe be barred from representing his client for breaching the said law, that is Section 7 of Cap 12 R.E. 2002.

To determine the PO at hand requires the Court to pinpoint the issue in dispute. The parties are at loggerhead on the issue of Mr. Sangawe representing the defendants. Whether the law disqualifies him to represent a party to this case because he attested the affidavits of the defendant that are part of the pleadings in the present case.

What does the law say on acting as commissioner for oaths and representing a party to the suit to which the attested document is part of the pleadings? Did Mr. Sangawe really attest the pleadings in the present case? If the answer is in the affirmative what relief are parties entitled to.

In **Joshua Samwel Nassari v The Speaker of the National Assembly of the United Republic of Tanzania and the Hon. Attorney General, Misc. Civil Cause No. 22 of 2019, HCT Dodoma District Registry at Dodoma** (unreported), Mansoor J, had this to say while making reference to CAT decision in **David W L Read**:

"I agree that an Advocate as the Commissioner for Oaths may administer oath or affirmation in respect of any affidavit to be used in any judicial proceedings, that is, any proceeding before any Court but once he acts as the Commissioner for Oaths in the proceedings he cannot turn around and represent the same party in the same proceedings in which he attested the affidavit since the affidavit is not a mere typed format, to be signed and attested as an empty formality. An affidavit is a solemn and voluntary declaration or statement of facts in writing, relating to matters in question or at issue, and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer such oath or affirmation. An affidavit

constitutes evidence, where so provided or agreed. In the present case the affidavit of the Applicant forms part of the present proceedings, the affidavits of the Applicant are a substitute for oral evidence of the Applicant."

I concur with the views of Mackanja J in **Calico Textile Industries Limited vs. Zenon Investment Ltd & 2 others , Misc. Civil Cause No. 10 of 1998** (unreported) and Mansoor J's position in **Joshua Samwel Nassari's case**. With respect, I decline to support the view of Mihayo J in **Amiri Abdallah Kilindo** for a simple reason that while what he held was proper in the context of that case, the same cannot apply in every case. It is thus distinguished from the case at hand. Again, the canons of statutory interpretation are clear that whenever the statute is clear then plain meaning should be given to the words of the statute. Here, I am referring to Section 7 of Cap 12 R.E. 2002. Moreover, in the hierarchy of legal sources one cannot use Advocates Professional Conduct and Etiquette Regulations (G.N. 118 of 2018) to contradict or overrule the Cap 12 R.E. 2002 (principal legislation). Thus, Section 7 of Cap 12 R.E. 2002 takes precedence over the Regulations on Advocates professional conduct etiquette regardless of time the regulations were made. I am also alive to the argument that the regulations and the principal Act should be read together. It is my view that

even if the two must be read parallel where there is conflict the principal Act takes primacy.

In lieu of Section 7 of Cap 12 R.E. 2002, **Calico Textile Industries Limited v Zenon Investment Ltd & 2 others, Misc. Civil Cause No. 10 of 1998** (unreported) and **Joshua Nassari's case** I am convinced that Mr. Sangawe is disqualified to represent the defendants. However, a distinction should be drawn between the foregoing decisions and that of **David W.L. Read and others vs. the National Agricultural Corporation and others, Civil Case No. 51 of 1997**, (unreported). In the latter case at page 4 in which Hon Judge E HK Rutakangwa while quoting the words of Hon Mrosso J in **Shahin Limited**, he said:

"I understand the ban in section 7 cited above refer to a situation in which after a proceeding of a matter is before the court, an advocate exercise his powers of Commissioner for Oaths knowing that he is an advocate for a party in the proceedings and (sic) matter. The section does not impose a ban on an advocate in respect of all proceedings, past, present and future, in which he was or will be an advocate..."

Indeed, the law in section 7 of Cap 12 does not impose a ban on the advocate in respect of all proceedings past, present and future, in which he

was or he will be an advocate. It is undisputed that the affidavits attested by Mr. Sangawe will be used as evidence in the present case, and thus Advocate Sangawe might be required by the Court to appear as a witness as the affidavits he witnessed constitutes the evidence on which the defendants' case is founded. I agree with the holding in **Calico Textile Industries Limited vs. Zenon Investment Ltd & 2 others, Misc. Civil Cause No. 10 of 1998** (unreported) that section 7 creates a ban to the advocate who acted as the Commissioner for Oaths to represent the applicant/party in the proceedings. In the cited case of **Calico Textile**, Judge Mackanja (as he then was) discussed the restrictions imposed by Notaries Public and Commissioner for Oaths Ordinance, Cap 12 to exercise the powers of a Commissioner for Oaths and at the same time representing a party in the same proceedings.

At this juncture, I feel obliged to say something regarding the advocate attesting a contract or attesting an affidavit. The parameters set out in Section 7 of Cap 12 R.E. 2002 apply to any case or matter where the advocate acted as commissioners for oath. It is immaterial whether it is a contract or affidavit. Moreover, while time is of essence as to when the advocate acted as a commissioner for oath, I think this should not detain us much. The essence of estopping the advocate from representing a client to which he acted as a commissioner for oaths is that there is conflict of

interest, or the context of the case suggests that the advocate may be called as a witness in a case for which he attested/witnessed its pleadings.

Perhaps for jurisprudential enrichment one may ask was Mr. Sangawe aware when attesting the affidavits (counter affidavits) that he will represent the deponent in this case? It seems that he was not aware, and he did not foresee that Mr. Mramba will withdraw himself from representing the defendants. It may be intriguing to read Section 7 of Cap 12 R.E. 2002 between the lines:

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

The law is conspicuous no Commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is an advocate to the parties to the proceedings. Mr. Sangawe exercised his powers as commissioner for oaths when he was neither an advocate of either party nor interested in the matter. And it cannot be said he foresaw himself becoming an advocate for the deponent when attesting the affidavits. But the term interest is broad and difficult to define. I will not venture into defining it now.

On a second limb of Section 7 of Cap 12 that the advocate is barred to represent a party in a matter he has interest. This is irrelevant as Mr. Kitambwa rightly noted that the issue of conflict of interest is non-issue and should be excluded.

Despite the foregoing obiter dictum, I am of the settled view that Mr. Sangawe is disqualified to represent the defendant for he acted as a commissioner for oaths for the 1st defendant and the said documents (counter affidavits) he attested are part of pleadings in the present case and they are therefore evidence in the matter. The court may eventually call Mr. Sangawe as a witness in the case at hand.

It is so ordered.



DATED at TANGA this 13th Day of May 2022.


U. J. AGATHO
JUDGE
13/05/2022

Date: 13/05/2022

Coram: Hon. Agatho, J

Plaintiff: Present with his advocate Mr.Senguji

1st Defendant: Present with advocate Sangawe

2nd defendant: Absent

B/C: Debora

JA: Ms. Husna Mwiula

Court: Ruling delivered on this 13th day of May, 2022 in the presence of the Plaintiff, his Advocate Sengaji, 1st Defendant and Advocate Sangawe.



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U. J. AGATHO

JUDGE

13/05/2022

Court: Right of Appeal fully explained.



A handwritten signature in blue ink, appearing to read "U. J. Agatho", with a small mark to the right.

U. J. AGATHO

JUDGE

13/05/2022