

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.130 OF 2022**

*(Arising from the decision of the Resident Magistrate's Court of Dar es  
Salaam at Kisutu in Civil Case No. 107 of 2015 delivered on 10<sup>th</sup> March, 2016  
Hon. T.K. Simba, SRM)*

**THE ATTORNEY GENERAL.....APPLICANT**

**VERSUS**

**MOHAMED LIUNDI.....1<sup>ST</sup> RESPONDENT**

**DAR ES SALAAM WATER AND SEWAGE**

**CORPORATION .....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order: 10/11/2022*

*Date of Judgment: 29/11/2022*

**POMO; J**

On 28<sup>th</sup> March, 2022 the Applicant filed this application in which is seeking an extension of time to lodge out of time Revision case against the decision of the Dar es Salaam Resident Magistrate's Court at Kisutu (the

trial court) in Civil Case No. 107 of 2015. Before it could be heard on merit, the application has encountered three preliminary objections raised by the 1<sup>st</sup> respondent, the notice of which being filed on 26<sup>th</sup> May, 2022. The said objections read thus: -

- 1. The maker of the Application is unqualified person*
- 2. This Honourable Court has not been properly moved for failure to attach either a certificate or a notice of intention of joining the Attorney General as a party in the case*
- 3. The Application filed before the court is a total abuse of the Court process*

Hearing of the objections raised was on 10<sup>th</sup> November, 2022 and whereas the Applicant was represented by Mr. Edwin Joshua Webiro, the learned state attorney assisted by Happiness Nyabunya, the learned state attorney too; the 1<sup>st</sup> Respondent was represented by Miriam I. Majamba, the learned Advocate while Amos Masala, the learned state attorney appeared for the 2<sup>nd</sup> Respondent.

Submitting in support of the first preliminary objection, Ms Miriam argued that under section 15(3) of the Office of the Attorney General (Discharge of Duties ) Act, [Cap 268 R.E.2019] (**the Act**) provides that a

107.

state attorney must be issued by the Solicitor General with an instrument authorizing him or her to practice. That, it is this instrument which allows a state attorney to represent the Attorney General in court of law. Ms Mariam, argued further that under **guideline 6(1) & (2) of the Office of the Attorney General (Discharge of Duties) Guidelines for Practising State Attorneys and Law Officers, 2020** GN No.1008 of 2020 provides that anything done by unqualified person involving the government becomes invalid. That in the list of state attorneys and law officers in the Notice GN No. 1011 of 2020 issued under the **Office of the Attorney General (Discharge of Duties) Act, [Cap. 268 R.E.2019]** the drawer of the documents forming the application herein is not among the names listed as such he is unqualified person.

Responding to this objection, Mr. Edwin entirely subscribed to Ms Mariam's submission that **section 15(3) of the Act** as well as order 5(6) of GN. 50 of 2018 empowers the Solicitor General to issue a state attorney a practising instrument which entitle the bearer to appear in court and represent the government. It was his further argument that the same is in *parimateria* to **section 39(1) of the Advocates Act, [Cap 341 R.E.2019]** which requires an advocate to have a practising certificate

187.

issued by the Chief Justice to enable him appear before the court of law to represent clients. Both the laws none mandate in any court when, be the state attorney or an advocate, is appearing in court to be accompanied with the practising certificate or instrument.

Mr. Edwin again submitted that the herein objection needs ascertainment of evidence in proving it thus doesn't qualify to be raised a preliminary objection. Preliminary objection (P/O) should solely be purely on point of law, he stressed. He referred to this court the case of **Mukisi Biscuits Manufacturing company Ltd Vs West End Distributors Ltd [1969] EA 696 at page 700** which is quoted with approval in the case of **National Insurance Corporation (T) Ltd and Another Vs Shengena Limited, Civil Application No. 20 of 2007 CAT at Dar es Salaam (Unreported)** at p.8. That, P/O cannot be raised if any fact has to be ascertained. Whether or not the maker or drawer of the documents in this application has been issued with the practising instrument by the Solicitor General is a question which needs evidence

That the guidelines cited GN No.1008 of 2020 which is guideline 6(1) & (2) prohibit unqualified person to take action or represent the government but under guideline 3 a qualified person is a person who is

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admitted under the roll of advocate under the Advocates Act, [Cap 342 R.E.2019] and that if a person is an employee of the government he automatically become a qualified person. That the maker or drawer of the application documents is in the roll of advocates though a government employee thus automatically a qualified person

It was his further argument that the drawer is in the list of state attorneys and that the list can be accessed via <https://oagmis.go.tz> and that the roll number of the drawer is No.2258 thus the drawer is a qualified person and he thus asked the court to overrule the objection

In rejoinder, Ms Mariam submitted that the P/O qualifies so to be as the same touches the qualification to draw documents for court use, which has to be ascertained before any case can be heard. That, in GN No.1011 of 2020 before being updated on 26<sup>th</sup> September,2022 the name of the drawer herein was not in the list. His name has now been listed through GN No.583B of 2022 which updated the former list.

The argument that any employee can represent the government is a misleading one in that the laid down rules have to be complied with. The learned counsel concluded by submitting that the time the drawer of the



application documents drew them he was not a qualified person thus the documents he drew are invalid. She prayed the objection be upheld.

I have given due consideration to the rival submissions for and against the raised first preliminary objection. From the parties' submissions in respect of this objection, the issues arising for determination are, **one**, whether this Preliminary objection raised qualifies so to be. **Two**, whether the drawer of the application herein was a qualified person at the time he drew the application documents **and lastly**, what is the fate of the application should the two issues be decided affirmatively?

As to the first issue, I need to be guided by **section 59(1) of the Evidence Act, [Cap 6 R.E.2019]** which provides thus:-

*"S.59 (1) - A court shall take judicial notice of the following facts-*

*(a) all written laws, rules, regulations, proclamations, orders or notices having the force of law in any part of the United Republic". End of quote.*

The qualification in question to draw the herein application documents on behalf of the government is governed by the written law, rules, regulations and notices of which the above reproduced section 59 (1)(a) of the Evidence Act requires the court to take judicial notice. The



argument that ascertaining the evidence is required, therefore, does not arise here as only the duty of the court is that of just taking judicial notice. This is a position which was also taken by the Court of Appeal in a scenario calling for taking judicial notice in Philip Tilya Vs Vedatina Bwogi, Civil Application No.546/01 of 2017 CAT at Dar es Salaam (unreported) at pp. 5 – 6, where the court of appeal had this to state:-

*"It is true as submitted by Mr. Manyangu that the applicant has not placed before us any material on which to decide the issue. However, **section 59 (1) (g) of the Evidence Act [Cap 6 R.E. 2002] stipulates: -***

*"59 (1) A court shall take judicial notice of the following facts-*

- (a) not relevant*
- (b) not relevant*
- (c) not relevant*
- (d) not relevant*
- (e) not relevant*
- (f) not relevant*
- (g) the division of time, the geographical divisions of the world and **public festivals, feasts and holidays** notified in the Gazette"*

The court of appeal went on to state at pp. 5 – 6 thus: -

101.

*"However, as already shown, **the applicant decided to sit back and left us to go by section 59 of the Evidence Act**, reproduced but a while ago.*

*First, we managed to get a copy of Press Release issued by the Muslim National Council, popularly known by its Swahili acronym, BAKWATA, dated 19<sup>th</sup> June 2017, declaring that Eid prayers for that year would be celebrated in Kilimanjaro on 25<sup>th</sup> or 26<sup>th</sup> of June 2017. As the communication shows, the date for the prayers depended on the sighting of the moon, and as it occurred, the moon was not sighted on the anticipated date. Instead, Eid was celebrated on 26<sup>th</sup> and 27<sup>th</sup> of June 2017 according to IPP Media website; <https://www.ippmedia.com/en/news/tanzania-muslims-mark-eid-el-fitr> which we visited on 14<sup>th</sup> July 2021.*

***On the basis of the above information, which we take judicial notice of, 27<sup>th</sup> of June 2017 was a public holiday and the applicant could not have lodged the supplementary record of appeal on that date**", End of quote*

Guided by section 59(1)(a) of the Evidence Act together with the Court of Appeal in **Philip Tilya case (Supra)** it is my considered view that the herein raised objection is purely on point of law in that the qualification of the drawer of the Application if left ascertained the court will run into





the risk of acting on the invalid documents drawn by an unqualified person. The **Mukisi Biscuit case (supra)** cited by the Applicant is distinguishable because the circumstances of the objection raised here challenges the validity of the application presumed to be drawn by unqualified person whose ascertainment requires taking judicial notice under section 59(1)(a) of the Evidence Act, [Cap. 6 R.E.2019]

Coming to the second issue as to whether the drawer of the application herein was a qualified person when he drew the herein application documents. Both parties are at one that section 15(3) of the Office of the Attorney General (Discharge of Duties ) Act, [Cap 268 R.E.2019] empower the Solicitor General to issue practising instrument to a state attorney, the same reads thus:-

*"S.15(3) - **The Solicitor-General may issue each Law Office and State Attorney in ministries, local government authorities, independent departments and other government institutions, agencies and organisations **with Practice Instrument that will entitle the bearer to appear in court in cases where the Attorney General is a party.****"*

101.

Equally so, both parties are in agreement with the position obtaining under guideline 6 (1) of the **Office of the Attorney General (Discharge of Duties) Guidelines for Practising State Attorneys and Law Officers, 2020 GN. 1008 of 2020** which provide as follows: -

*"6(1) - Any action, suit, cause, matter or proceeding involving the Government in relation to which an unqualified person so acts shall be invalid.*

The area where the parties have locked horns is on who is a qualified person to draw documents and represent the Attorney General in court of law?

The documents forming the application herein was drawn by one **Edwin Joshua Webiro** and filed in this court on **28<sup>th</sup> March, 2022**.

Under **paragraph 3(2)(d)** of the **Attorney General (Appointment of Law Officers and State Attorneys) Notice, 2020 GN No. 1011 published on 27/11/2020 (the Notice)** it is provided as follows: -

*(2) The Law Officers or **State Attorneys appointed** as such by this Notice, shall have mandate to-*

*YH.*

(a) - (c) Not relevant

(d) ***upon being issued with specific instrument by the Solicitor General pursuant to the provisions of the Office of Solicitor General (Establishment) Order, 2018, conduct civil litigation;***

(e) N/A.

Again, under paragraph 3(1) the schedule to the Notice is made and the names of the state attorneys and law officers are listed in that notice. Going by the list, Edwin Joshua Webiro, the drawer of the documents forming the application is not among them. No any other list of the state attorneys had ever been released since then until the GN No.583B dated **26<sup>th</sup> September, 2022** when the list of state attorneys got updated through the introduced website <https://oagmis.agctz.go.tz> formed under paragraph 3(2) of the said GN No.583B of 2022. In the updated list the drawer is on the Roll of State Attorneys with **Roll number 2258**

The case file record shows that, the drawer of the documents forming the application, as pointed out earlier, drew the documents and filed them in court on **28<sup>th</sup> March, 2022**. By then he was not a listed state attorney issued with practising instrument by the Solicitor General to

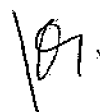
187.

represent the government in courts of law in civil cases for and against the government.

Under the circumstances, in my considered view, the drawer of the herein application documents was not a qualified person the time he drew them on 28<sup>th</sup> March, 2022. This is because under our laws the power to authorize one to represent the government in court of law in civil matters vests in the Solicitor General and no one else.

The Court of Appeal of Tanzania faced with documents drawn by unauthorized person in **Rafii Said Mpendu Vs Adam Ally Mkalapema (Administrator of the estate of the late Ally Mkalapema) and 3 Others, Civil Application No.603/17 of 2021 CAT at Dar es Salaam (Unreported)** at pp. 8 – 10 had this to state:-

*"Basing on the above provisions of the law, **what proceeded before the District Land and Housing Tribunal and the High Court, in our view was a nullity and the Court cannot let it to stand out.** This position of the law has been positively applied in a number of decisions of this Court; one of them is **Edson Osward Mbogoro** (supra), which has been relied upon by Mr. Nassoro. In that case the appellant who was an unsuccessful candidate of the Parliamentary Elections of 2005 for the Songea Urban constituency,*



having lodged the petition, he applied for extension of time to apply for exemption from paying of security for costs. The application was dismissed following a preliminary objection to the effect that the Court lacked jurisdiction to adjudicate on such application. Aggrieved by that decision the appellant lodged an appeal to the Court of Appeal. **Before the hearing of appeal there were preliminary objections to the effect that the appeal was incompetent because the Notice of Appeal, the Memorandum of Appeal and the Records of Appeal were drawn, signed, certified and lodged by an advocate who was not entitled to practice before the High Court and the Court of Appeal and that no leave to appeal had been obtained in terms of section 5(1) (c) of the Appellate Jurisdiction Act 1979. After satisfying itself that the point of objections raised have merit, the Court held among others that:-**

*"Although there is no specific statutory provisions on the point if an advocate in this country practices as an Advocate without having a current practicing certificate, **not only does he act illegally but also whatever he does in that capacity as an unqualified person has no legal validity.** It follows that the notice of appeal, the memorandum*

181.

*of appeal and the record of appeal **which were prepared and filed in this Court by unqualified person purporting to act as an Advocate of the Appellant were of no legal effect.**"*

*When we relate what transpired in the above discussed case to the present one, we hasten to state that we disagree with Mr. Martin that **Edson Osward Mbogoro's**, case (supra) is distinguishable to the present case because the circumstances herein are more or less the same'.*

End of quote

Since Edwin Joshua Webiro was not a qualified person on 28<sup>th</sup> March, 2022 when he drew the documents forming the application, it follows , in my view, that the application herein is incompetent for being founded on invalidly drawn documents incapable of being acted upon by the court. Following that, I uphold the first preliminary objection raised by the 1<sup>st</sup> Respondent against the application herein.

Having upheld the first preliminary objection which suffices to dispose of the application I find no need to proceed discussing the rest of the objections raised.

In the upshot, I hereby declare the application to be incompetent and struck it out on the ground that it is based on invalid documents drawn by an unqualified person. The same is struck it with no order as to costs.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 29<sup>th</sup> day of November, 2022



Musa K. Pomo

Judge

Ruling delivered on this 29<sup>th</sup> November, 2022 in presence of Amos Enock the learned State Attorney for the 2<sup>nd</sup> Respondent also holding brief of Edwin Webiro the learned State Attorney for the Applicant and in presence of the 1<sup>st</sup> Respondent and his advocate Ms Miriam I. Majamba



Musa K. Pomo

Judge

29/11/2022

