

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CIVIL REVISION NO. 4 OF 2022

(Originating from Misc. Civil Application no. 2 of 2022 of Shinyanga District Court at Shinyanga; U.S. Swallo- PRM)

**ENERGY AND WATER UTILITIES
REGULARORY AUTHORITY (EWURA).....APPLICANT**

VERSUS

**1. JAMBO PETROLEUM PRODUCTS LIMITED
2. MANAGING DIRECTOR OF ORYX
ENERGIES TANZANIA LIMITED** } **.....RESPONDENTS**

RULING


3rd & 6th June, 2022

A. MATUMA, J.

This is a Revision by the Court ***suo motu*** resulting from a complaint letter of the Applicant dated 19th April, 2022.

In that particular letter the applicant complained against the order of the District Court of Shinyanga in Misc. Civil Application no. 2 of 2022 by Hon. U.S. Swallo, PRM which was issued against her without her being a party to the matter before the Court or being summoned to be heard. Part of such complaint reads;

*"The principal Resident Magistrate extended the interim order **to government agencies, EWURA inclusive**, who are not party to the Application or pending main suit, thus*


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*restraining it from performing its legal obligations. **The order of the principal Resident Magistrate clearly act to sabotage lawful actions taken by EWURA against the Applicant (In this matter the 1st Respondent).***"

With such complaints and some others detailed in the complaint letter, as a Judge Incharge, I called the records of the District Court in respect of the complained matter in the exercise of my supervisory powers over subordinate Courts.

The records were brought accordingly and upon perused the same, I was satisfied that the Applicant is not a party to Misc. Civil Application no. 2/2022 nor its main suit Civil case no. 3 of 2022 pending in the District Court of Shinyanga at Shinyanga.

Yet an adverse order obstructing her from executing her legal operations was issued. I thus directed that Revisional proceedings be opened and both parties be summoned to address the Court on the propriety of the order.

Before going to the merits of this Revisional proceedings let me demonstrate a bit the historical background of the matter;

The Applicant is accusing the 1st Respondent to run business (petrol station) on plot no. 91 C, Block S. Uzunguni area within Shinyanga Municipality without a business licence and for not being compliant to health, safety and Environmental requirements. She is further accusing the 1st respondent for having been **using courts** and **police force** in a dubious manner to run her petrol station without licence since 2012 and that at all times when she attempted to execute her duty for closing the 1st respondent's petrol station, she faced impediments from the 1st respondent by using Courts and police forces hence according to her

letter; ***"illegal operations of the Applicant (now the 1st Respondent) are blessed"***.

The 1st respondent also has her own grievances against the 2nd respondent her lessor of plot no. 91C supra who has refused to execute the lease Agreement as a pre-requisite for EWURA to issue her a business licence.

In that respect, through Misc. Civil Application no. 6 of 2022 the 1st Respondent brought an application to this court for **mareva injunction** against the Applicant. Such Application was drawn and filed by Mr. Paul Kaunda learned Advocate.

At the hearing of such application both parties agreed in material particular that the application had several defects and therefore the learned advocate for the 1st Respondent prayed to withdraw it with leave to refile. I granted the prayer and the application was marked withdrawn with leave to refile.

The 1st respondent then filed Misc. Civil Application no. 7 of 2022 in this Court against the Applicant and the Attorney General. This was also a **Mareva injunction Application** to restrain the Hon. Attorney General and EWURA from closing her petrol station pending maturity of the statutory notice to sue the Government.

The Application was brought both exparte and interparte. In the presence of both parties on 11/03/2022 I granted an interim order pending hearing of the main application;

"The Respondents to file their respective counter affidavits on or before 18/3/2022. Hearing of this Application on 18/03/2022 at 08:30 am."

In the meantime, the Respondents (Attorney General and EWURA) and their agents are restrained from closing down the operations of the Applicant's Retail outlet at plot no. 91C Block "S" at Uzunguni area within Shinyanga municipality pending determination of this Application.

It is so ordered".

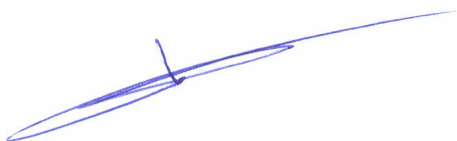
The 1st respondent having obtained the interim order did not want to prosecute her application employing delay tactics. On the 1st day of April, 2022 I decided to dismiss such application for want of prosecution.

The 1st respondent having seen that her application has been dismissed for want of prosecution; rushed to the District Court and lodged the same application and seeking the same order but dishonestly removing the Applicant herein (EWURA) and the Hon. Attorney General purporting to sue the 2nd respondent herein oryx-Energies Tanzania Limited but the orders sought were against the government, EWURA so to speak. The parties in that Application at the District Court reads;

**"JAMBO PETROLEUM PRODUCTS LIMITED -----APPLICANT
VERSUS
MANAGING DIRECTOR, ORYX ENERGIES
TANZANIA LIMITED ----- RESPONDENT."**

But the orders sought extended to government agencies which are not party thereto;

*"That this Honourable Court be pleased to issue temporary injunction restraining the Respondent, any person, **government agencies or their workmen** from closing down the petrol station....."*



During exparte hearing of that Application, the 1st respondent's representative disclosed the government agency referred in their application to be the Applicant herein EWURA when he submitted;

"....EWURA has been threatening to close the station....."

He then prayed for restraint order against the all government agencies including EWURA who were in fact not party to the suit;

*"I pray for temporary injunction to restrain the respondent **and any authority** from closing down the petrol station....."*

The Honourable Principal Resident Magistrate accepting the prayer granted the interim order not only against the respondent in that suit but also against all government agencies in which EWURA is inclusive.

From such order the Applicant herein (EWURA) has failed to execute her operations against such petrol station because the police force has denied them any assistance as per last paragraph of page 4 of the complaint letter;

"The police Force has always been refusing to give assistance on the reason that there is an order restraining EWURA from closing the facility while they are; mandatorily required to give such assistance."

It is from this back ground the complaints were made hence these Revisional proceedings.

At the hearing of this Revision Mr. Solomon Lwenge learned Senior State Attorney and Mr George Kalenda learned State Attorney represented the Applicant who had also her officer present one Nathaniel Edward Uiso the Senior petroleum Inspector.

The second respondent was represented by her written sales Representative one John Misangia Obimbo.

Mr. Paul Kaunda learned advocate represented the 1st Respondent. But also, in the circumstances of the facts I have demonstrated above I had also summoned Mr. Emmanuel F. Sululu learned advocate who drew the Application in the District Court which is subjected to this revision for him to address on three issues which were dully served to him;

- i. to submit on the propriety of Misc. Civil Application no. 2/2022 which he drew and filed in the District Court of Shinyanga seeking orders against government agencies without making them party to the application itself,*
- ii. to state why should this Court not draw an adverse inference against him to the effect that he drew such Application maliciously with the view of injuring the Applicant (EWURA) contrary to regulation 92 (2) of the Advocates (Professional conducts and Etiquette) Regulations, 2018,*
- iii. and to state why should this court not exercise the powers vested in it under **section 22 (1), (2) (a) and (b) of the Advocates Act, Cap. 341 R.E. 2019** and issue appropriate orders in case it is determined that the Application at the District Court was drawn and filed contrary to the professional conducts supra.*

Mr. Emmanuel F. Sululu learned advocate was thus present and ready for submissions on the issues raised by this Court.

The hearing of this Revision proceedings was however not easy as Mr. Paul Kaunda learned advocate for the 1st respondent in untold manner and disrespect to the Court process rose disturbances in an attempt to

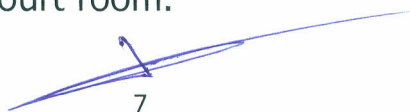
stop the hearing of these proceedings after I had overruled his two points of preliminary objection. Prior to the hearing of this Revision Proceedings Mr. Paul Kaunda for the 1st Respondent had lodged preliminary objections that; ***this court has no jurisdiction to entertain the matter*** and ***that this court has not been moved properly***. After hearing both parties for and against the preliminary issues supra, I made a ruling on the spot dismissing them.

Mr. Paul Kaunda learned advocate explained that he was dissatisfied with my ruling dismissing his preliminary objections and therefore intended to appeal to the Court of Appeal.

I told him to go on with his intent but as the matter was due for hearing and all other parties were ready I shall proceed accordingly as his intent do not legally bar me from proceeding with the matter before me. The learned advocate became furious denying other parties to make their respective submissions pressing the Court to stop a hearing until when he will appeal and his grievances determined by the Court of appeal.

As before me there was no formal application to that effect nor I had allowed him to make oral application in terms of the proviso to ***order XLIII rule 2 of the Civil procedure Code, Cap. 33 R.E. 2019***, I required him to proceed with the hearing or vacate the Court room so that we proceed with the hearing.

He repeatedly expressed that he was not ready to proceed and I have to stop the hearing. In that regard I ordered him to be forcefully evicted from the Court room to maintain the order and one H. 7312 PC Mohamedi assisted to maintain the order of the Court by removing the furious advocate from the Court room.



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Now back to the matter itself, Mr. George Kalenda learned State Attorney submitted that the Applicant (EWURA) was condemned by the District Court without being heard which is contrary to the law. He cited the case of ***Dino Katsapas versus Thinamy Entertainment and 2 others, Civil Revision no. 1 oof 2014*** in which the Court of Appeal at Dar – es – Salaam held at page 12 that the proceedings condemning a party unheard is highly irregular and thus a ruling and orders thereof becomes illegal.

The learned State Attorney also argued that under order **XXXVII rule 4** of the CPC supra to the effect that the District Court ought to have issued a notice to the other party before granting the injunction but it did not do so. He also cited article 13 (6) (a) of the constitution of the United Republic of Tanzania for the right of a party to be heard before an adverse order is issued against him, the proviso of **order XXXVIII rule 1 (b) of the CPC** to the effect that temporary injunctions cannot be issued against the government but in lieu thereof declaratory orders for the rights of the parties, and finally the case of ***Abdi Ally Salehe V. Asac Care Unit Limited and 2 others, Civil Revision no. 3 of 2012*** for the minimum conditions set by the Court of Appeal to be fulfilled before granting an injunction order.

He then prayed this Court to quash the ruling of the trial Court.

The 2nd Respondent on his party submitted that even on their party were not heard and prayed the decision of the District Court to be quashed.

On his party Mr. Emmanuel F. Sululu learned advocate who in fact was not representing either party to these proceedings but summoned for

the issues herein above stated conceded that it was wrong for him to insert government agencies in the application while he did not make them parties to it and that it was wrong for the trial District Court to issue such order against the government without it being a party.

The learned advocate however explained that in drafting such application he had no malice against the Applicant (EWURA) nor he specifically named her in the Application but the 1st respondent's officer is the one who mentioned EWURA in the course of submitting for the injunction at the District Court.

Mr. Sululu went further to blame the District Court that it had a duty to screen such application before admitting it;

"I erred to insert government agencies in the Application but the Court had a duty to screen the same and refuse admission of it."

Mr. Sululu learned advocate further submitted that the 1st respondent and even advocate Paul Kaunda didn't let him know that they had their application before this Court dismissed for want of prosecution on the same matter, the fact which had it been made known to him he would have not drafted such application;

"I have even come to learn today from Mr. Paul Kaunda advocate that there was similar application in this Court against EWURA which was dismissed for want of prosecution."

It might be that is why they skipped Mr. Kaunda and engaged me but did not disclose to me that fact."

Had I been informed of such Application I would have not taken that case. I would have returned them to Kaunda for them to find out the correct procedure."

The learned advocate finally asked this Court in case it finds him to have acted below standard and against the provisions of the Advocates (professional conduct and Etiquette) Regulations to warn him without further orders under the Advocates Act.

From the herein above submission of the parties, I find out that there is no dispute that in Misc. Civil Application no. 2 of 2022 at the District Court of Shinyanga, the Applicant herein as one of the Government Agencies was not made a party thereto and yet an order adverse to her was sought and granted as herein above quoted.

The adverse order against her was an interim restraining her from closing down the petrol station located at plot no. 91C Block "S" Uzunguni area within Shinyanga Municipality pending determination of the Application inter – parties and final disposal of Civil case no. 3 of 2022.

Even though the Applicant is not a party either the inter-parte application or the main suit as rightly complained and dully submitted by the learned State Attorneys. She was therefore not expected to be heard altogether be it in the application or the main suit.

As rightly submitted by Mr. George Kalenda learned State Attorney not only the laws of this land condemn habits of issuing adverse orders against parties without according them opportunity to be heard, but also the constitution of this Country which is a mother law or Grundnorm.

The right to be heard before anyone is condemned has been regarded in this Country as a natural justice which cannot be taken away anyhow and or be vacated. For instance in the case of ***Mbeya – Rukwa Auto parts and Transport Ltd V. Jestina George Mwakyoma (2002) TLR 251*** the superior Court of the land held;

"In this Country, natural justice is not merely a principle of common law; It has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law, and declares in part;

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinaachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu....."

In this matter EWURA was not accorded opportunity to be heard, she was condemned unheard which is contrary to the law supra. The order or any decision reached in contravention of the right to be heard has always been held in this Court and the Court of Appeal to be illegal. Its proceeds have also been always declared a nullity and accordingly quashed.

In the case of Dino Katsapas supra at page 12 for instance, the Court of Appeal made it clear that the proceedings against one unheard are highly irregular, and the ruling and order thereof illegal. The remedy is to nullify such proceedings, quash the ruling and set aside the order thereof.

In Abdi Ally Salehe's case supra, the Court of appeal quoting some other authorities held that it is elementary that the purposes of an interlocutory injunction is to maintain the status quo until the main suit is finally determined.

In that regard, a well mined judicial officer is not expected to issue a temporary injunction order against a third party (against one who is not a party on the matter before hand) because it would serve no useful purpose rather than injuring such third party as no forum is made for him


to be heard at any stage from the date the interim order is issued up to the date when the main suit will finally be determined.

Not only that but also issuing such order against a none party to the suit at hand is to deny him/her the rights to challenge such decision in a formal way because it has been decided in a number of cases that no one can appeal against the decision he was not a party.

The only remedy would therefore be, to seek the superior Court's intervention by way of complaints like it has happened in this case. It is my humble finding that we should not turn superior Courts to be Courts of complaints. If we stands to the available due processes, no order shall be given adverse to the one who is not party to the matter before the Court. By doing so those parties would only take the available legal redress and not filing complaint letters. The contrary is also true, if we issue orders against none parties, we must expect so many Revisional Proceedings by superior Courts which are even free of court fees because they are Revision by the Court suo motu.

With the herein remarks and observations, I allow this application. The proceedings in respect of Misc. Civil Application no. 2 of 2022 of the District Court of Shinyanga by U.S Swallo (PRM) are hereby declared a nullity, the ruling and order thereof is as well declared illegal. Such ruling is hereby quashed and the order thereof is set aside.

Since the pending inter-parties application at the District Court for temporary injunction pending hearing of the main suit is still seeking the District Court to issue an order against among others government agencies EWURA so to speak while those government agencies are not



party thereto, it is hereby declared that such application is bad in law and cannot be lawfully heard and determined.

In the exercise of my Revisional powers under **section 79 (1) (c) of the CPC supra**, I order Misc. Civil Application no. 2 of 2022 to be struck out of the Register of the District Court.

The 1st Respondent if has any rights infringed or about to be infringed by the Applicant herein should initiate the legal proceedings against her so that both of them are heard accordingly.

This order should be immediately communicated to the trial District Court for compliance without any undue delay.

The main suit Civil case no. 3 of 2022 by the 1st respondent against the 2nd respondent at the trial District Court is maintained because I have gone through it and I am satisfied that the orders sought therein do not affect any third party even if they are granted.

EWURA is mentioned in it but not in an adverse manner. The order is sought to compel the 2nd Respondent to apply for business licence from EWURA on behalf of the 1st Respondent. Whether or not the 2nd Respondent is legally obliged to apply for business licence from EWURA on behalf of the 1st respondent is a matter to be determined by the trial Court and whatever outcome thereof will not affect EWURA. Otherwise I would have directed the proper course to be taken.

I however direct that such Civil case no. 3/2022 in the District Court must be heard expeditiously as it would be possible because it is a suit relating to business so that its fate is determined as soon as possible to avoid injuring the businesses of either party.



In relation to the issues against Mr. Emmanuel F. Sululu supra, I agree with him that he was wrong to seek orders against government agencies without making them parties to such application and that the District Court wrongly issued the order against government agencies (EWURA) for they were not party to the application.

I however disagree with him that he made that application innocently without intending to injure EWURA unheard. This is due to the historical background of the matter as reflected supra and the contents of paragraphs 4 and 6 of the supporting affidavit to such application which Mr. Sululu learned advocate drew and filed.

About the historical background, I have already stated earlier that the 1st respondent had her application of the same nature dismissed for want of prosecution by this Court.

Without applying for its restoration or take any other available legal course, the 1st respondent in the service of Mr. Emmanuel F. Sululu learned advocate went to the lower Court and instituted the same very application to restrain EWURA from executing her duties without making her a party thereto.

Mr. Sululu has pleaded that he was not aware of such dismissed application and his client the 1st Respondent did not disclosed that fact to him.

That can't be true. This is because in drafting such malicious application he was duty bound to inquire from the 1st respondent the genesis of the matter and all steps she has taken before he takes another step to avoid possible legal obstacles. In any case if he was not aware he



could not inset government agencies and EWURA in particular in the application without making them parties thereto.

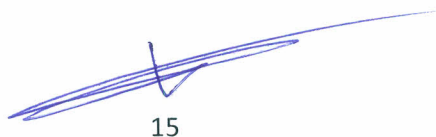
Not only that but Mr. Sululu himself in a deposed certificate of Urgency by his own signature named EWURA to have not issued a business licence to the 1st Respondent due to the reluctance of the 2nd Respondent to cooperate with her in ensuring that EWURA issues such licence.

In that regard, when Mr. Sululu stated on the chamber summons that government agencies be restrained from closing the petrol station of the 1st Respondent he had in mind EWURA. The affidavit in support of the Application under paragraph 4 and 6 Mr. Sululu drafted it naming named EWURA to have not issued the business licence to the 1st respondent and condemned her for interruptions of the 1st respondent's businesses due to the reluctance of the 2nd Respondent to execute with her a lease agreement.

In that respect Mr. Sululu had in mind that the target of his client was EWURA and thus he could have advised him to take proper legal actions against EWURA. Had him advised his client as such, he would have been informed of the dismissed application before this Court.

I therefore believe that he was aware of the dismissed application but what they did was a conspiracy for the change of advocate, removal of EWURA from their pleadings but seeking adverse orders against her through dishonest trick.

I am even forced to believe that the conduct of Mr. Paul Kaunda learned advocate as demonstrated supra is a result of such conspiracy



because he was aware that they had obtained an order of the Court illegally and the illegal order was shortly to die.

Regulation 92 (1) and 2 (a) of the Advocates (Professional conducts and Etiquette) Regulations supra provides that as an officer of the Court, the advocate shall treat the Court with condous, courtesy and respect and shall not;

"abuse the process of the Court by instituting proceedings which although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purposes of injuring another party."

With what I have stated herein above I have no doubt that Mr. Emmnauel F. Sululu learned advocate drew the impugned application knowingly that the target was to injure the lawful operations of EWURA. But again in drafting the application and seeking orders against government agencies without making them party to the suit so that they could be summoned and accorded opportunity to be heard, the learned advocate was contravening among other provisions, Regulation 92 (2) (b) of the Etiquette supra which restricts an advocate from assisting or permitting his client to do anything that is dishonest or dishonourable.

Even applying the minimum standard, the learned advocate is not expected to seek adverse orders against one without pleading him as a party to the suit. That is dishonest and dishonourable.

In the case of ***Evance Bugale versus Jimi Modesti, Misc. Land Application no. 3 of 2021***, High Court at Kigoma, I had time to speak on fraud documents deceiving judicial officers to the detriment of the reputation of the Court. I held;

"It is from these fake, false and fraud documents which damage the reputation of the Court once they go undetected as the opponent parties would not be positioned to know that the Courts have been deceived. It is the reputation of the Court that would be put into inquiry."

I then concluded;

"The reputation and dignity of the Court must therefore be protected."

In dealing with a matter of similar nature where an advocate assisted a fake party to impersonate being the real party to the suit one Nyamunini Ntarambigwa which was already determined by the lower Court so that he could intervene the decisions of the Court in which the real party (Nyamunini s/o Ntambigwa) was by himself satisfied, I ruled in the case of ***Nyamunini s/o Ntarambigwa versus Simoni s/o Kikoti, Misc. Land Application no. 19/2021***, High Court at Kigoma that although life might be tough, clients not easy to get them, busy bodies might have good money and handsomely paying; an advocate must confine to professional ethics and earn a living from justifiable legal incomes only.

In the instant matter the District Court of Shinyanga has already been put into inquiry of its reputation and dignity. The 1st respondent is alleged to operate business without licence since 2012 and at all this period, Court's orders are involved in an untold manner as herein above stated.

In that respect we should act to the required standard to avoid dragging the reputation of the Court of law into a pit latrine. Judicial officers including magistrates should as well act diligently. They should not be endorsers of documents before their table without reading them

thoroughly, scrutinizing them and adjudging them into the requirements of the law. To the contrary they will be doing injustices to their respective offices and the Court generally. Nothing would be deserving to them than a removal from office so that those who are committed for the job steps in.

With all these I find Mr. Emmnauel F. Sululu learned advocate to have committed professional misconducts contrary to regulation 92 (2) (a), (b), (e), (f) of the Advocates Etiquette supra. I find him guilty accordingly.

Having so found, I have considered his mitigations that he is a sole advocate in the chamber and thus any stiff measure would injure his clients at large, and that he has no previous records of any misconduct. I therefore enter a sentence that he is warned not to commit again any professional misconduct. He should at all times be honest to the Court for the sake of Court's reputation.

This mater having been raised from the Revision by the Court suo motu, no orders as to costs to either party. Whoever aggrieved has the right to appeal to the relevant authority.

It is so ordered.




A. MATUMA
JUDGE
06/06/2022