

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
LAND CASE NO 1 of 2023

ESHA MOHAMED EMAMUPLAINTIFF

VERSUS

1. MTWARA MIKINDANI MUNICIPAL COUNCIL
2. BHARAKAT DHOKIA
3. ATTORNEY GENERAL
4. ABDUL SELEMAN NYUNDO
(Administrator of the
Estate of the late Seleman Hamisi Nyundo)

..... DEFENDANTS

RULING

Date of last Order: 04.05.2023

Date of Ruling: 12.05.2023

Ebrahim, J:

The plaintiff in this case has instituted this suit jointly against the defendants for the recovery of Plot No, 360 Block CC located at Chuno Area within Mtwara Municipality in Mtwara Region claiming that it was unlawful granted/allocated to 2nd Defendant by the 1st Defendant while knowing that the Plaintiff purchased the same from the 4th Defendant in 1998.

Upon being served with a copy of the plaint, on 25th January 2023, advocate Hussein Mtembwa from HM Noble Attorney filed the Written Statement of Defence on behalf of their client i.e., the 2nd Defendant. Among other things, they raised three points of preliminary objection to wit:

1. *As between the Plaintiff and the 2nd Defendant, the matter is res judicata.*
2. *As between the Plaintiff and the 2nd Defendant, this honourable court is functus officio.*
3. *As between the Plaintiff and the 1st Defendant, this honourable court is functus officio.*

As per the established principles and rules of practice, once there is preliminary objection, the same must be determined first. The court therefore scheduled a hearing date for the preliminary point of objection to be on 04.05.2023 and also issued an order of *ex parte* hearing against the 4th Defendant.

When parties appeared on the scheduled date of 04.05.2023, counsel for the plaintiff, advocate Ngongi raised an objection against the propriety of advocate Mtembwa filing the written statement of defence as an advocate for the 2nd defendant whilst he had no practicing certificate as he had not yet renewed his licence.

When asked by the court, advocate Mtembwa agreed to proceed arguing the raised concern about his capacity to act as an advocate for the 2nd defendant at that particular time.

Advocate Ngongi submitted before the court that the Written Statement of Defence drawn and filed by advocate Mtembwa on 25.01.2023 had no legal effect and should be expunged from the court records. He referred the court to the Court of Appeal case of Edson Oswald Mbogoro Vs DR. Emmanuel John Nchimbi & Another, Civil Appeal No. 140 of 2006 which discussed the status of a document presented by an advocate with no valid licence and concluded that the same is illegal. He prayed for the court to the filed Written Statement of Defence as illegal.

In his response, Mr. Mtembwa did not dispute the fact that he did not have a valid licence when he filed the WSD on behalf of his client, he only challenged the fact that advocate Ngongi has not stated when his certificate was issued. He cited the provisions of section 38(2) of the Advocate Act, Cap 341 RE 2019 which state that practicing certificate are valid from 1st of Jan to 31st Dec of each year and that there is grace period between 1st day of January to 1st day of February of the following year for any advocate who had a valid

certificate by 31st December of the preceding year. He said, his interpretation of the said piece of legislation is that within the grace period an advocate can proceed with legal matters. To cement his line of argument, he cited a persuasive case of **Sophia Sadala Ndossy and Another Vs Saidi Sadala Ndossy & 2 Others**, Misc Civil Application No. 583 (HC- DSM) pg 6.

He further urged this court to be persuaded by the case of **Richard Joseph Ruisye Vs Ibrahim Salum Suud**, Land case No. 167 of 2020 where the judge only expunged from the records the submission part which was filed after the grace period of the validity of the tenure of the practicing certificate but maintained the preliminary objection. He distinguished the circumstances of the cited case of Edson Mbogoro (supra) with the instant case that in the cited case the notice of appeal was filed on 19.05.2006 and the records of appeal were filed in December 2006. He further urged this court to be persuaded by the wisdom of this court in the case of **Francis Alphonse Vs Penina Warioba**, Land Revision No. 1 of 2022 (HC-MWZ) which decided to be seized with the documents and not penalize the party for inadvertent act of his advocate.

In rejoinder, advocate Ngong'i insisted that the purpose of the grace period is the waiver of penalty for a person who is late to pay his licence. He insisted that there is no law that allows a lawyer to practice during the grace period. He added that the client was equally responsible to ensure that an advocate has a valid licence and insisted that the WSD filed on 25.01.2023 be expunged from the record.

After having followed closely the rival submissions by both counsels, the point for determination is whether the documents filed during the grace period are legally viable.

Indeed, **section 38(1) of the Advocates Act Cap 341 RE 2019** states clearly the validity period of the practicing certificate of an advocate. It states thus:

"38 (1) Every practising certificate shall, subject as hereinafter provided, take effect on the day on which it is issued by the Registrar:

*Provided that every practising certificate issued between the first day of January and the first day of February in any year to an advocate who held a valid practising certificate on the thirty-first day of December of the preceding year **shall have effect for all purposes from the first day of January in that year**".*

Indisputably is the fact that when advocate Hussein Mtembwa filed the Written Statement of Defence for the 2nd defendant on 25.01.2023, he had not yet renewed his practicing certificate. Mr. Mtembwa argues that he filed the same during the grace period whilst advocate Ngongi is adamant that the grace period is for the waiver of penalty only and no law has provided that an advocate can practice during a grace period.

Indisputably also is the position that the period between 1st January to 31st December of the following is a grace period for an advocate who by 31st December of the preceding year held a valid practicing certificate.

Before I embark on the journey of interpreting the law and its intention as so provided, I directed my mind as to what is the essence of the grace period?

It is my understanding that in essence the grace period is a specific period when a person is given an allowance of time or an obligation is waived following the deadline of meeting or doing a certain obligation which otherwise consequences would have followed e.g., cancellation of a loan, practicing certificate etc. That waiver exists

and the consequences are halted provided that the obligation is met during such period.

From my position therefore, during the grace period if the consequences for failure to meet the obligations are waived, the status quo of the certain position or qualification is equally maintained unless otherwise stated.

I am saying so because, looking at the wordings of the proviso of **section 38(1) of cap 341** and for the purpose of this ruling the catch phrase is "***shall have effect for all purposes from the first day of January in that year***", it is my finding that the proviso did not specifically state that the grace period is for avoiding penalty only. Rather, in construing the said proviso and applying parity of reasoning and looking at the intention of the legislature, I find the phrase '**for all purposes**' connotes the purpose of which the valid certificate stands for which in reading together with **section 39(1) (a) (b) and (c)** of the same Act qualifies a person to act as an advocate.

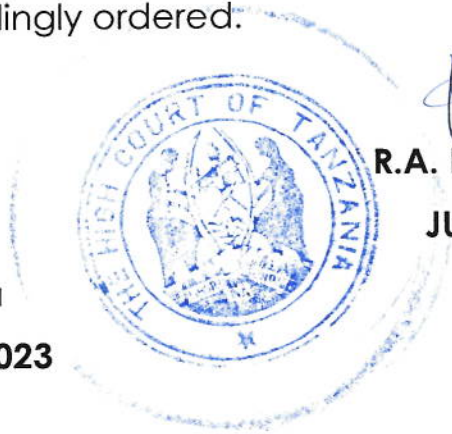
In the before this court, advocate Mtembwa filed the documents well within the grace period. Therefore, I am persuaded by the holdings of my learned brother judges in the cited cases of **Richard Joseph Rusisye (supra)** and the case of **Sophia Sadallah Ndossy (supra)**, and

equally hold that the Written Statement of Defence filed on 25.01.2023 by advocate Hussein Mtembwa is a valid document before the court as the same was filed during the grace period.

That being said, I overrule the point of objection tabled by advocate Ngongi. Costs shall be in the main cause.

Accordingly ordered:

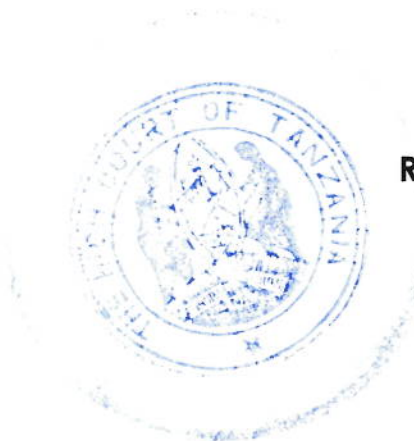
Mtwara
12.05.2023



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R.A. Ebrahim
JUDGE

Order: The hearing of the preliminary objection raised by the second defendant shall be disposed of by way of written submission as per the schedule set by the court.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
JUDGE
12.05.2023