

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND REVIEW NO. 1 OF 2023

*(Originating from the High Court of Tanzania at Mbeya, Misc. Land Application No. 86 of 2022)*

**INDUSTRIAL CLOTHING AND SUPPLIES CO. LTD ..... APPLICANT**

**VERSUS**

**ABRAHAM MWAKITALU ..... 1<sup>st</sup> RESPONDENT**  
**CHARLES KANJOKA MANENGE ..... 2<sup>nd</sup> RESPONDENT**  
**ELISARIA ABRAHAM KIJANGI ..... 3<sup>rd</sup> RESPONDENT**  
**BENSON DAVID KAMBINDE ..... 4<sup>th</sup> RESPONDENT**  
**KETHA FRANCIS E. AHOBOKILE ..... 5<sup>th</sup> RESPONDENT**  
**EBENEZAR RICHARD MOSHI ..... 6<sup>th</sup> RESPONDENT**  
**EMMANUEL BETSON SANGA ..... 7<sup>th</sup> RESPONDENT**  
**MOSES VENANCE KIPEPEO ..... 8<sup>th</sup> RESPONDENT**  
**DANIEL USWEGE MWAIGOMOLE ..... 9<sup>th</sup> RESPONDENT**

**RULING**

Date of hearing: 25/5/2023

Date of ruling: 6/7/2023

**NONGWA, J.**

The applicant has brought this application for review of the ruling in Misc. Land Application No. 86 of 2022 in that the advocate who represented the respondents had no valid practising certificate. The

application is predicated under section 78(1)(b) and Order XLII rule 1(1)(b) of the Civil Procedure Code [Cap 33 R: E 2022].

Grounds upon which the application is brought is that when Misc. Land Application No. 86 of 2022 was called for hearing on 8<sup>th</sup> February 2023, Mr. Sambwee Mwalyego Shitambala Roll No. 1004 had no valid practising licence and the applicant had no knowledge. It is contended that after delivery of the ruling in the aforementioned application, due diligence was done on 16<sup>th</sup> March 2023 discovered that the advocate who represented the respondents and conducted hearing, did all that while practising certificate had expired. He thus prays the proceedings and ruling to be nullified and an injunctive order be issued against the respondents. The respondent did not file reply to the application.

On the date for hearing the application the applicant was represented by Mr. Peter Bana whereas the respondents had the service of Sambwee Mwalyego Shitambala both learned counsels. Hearing was in the form of written submission. Mr. Bana filed submission in chief while Mr. Shitambala did not file reply submission. Owing the above counsel for the applicant filed notice of default to file written submission and argued the court to continue composing ruling based on his submission only.

In his submission Mr. Bana argued that in terms of section 39(1)(a)(b)(c) of the Advocates Act [Cap 341 R: E 2019] bars unqualified person from commencing, carrying on or defending any suit or to act as an advocate. He cited the case of **Zakayo Mepukori Ole Leida vs Lopolun Village Council and 14 Others**, Land Case No. 4 of 2021, HCT at Arusha (Unreported) in that all acts done by an advocate who has no practising certificate is invalidated. He added that the principle applies even to documents prepared and drafted by such advocate, on this the case of **Pangea Minerals Ltd vs Petrofuel T. Ltd and Others**, Misc. Commercial Application 51 of 2020, HC Commercial Division (Unreported) in support of the argument.

It was further submission from counsel for the applicant that review is done upon discovery of new evidence which could not have been produced or came to party's knowledge after exercise of due diligence and that where there is some mistakes or error apparent on the face of record, citing the case of **Ruth Makaranga vs Salum Ayub**, Civil Application No. 363 of 2021, [2022] TZCA 562 CAT at Dar es Salaam (Unreported).

He said that after hearing the application, made efforts to find if counsel for the respondents had valid practising certificate on 8/2/2023

by approaching the Ethics Committee of the Tanganyika Law Society. He added that on 21/3/2023 communicated with the office of registrar of the high court who allowed him to access the ewakili and have the print out. He submitted that, his efforts found that from 1<sup>st</sup> January 2023 to 23<sup>rd</sup> February 2023 Mr. Shitambala had no valid practising certificate when made appearance on 8<sup>th</sup> February 2023 before Hon. Nongwa, J. and represented the respondents, he thus prayed all proceedings of that date to be expunged.

Mr. Bana continued to submit that the appearance of unqualified to represents clients in court constitutes an illegality and the court cannot condone it. According to the applicant's counsel the proceedings in Misc. Land Application was supposed to be conducted *ex-parte*, he thus implored the court to recompose the judgment based on his submission made on 8<sup>th</sup> February 2023 and the order sought in that application be granted.

I have considered the application and the only issue for my determination is whether the application has merits. Before dealing with merits of the application, I want to address the issue of failure to file written submission as ordered. As the law stands is that failure to lodge written submission is tantamount to non-appearance on the date called



for hearing and the consequences under order IX of the CPC applies equally to parties. In this matter it is the respondents who did not file their written submission, on that account the matter is deemed to proceed *ex-parte* against them owing that they did not file pleadings.

Reverting to merits of the application, it is without any doubt that Mr. Shitambala is an advocate with roll No 1004 and that is acknowledged by the applicant. The conditions to act as an advocate is enumerated under Section 39 (1) of the Advocates Act, it provides;

*'39.-(1) Subject to the provisions of section 3, no person shall be qualified to act as an advocate unless—*

*(a) his name is on the Roll;*

*(b) **he has in force a practising certificate; and***

*(c) **he has a valid business licence,***

*and a person who is not so qualified is in this Part referred to as an "unqualified person".' (Emphasis supplied)*

Conditions (b) and (c) are most important because the name being in the roll is one thing but to practise as advocate, then there have to be in force a practicing certificate and a valid business licence. The practising certificate of an advocate is renewed each year as per section 38 which reads;

*'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.*

*(2) Every certificate shall continue in force from the day on which it has been taken or takes effect in accordance with this section until the thirty-first day of December next following (both days inclusive) and shall then expire.*

*(3) The Registrar shall cause to be entered upon the Roll a note of the date of issue to any advocate of a practising certificate.'*

The above provision presupposes that a valid practising certificate once issued it expires on the 1<sup>st</sup> day of February the following year. Let us assume the practising certificate is issued on 1/1/2021 then it will expire in 1/2/022 that is in accordance with the proviso to subsection (1) of section 39 of the Advocate Act.

In the present matter on 8<sup>th</sup> February, 2022 when Misc. Land Application No. 86 of 2022 came on for hearing, Mr. Peter Bana appeared for the applicant while Mr. Shitambala for the respondents, ruling thereto was delivered on 16<sup>th</sup> March, 2022. The applicant submission is that on that day when application was heard Mr. Shitambala had no valid

practicing certificate and in terms of section 39 (1) of the Advocate Act was unqualified person incapable of appearing in proceedings as advocate.

The above presented scenario is not novel in this country, in the case of **Edson Osward Mbogoro vs Dr. Emmanuel John Nchimbi & Another**, Civil Appeal No. 140 of 2006 [2007] TZCA 15 (CAT at Dar es Salaam; [www.tanzlii.org.tz](http://www.tanzlii.org.tz); 20 September 2007) the court considered the fate of documents prepared by unqualified person and held that;

*'... although there is no specific statutory provision 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. We also take the liberty to say that to hold otherwise would be tantamount to condoning Illegality. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court by Dr. Wambali purporting to act as an advocate of the appellant were of no legal effect....'*

In another case of **Rafii Said Mpendu vs Adam Ally Mkalapema & Others**, Civil Application No. 603 of 2021 [2022] TZCA 735 (CAT at Dar es Salaam: [www.tanzlii.org.tz](http://www.tanzlii.org.tz); 21 November, 2022) which is similar to the present circumstance the court was confronted with the issue. In this case a person who presented himself as advocate while not, represented the respondents from the District Land and Housing Tribunal to the High

Court. Upon delivery of judgment in the high court, counsel for the applicant moved the court to review the decision on account that the respondents were represented by a person who was not the advocate. The application for review was disallowed by the high court. Because the decision in review is not appealable the applicant filed application for revision in the Court of Appeal. The court considered arguments of the parties and indorsed the holding quoted above in the case of **Edson Oswald Mbogoro** (supra). The proceedings of the high court and the district land and housing tribunal was nullified and ordered hearing afresh.

After perusing the memorandum of review and its annexures and the affidavit on authenticity of the printout from the ewakili database, I have found that it is true that on 8<sup>th</sup> February, 2023, Mr. Shitambala had no valid practising certificate and could not have legally represented the respondents as the advocate. The allegations were not controverted either by filing a reply to the memorandum of review or filing written submission to oppose the application. I therefore find merits in the application.

The applicant moves the court to nullify only submission made by Mr. Shitambala, the arguments which I find untenable. Having found that 8<sup>th</sup> February, 2023 counsel for the respondents appeared and conducted




proceeding while unqualified, all proceedings including submission made by Mr. Bana becomes illegal unworthy to be acted upon. The net effect is that all proceedings of 8<sup>th</sup> February, 2023 is nullified including the resulting ruling, the application is reverted to the order dated 14<sup>th</sup> December, 2022 which set a date for hearing. No order as to costs.

It is so ordered.

DATED at MBEYA this 6<sup>th</sup> day of July, 2023



  
**V.M. NONGWA**  
**JUDGE**