IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS LAND APPLICATION NO. 26805 OF 2023

KERIKA OLOIYO LENDOLOK .....FIRST APPLICANT

NDERERE KOPEJO KUNDAYO .....SECOND APPLICANT

MORANI MAKAROTI KITEMERA .....THIRD APPLICANT

KIYONDO NGINANYI MENG'ORU.....FOURTH APPLICANT

SESILI SOKOYOTI NGOTO .....FIFTH APPLICANT

MUSA OLOKOIYO ORKUTET .....SIXTH APPLICANT

VERSUS

EMANUEL MPOSI .....FIRST RESPONDENT

SIWAJIBU KILANGWA.....SECOND RESPONDENT

ROBERT MADINGA.....THIRD RESPONDENT

SANGANENA MBOGO.....FOURTH RESPONDENT

NOELI MBULA .....FIFTH RESPONDENT

MOI NGANENA MBOGO.....SIXTH RESPONDENT

PORINO NYARUSI.....SEVENTH RESPONDENT

LETANGA KILOGOMBI.....EIGHTH RESPONDENT

HILARI NGANENA MBOGO.....NINTH RESPONDENT

BOSCO DANDA.....TENTH RESPONDENT

TINO NYWAGI.....ELEVENTH RESPONDENT

SEBIGA CHAMWERA.....TWELFTH RESPONDENT

KOSI MASAI NG'ORO..... THIRTEENTH RESPONDENT

FESTO NGANENA MBOGO..... FOURTEENTH RESPONDENT

SOTELI MKALAWA.....FIFTEENTH RESPONDENT

RULING

14th and 19th February 2024

MIRINDO, J.:

This decision pertains to a preliminary objection to the adequacy of the applicants' affidavit in support of their application for temporary injunction pending hearing of the main suit. In the course of the hearing, the applicants, represented by learned Advocates Baraka Elias Sulus and Moses Sirili Masami, in response to the preliminary objection, called into question the *locus standi* of the respondents' advocate, Mr Bonaventura Stephen Njelu who was also present in court. Given that this question was raised in the course of their submission on the preliminary objection and it may have the effect of defeating the objection itself, I think it is a matter that should be addressed first in this ruling.

The learned Advocate Masami informed this Court that the learned Advocate Njelu prepared the counter-affidavit upon which the preliminary objection emanates when his practising certificate had expired. The learned Advocate pointed out that the respondents' counter-affidavit and preliminary objection were drawn on 15th January 2024 and filed in court on 17th January 2024. The learned Advocate Masami invited this Court to take judicial notice of this fact and hold that the documents were prepared by unqualified

advocate contrary to the provisions of sections 39 (1) (b) and 41 (1) of the Advocates Act [Cap 341 Re 2019].

The learned Advocate Njelu conceded as much but disagreed that he was unqualified at the time he prepared the counter-affidavit and the preliminary objection. He clarified that he prepared those documents during the grace period for renewal of practising certificates in terms of section 38(1) and that he renewed his practising certificate on 17th January 2024 before the expiry of the grace period.

The import of section 38 (1) of the Advocates Act [Cap 314 Re 2019] is therefore at issue in this application. Subsection (1) of section 38 enacts a general effective date for the issuing of practising certificates by the Registrar of the High Court. Nevertheless there is a proviso that recognises a different effective date for practising certificates issued between 1st January and 1st February for advocates who had valid practising certificates on the 31st December of the preceding year. Any practising certificate issued on any date covered in the proviso is effective from the first day of January of the relevant year.

It was the argument of the learned Advocate Masami that the provisions of section 38 (1) do not explicitly refer to "grace period" and in any event they do not authorise an advocate to practise without a valid certificate. In his opinion, while the proviso to subsection (1) of section 38 provides the additional period for renewal of practising certificate from 1st January to 1st February in every year, it does not authorise advocates to practise without practising certificates. The fact that a practising certificate may be issued in

any date between January and 1st February and takes effect from 1st January of that year does not validate acts done by uncertificated advocates from 1st January to 1st February. This view, the learned counsel argued, is supported by the decision of this Court in *China Henan Int. Cooperation Group Co. Ltd (Chico) vs Morning Glory Construction Company* (Civil Appeal 4 of 2020) [2020] TZHC 3984 (3 December 2020).

As already stated, the learned Advocate Njelu, was of the opinion that section 38 (1) authorises advocates to practise without practising certificates during the additional period.

It is clear to me that the case of *China Henan Int. Cooperation Group Co. Ltd (Chico) vs Morning Glory Construction Company* (Civil Appeal 4 of 2020) [2020] TZHC 3984 (3 December 2020) cited by the applicants is distinguishable from the present case since the impugned advocate renewed his practising advocate on 3rd June 2020 well beyond the days of grace.

The issue of grace period for renewal of practising certificates seems to have featured in the Court of Appeal only in arguments and does not appear to have been decisively dealt with there. It has featured in counsel arguments in *Tccia Investment Company Limited v Dr. Gedion H. Kaunda* (Civil Appeal 310 of 2019) [2022] TZCA 599 (5 October 2022) but it was mentioned in one precedent cited by the Court of Appeal in *Edson Osward Mbogoro v Dr Emmanuel John Nchimbi and Another* (Civil Appeal 140 of 2006) [2007] TZCA 15 (20 September 2007).

It is instructive to note that in *Edson Osward Mbogoro,* the Court of Appeal upheld the objection raised against the unqualified appellant's

advocate who drew the appeal documents between 6th May 2006 and 15th December 2006 while uncertificated. The Court held that he was an unqualified person in terms of the provisions of section 39 (1) (b) of the Advocates' Act. The case of *Edson Osward Mbogoro* is distinguishable from the facts of this case for at least two reasons. First, it dealt with uncertificated advocate who had not completely renewed his practising certificate. Second, the courts document were not prepared during the grace period.

On the other hand, this Court has indirectly dealt with the issue of grace period. In *Industrial Clothing and Suppliers Co. Ltd vs Abraham Mwakitalu and others* (Land Review 1 of 2023) [2023] TZHC 18816 (6 July 2023), Nongwa J held that since a practising certificate expires on the 1st February of any year in light of section 38 (1), the appearance of uncertificated advocate on 8th February 2023, rendered the proceedings a nullity:

> The above provision presupposes that a valid practising certificate once issued it expires on the 1st day of February the following year. Let us assume the practising certificate is issued on 1/1/2021 then it will expire on 1/2/2022 that is in accordance with the proviso to subsection (1) of section 39 of the Advocate Act.

Implicit in this decision is that the proviso to subsection (1) of section 38 enacts a grace period. In *Wellworth Hotels and Lodges Ltd vs East Africa Canvas Co Ltd and Others* (Commercial Case 5 of 2020) [2020] TZHCComD 2048 (22 September 2020), there was an objection against the plaintiff's advocate on the ground that he had not renewed his practising certificate for the year 2020 at the time he drafted and filed the plaint on 20th January 2020. Since the plaintiff's advocate renewed his practising certificate on 3rd

February, 2020, Nangela J held that he was unqualified person who could not benefit from the grace period enacted in the proviso:

> And, as correctly argued by the learned counsel for the 4th and 5th Defendants, although section 38 (1) and (2) of Cap.341 [R.E.2019] gives a grace period of renewal of one's certificate of practice up to the 1st February of each year, with retrospective renewal validity effectively from the 1st day of January, unfortunately...[the plaintiff's counsel] cannot benefit from it because, his certificate was renewed on the 3rd day of February.

The two authorities of this Court are to the effect that the proviso to section 38 (1) creates a grace period during which an advocate who in the preceding year had a practising certificate.

Fortunately, this issue has been decisively dealt with in the leading case *of Prof Syed Huq v Islamic University in Uganda* [1995–1998] 2 EA 117 of the Supreme Court of Uganda whose majority decision was adopted in *Edson Mbogoro*. In *Huq*, none of the advocates from the firm respresenting the appellants had renewed their practising certificates at the time of extraction of the decree subject to appeal on 2nd August 1985. It was argued that for this the appeal was liable to be struck out as incompetent. The respondent sought to rely on the provisions of section 14 (1) of the Advocates Act 22 of 1970 on the ground that legal practice by uncertificated advocates amounts to an offence. Section 14 (1) criminalises practice without a valid practising certificate but contains a proviso barring prosecution for uncertificated advocates who practises between January and February after the expiry of their certificates on 31st December of the preceding year. The Supreme Court held that acts

done during the grace period were valid and Wambuj CJ summarised the legal position in these terms [at page 131]:

> On the law and the authorities I have referred to the position appears to be:
>
> (1) That an advocate is not entitled to practice without a valid practicing certificate;
>
> (2) That an advocate whose practicing certificate has expired may practice as an advocate in the months of January and February but that if he does so he will not recover costs through the Courts for any work done during that period. The documents signed or filed by such an advocate in such a period are valid;
>
> (3) That an advocate who practices without a valid practicing certificate after February in any year commits an offence and is liable to both criminal and disciplinary proceedings (see sections 14 and 18 of the Advocates Act). The documents prepared or filed by such an advocate whose practice is illegal, are invalid and of no legal effect on the principle that Courts will not condone or perpetuate illegalities.

The expression "grace period" famously known as the "day of graces" in English Law has been defined by Bruke J in *Jowitt's Dictionary of English Law*, Vol 1: A-I, 2nd edn, London: Sweet and Maxwell, 2010 as being:

> days allowed for making a payment or doing some other act after the time limited for that purpose has expired.

The purpose of the grace period, as stated by the Supreme Court of Uganda in *Alfred Olwora v Uganda Central Co-operative Union Ltd*, Civil Appeal No 25 of 1992 (UR), is:

> ....to enable advocates to renew their certificates by completing all formalities like inspection of Chambers which they have to go through before their certificates are renewed The period was also intended to

enable their clients and the general public to benefit from the legal services of advocates without abrupt disruption.

For these reasons, I have come to the conclusion that acts done by uncertificated advocates during the grace period are valid provided that in the preceding year they possessed a valid practising certificate and renewed them prior to the expiry of the grace period. As advocate Njelu satisfied both conditions, I hold that he was not unqualified person and the documents he prepared are valid before this Court.

Having rejected the Applicants' argument on locus standi, I now proceed to consider the main points of the preliminary objection raised by the respondents.

The learned advocate Njelu argued that the statements in seven paragraphs of the affidavit in support of the chamber summons are based on hearsay evidence and should be expunged and the application be struck out with costs. The learned Advocate stated that the statements in these paragraphs which are sworn by Advocate Baraka, are derived from the applicants which the latter advocate believed them to be true. Mr Njelu contended that the supporting affidavit contravened the provisions of Rule 3 (1) of Order 19 of the Civil Procedure Code [Cap 33 Re 2019] because Advocate Baraka has not stated on what grounds he believed the information to be true. It was the view of the learned counsel Njelu that there should have been additional affidavits from the applicants themselves authorising Advocate Baraka to swear on their behalf. For this reason, Advocate Njelu argued that the affidavit contains hearsay evidence which is inadmissible.

The learned Advocate Njelu argued further that an advocate who swears on information given by clients assumes two roles: an advocate and a witness. To buttress up this argument, he sought to rely on two decision of this Court, namely: *Said Salim Hamdun and Two Others v Administrator General* (Misc Civil Application 267 of 2022) [2022] TZHC 14099 (26 October 2022) and *Joseph Peter Daudi and Another vs Attorney General and Others* (Misc Land Application 447 of 2020) [2021] TZHCLandD 127 (9 March 2021).

In response, the learned counsel Masami argued that the provisions of Rule 3(1) of Order 19 recognises two sets of facts that can be made in affidavits. An affidavit may be based on facts which form part either of the deponent's personal knowledge or belief. The learned counsel stressed that facts in affidavits in support of interlocutory applications may be based on the belief of the deponent. Since the affidavit in the present application is for an order of temporary injunction, it was proper to set out in the affidavit statements based on the advocate's belief. Mr Masami noted in such cases it was not necessary to state reasons for belief. He distinguished the two cases cited in so far as they did not address the permission to set out facts based on the deponent's belief in interlocutory applications.

There is no doubt that the present application is wholly based on information received from the applicants as to the nature of the dispute for which they are seeking an order of temporary injunction. In the present application, the source of information is disclosed to be the applicants themselves. The question then is whether disclosure alone was sufficient. To

start with, the proviso to sub-rule (1) of Rule 3 imposes an additional condition to the effect that the grounds of belief must be stated in the affidavit.

An affidavit that is based on statements that the declarant believes to be true is widely referred to as one based on information. Such information has been declared by courts to be hearsay evidence: *Mustafa Raphael v Eastern Africa Gold Mines Ltd*, Civil Appeal 40 of 1998, Court of Appeal of Tanzania at Dar es salaam (2002); *Corigrain (UK) Ltd v Korea Nanyang Trading Corporation*, Civil Case 146 of 1989, High Court of Tanzania at Dar es Salaam (1989) (unreported).

Despite the broad wording of Rule 3(1) of Order 19 of the Civil Procedure Code tending to authorise the use of "information" in interlocutory applications, judicial approach has been more restrictive and confines its application to interlocutory applications that do not decide rights of the parties. As stated in Mulla DF, *Mulla: Code of Civil Procedure*, 18th edn (Prasao BM and Mohan BM), Vol 2, Haryana: Lexis Nexis, 2011, at 2257:

> ...For the purpose of this rule [Order 19 Rule 3(1)] those applications are interlocutory applications which do not decide the rights of the parties.

Hearsay evidence is admissible in interlocutory applications "which hardly require proof": *Rev. Christopher Mtikila and Another v the Hon Attorney General and Another*, Civil Appeal 28 of 1998, Court of Appeal of Tanzania at Dar es Salaam (1995) or which are merely "formal or non-contentious matters of law": *Hon Zito Zuberi Kabwe (MP) v the Board of Trustees, Chama cha Demokrasia na Maendeleo and Another*, Civil Case 270, High Court of Tanzania at Dar es Salaam (2014). The law does not allow "a party to prove

his case by hearsay evidence": *Rev. Christopher Mtikila and Another v the Hon Attorney General and Another*, Civil Appeal 28 of 1998, Court of Appeal of Tanzania at Dar es Salaam (1995)

As a consequence, there are two restrictive principles which govern affidavits based on information. First, counsel's affidavit on behalf of their clients should be limited to facts which they have personal knowledge as was stated in *Lalago Cotton Ginnery and Oil Mills Co Ltd v The Loans and Advances Realization Trust (LART)*, Civil Application 80 of 2002, Court of Appeal (2002).The second principle is that before an affidavit, based on information, can be acted upon both the source of information should be disclosed and such affidavit must be supported by the affidavit of the person who is the source of the information. One of the leading Court of Appeal cases on this principle is *Salima Vuai Foum v Registrar of Cooperative Societies and Three Others* [1995] TLR 75. In this case the Court of Appeal upheld the ruling of the High Court of Zanzibar that an affidavit that does not disclose the sources of information stated in was defective. In a judgment delivered by Lubuva JA, the Court of Appeal summed the legal position thus [at page 78]:

> The principle is that where an affidavit is made on an information, it should not be acted upon by any court unless the sources of the information are specified....

The second aspect of the principle has been stated in several cases including *Stephen Wasira v. Joseph Warioba* [1997] TLR 205 and *Francis M Njau v Dar es Salaam City Council*, Civil Appeal 28 of 1994, Court of Appeal of Tanzania at Dar es Salaam (1995) (unreported). In *Francis M Njau*, an advocate swore an affidavit in support of an application to set aside an ex

parte order that allowed the respondent to prove its case *ex parte*. Part of the affidavit stated that he was unaware of the hearing date because he was not informed by the aadvocate who held on his behalf and his secretary had forgotten to make an entry in his court diary. The High Court held that the affidavit was defective and could not be acted upon. On appeal to the Court of Appeal, it was held the failure of the secretary of the advocate to make an entry in a court diary was not a fact within the personal knowledge of the deponent:

> The secretary did not file an affidavit and this is what RUBAMA J said offended our decision in *Malima*. [Counsel's] stand is that he testified to matters entirely within his knowledge. That is definitely true with respect to the fact his court diary was blank. But when [counsel] offered an explanation why the diary was blank, that is, because his secretary forgot to make an entry, then that was not a matter within [counsel's] knowledge. The secretary had to testify as to how she came to know of the date of the hearing, whether or not it is her duty to make entries in the court diary and whether or not she had forgotten to do so in the present case. That is certainly an omission which nullified the affidavit.

In *Hon Zito Zuberi Kabwe (MP) v the Board of Trustees, Chama cha Demokrasia na Maendeleo and Another*, Civil Case 270, High Court of Tanzania at Dar es Salaam (2014), there was an application for an order of temporary injunction pending the hearing of the main suit in relation to the removal of the applicant from party leadership positions and actions regarding his membership. During the hearing, there was one objection that part of the counter affidavit contained hearsay evidence. However, the trial judge, his Lordship Utamwa directed the parties to address him on the "propriety of the counter affidavit as a whole being sworn by... [counsel] for the respondents." Having heard arguments from both sides, Utamwa J agreed that on the authority of *Lalago's* case (which is cited above) counsel can swear affidavit on

behalf of their clients but only on matters of personal knowledge they obtained in their capacity as advocates. It is not, his Lordship held, within the counsel's mandate to swear substantive evidence on behalf of their clients in order to establish right or deny liability. For these reasons, Utamwa J struck out the respondent's counter affidavit and proceeded to determine the application as unopposed

In light of the above exposition of the law, it follows that the affidavit in support of the present application is based on inadmissible hearsay evidence and is hereby struck out.

I am aware that it is at the discretion of the court to allow amendment of an affidavit if its defects are not material. In the application before me, the offending paragraphs constitute the substantive part of the applicants' affidavit and the affidavit cannot be salvaged.

Having struck out the applicants' affidavit and leaving intact only one paragraph, I proceed to uphold the preliminary objection and struck out the application. As the documents in this application were prepared by uncertificated advocate during the grace period, I make no order to costs. It is so ordered.

Dated at Babati this 18th February 2024

F.M. Mirindo

JUDGE

18/02/2024

Court: Ruling delivered in chambers this 19th day of February 2024 in the peesence of the Applicants' advocates Mr Baraka Sulus assisted by Advocates Moses Sirili Masami and Advocate Alexander Williams Shillah, and Mr Bonaventura Steven Njelu, Advocate for the Respondents.

F.M. Mirindo

JUDGE

19/02/2024