

IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
IRINGA SUB-REGISTRY

MISC. ECONOMIC CAUSE NO. 10 OF 2018
(Originating from Iringa District Court, Economic Crime Case No. 42 of 2017)

1. SPEDITO PASCAL TWANGE

2. PIUS JOSEPH BILALI

3. DAMAS KATROSI IPELELE

VERSUS
REPUBLIC

RULING

The above named applicants Spedito Pascal Twange (1st applicant), Pius Josepha Bilali (2nd applicant) and Damas Katrosi Ipelele (3rd applicant) are applying to this Court to be granted bail, by way of a chamber summons supported by a joint affidavit sworn by all the applicants. The application cited section 29(4)(d) and section 36(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 and section 148 (1)(2)(3) of the Criminal Procedure Act, Cap 20 RE 2002 and Rule 6 of the Economic and Organized Crimes Control (The Corruption and Economic Crime Division) (Procedure) Rules 2016, GN No. 267 of 2016.

The Respondent Republic filed counter affidavit sworn by Blandina Manyanda, learned State Attorney and a notice of preliminary hearing. The objection raised was

to the effect that the application is improperly before the Court for failure to comply with mandatory provision of section 44(2) of the Advocates Act, Cap 341 RE 2002. In their submissions that amplified on this preliminary objection, the learned State Attorney representing the respondents Ms. Blandina Manyanda contentions was that, the applicants chamber summons and joint affidavit failed to comply to the section 44(2) of the Advocates Act, because whilst the drawn and filed area in the chamber summons and affidavit had their names, there was no endorsement, a requirement of the stated provision. That this was a contravention of the law which rendered the application defective and therefore incompetent and should therefore be struck out.

In response, the applicants, having gone through the chamber summons and the affidavit conceded to the fact that the place where it is written drawn and filed, though it contains their names their is neither signature or any other endorsement. But they asserted that they were assisted to prepare the documents by prison officials - lawyers, and they were directed places and areas to sign and are not conversant on the need to sign at the drawn and filed areas. They requested the Court to assist them and find the defect minor and consider the fact they have been imprisoned for a long time.

We have considered the submissions by the applicants and the respondents, and we first, find that the preliminary objection is a point of law and therefore we proceed to determine it. We find that there is not dispute that the chamber summons and the affidavit before the Court, on the part of drawn and filed, there is no endorsement of the applicants only their names, the applicants have also conceded this fact. The underlying issue for consideration then is, first, whether failure by the applicants to endorse the field of drawn and filed in the affidavit and chamber summons is in contravention of section 44(2) of the Advocates Act, Cap 341 RE 2002.

We had an opportunity to peruse through the contents of section 44(2) of the Advocates Act, and we find that from the reading of the section, it has to be read together with section 43 of the Advocates Act, Cap 341 RE 2002. In this case it is the applicants themselves who have put their names as the one to have drawn and filed and thus do not come within the ambit of those prescribed in section 43 of the Advocates Act, since it themselves whose names are there and not someone else who is to be paid, therefore strictly speaking we find this provision does not apply to this case. For the sake of argument on the other hand, even if it was to be argued that section 44(2) has not connection to Section 43 of the Advocates Act, since section 43 is referred in section 44 (1) and not 44(2) of the Advocates Act, the next issue for consideration is whether reading through section 44(2) of the Advocates Act, one can say the endorsement prescribed thereto is mandatory, that is, it is couched in mandatory terms.

There is no doubt that vide Section 53(2) of the Interpretation of Laws Act, Cap 1 RE 2002, where a section uses the word 'shall' it means, it must be performed. Case law has established that this is not the case in all matters. The Court of Appeal in Criminal Appeal No. 118 of 2010, *Bahati Makecja vs. R* (unreported), considered the ramifications of the word "shall" in section 293(2) of the Criminal Procedure Act, read along with section 53(2) and section 2(2)(a) and (b) of the Interpretation of Laws Act, and concluded that the word "shall" in the CPA was not imperative, but relative to the provisions of section 388 of the CPA and stated that: "*what this decision means is that:*

(i) Section 53(2) of the Interpretation of Laws Act should always be read in conjunction with section 2(2) of the Act

(ii) Section 53(2) of the Act only applies where a particular Act or written law does not provide to the contrary or if by its contents, its application (i.e section 53 (2) would defeat the purpose of the particular written law or would be inconsistent with such law".

This means that the construction of the word shall should be in light of the above findings and directives of the Court. Therefore taking all this in context it is clear that the word

"shall" in section 44(2) of the Advocates Act has to be interpreted in the light of whether non compliance in endorsing the relevant documents hinders the better performance of duties of the Court in effect hinders substantial justice, which we find may not be the case in every circumstances.

Consequently, we find that the circumstances of this case for the reasons stated herein are not mandatory to the applicants, being the ones whose name appear and also in the interest of justice. Consequently, we hold that the preliminary objection fails, since the non signing or endorsement in this case we find curable under the circumstances and in the interests of justice. Since the applicants have prayed for this, we grant their prayers to endorse whereabouts their endorsements are required in the chamber summons and affidavit. Ordered.




Winfrida B. Korosso

Judge

4th July 2018