IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

IRINGA SUB-REGISTRY

MISC. ECONOMIC CAUSE NO. 11 OF 2018

(Originating from Iringa District Court in Economic Case No. 1 of 2018)

1. DAUDI YEREDI NYUNGU

2. KANYANGA MSOMBE

VERSUS

REPUBLIC

RULING

This Ruling is against a Preliminary Objection raised by the Respondents challenging the competency of an application before the Court, filed by the above named applicants. The application by the applicants is filed pursuant to section 29(4) and 36(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 (EOCCA) using chamber summons supported by a joint affidavit sworn by the applicants. The applicants seek to be admitted to bail pending trial. The applicants face charges at the District Court of Iringa, in Economic Case No. 1 of 2018.

The respondents on service of the application filed a counter affidavit sworn by Blandina Manyanda, Learned State Attorney challenging most of the applicants

averments to strict proof. The counter affidavit was filed together with a notice of preliminary objection that states that the application is improperly before the Court for failure to comply with the mandatory provision of section 44(2) of the Advocates Act, Cap 341 RE 2002, and thus prayed for the application to be struck out.

The Court upon being satisfied that the preliminary objection is a point of law within the ambit of the principle expounded in ***Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors*** **Ltd.** (1969) EA 696, when the Court of Appeal held:

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit".

The Court upon being satisfied thus, proceeded to first hear and determine the submissions related to the raised preliminary objection. For the Respondent Republic the argument being that the chamber summons and the affidavit filed by the applicants are improper and defective for failure to endorse or sign where it states drawn and filed, contrary to what is provided in section 44(2) of the Advocates Act, Cap 341 RE 2002. That such failure cannot be cured since it renders the chamber summons and affidavit incompetent and the only available remedy is for the application to be struck out.

On the part of the applicants, they did not have much to say being laymen, stating that what they knew is that they signed where they were directed to by the Prison lawyers and thus if they are places important and have not been signed it was not from negligence or not wanting to sign. They prayed for the

Court to assist them and allow them to sign those places which they were being told they have not signed and the matter proceed with hearing. Arguing that they have been imprisoned for a long time. The Respondents Republic counsel's rejoinder was to reiterate what they had submitted in chief.

We find it important to state that looking at the chamber summons and the affidavit, there is no doubt that at the end of the documents were it is written drawn and filed, the names of the applicants appear but there is no signature or endorsement. This fact has also not been disputed by the applicants.

Importing section 44(2) of the Advocates Act, Cap 341 RE 2002 it states:

"*It shall not be lawful for any registering authority to accept or recognise any instruments unless it purports to bear the name who prepared it endorsed thereon*".

We find that section 44(2) has to be considered in the context of section 44 (1) which refers to section 43 of the Advocates Act. Therefore when section 43 read together with section 44 of the Advocates Act one finds that the requirement for endorsement is only where an instrument is prepared by any unqualified person for a fee or gain as outlined under section 43 of the Advocates Act.

This being the case, we find it important to also consider whether section 44(2) of the Advocates Act under scrutiny, is couched in mandatory terms to render non compliance fatal. In the instant case the document reveals that it was prepared by the applicants themselves. We also find that section 44(2) is not couched in mandatory terms by virtue of the fact that, the provisions does not enforce a duty. It is true that the word "shall" is there in section 44(2) of the Advocates Act, Cap 341 RE 2002 and it is true that section 53(2) of the Interpretation of Laws Act directs that whenever the word "shall" is used in any written law, it means that

function must be performed. But as held in Civil Appeal No. 35 of 2009, ***Attorney General and another vs. National Bank of Commerce Ltd,*** that; *"But section 53(2) of the Interpretation of Laws Act, should not be read in isolation from section 2(2) of that Act.*

Section2(2) provides:

"The provisions of this Act shall apply to and in relation to every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act unless in relation to a particular written law or document:

(a) Express provision to the contrary is made in an Act

(b) In the case of an Act the intent and object of the Act or something in the subject or content of the Act is inconsistent with such application or,

(c) In the case of subsidiary legislation the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application".

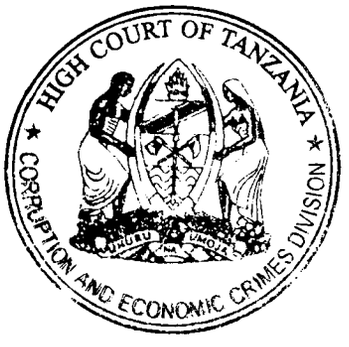
The Court of Appeal made reference to another decision of the full bench of the Court of Appeal in Criminal Appeal No. 118 of 2010 (unreported) ***Bahati Makeja vs R,*** *"considered the ramifications of the word "shall" in section 293(2) of the Criminal Procedure Act, read along with section 53(2)and 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. Stating that what this decision meant 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 in consistent with such law".

Applying this principle to the provisions under discussion we find this is not the case and thus we find the applicants failure to endorse upon writing their names in the chamber summons and affidavit in the current application, for reasons stated above is not fatal and therefore it is curable. Therefore the preliminary objection falls.

The applicants have prayed to the Court to allow them to endorse chamber summons and the affidavit, we find that having regard to the circumstances of the case, granting the prayer will not occasion any injustice. The applicants can proceed to endorse the documents and the matter application proceed with hearing.



Winfrida B. Korosso
Judge
4th July 2018