

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

**MISC. ECONOMIC CAUSE NO. 7 OF 2018**

(Originating from Iringa District Court, Economic Crime Case No. 02 of 2018)

**1. RASHID MOHAMED MBEDULE**

**2. KENETH MGWAMA**

**3. PAUL LIHO**

**VERSUS**

**REPUBLIC**

The Ruling relates to a preliminary objection raised by the respondents challenging the competency of the application before the Court filed by the above named applicants by way of chamber summons supported by a joint affidavit sworn by the applicants pursuant to section 29(4)(d) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002 (EOCCA). The applicants sought relief is that they should be admitted to bail pending determination of the main case. The notice of preliminary objection was filed together with the counter affidavit filed by the Respondent Republic.

The gist of the preliminary objection is that the application is incompetent before the eyes of the law as both the chambers summons and the affidavit in support thereof have been drafted and filed in court in disregard of the mandatory

provisions of section 44(2) of the Advocates Act, Cap 341 RE 2002 and the respondents thus prayed for the application to be struck out.

It should be borne in mind that apart from the preliminary objection the Court raised the following issues and invited the parties to address it. First is whether the fact the applicants have only cited section 29(4)(d) of the EOCCA to move the Court has any implications to the competency of the application. Second, whether the title of the application, written as Misc. Criminal Cause contravened Rule 6 of the of the Economic and Organized Crimes Control (The Corruption and Economic Crime Division) (Procedure) Rules 2016, GN No. 267 of 2016 which prescribed how the title should be addressed and the consequences for failure to comply with Rule 6 of the Court Rules. The third matter raised by the Court was with the name Rashid Mohamed Mbedule, whether the 1st applicant was a christian as averred in the affidavit and if so the effect of him swearing and the consequences thereto.

Before we venture into consideration of the submission by the parties, it is important to note that the 1st applicant stated in Court that despite his names, that is, Rashid Mohamed, which could be taken to be Moslem names, he is a Christian hence he swore the affidavit and what is reflected in the joint affidavit is the correct position. With that clarification, the Court proceeded to close the third issue by making a finding that the 1st applicant is a Christian and to close the issue for discussion upon clarification from the 1st applicant.

In amplifying their preliminary objection the learned State Attorney representing the Respondent Republic stated that the application before the Court is in contravention of the law since the chamber summons and the affidavit have not been signed or endorsed by the authors of the documents as expounded vide section 44(2) of the Advocates Act, Cap 341 RE 2002. That the signature of a person

drawing a document to be filed in court is essential and where there is failure to do so it renders such document defective and incompetent and therefore it should be struck out. On the matters raised by the Court, the respondents submitted that failure to cite section 36(1) of the EOCCA is fatal since it leads to no other conclusion but that the applicants have failed to properly move the Court to hear and determine the application since both section 29(4)(d) and 36(1) of EOCCA have to be cited. On the second issue of titling of the application as "*Misc. Criminal Cause*", whether it was in contravention of Rule 6 of the Court Rules, the Learned State Attorney said this was not proper and thus rendered the application incompetent.

On the side of the applicants, who appeared in person without any representation, they submitted that they had nothing important to allude to with regard to legal provisions, seeking guidance and assistance from the Court. The applicants stated that, it is the Prisons officers who had assisted them in drafting the chambers summons and affidavit and directed/shown them where to sign, therefore they did not know the places which they were supposed to sign and did not sign. Their expectations were that their application is in compliance with the laws.

We have considered all the submissions before the Court. Starting with the preliminary objection raised by the respondents, we find no dispute that the application lacks endorsement or signature on the names of those who have drawn and filed the chamber summons and the affidavit. We have gone through the provisions of section 44(2) of the Advocates Act, Cap 341 RE 2002 and find that, starting with section 44(1) which shows that the contents therein are subject to consideration of section 43 of the Advocates Act. There is no doubt that the applicants will not fall within the ambit of section 43 of Advocates Act being the applicants themselves. Taking this, the second aspect is whether section 44(2) of the Advocates Act, is couched in mandatory terms. We are aware of the provisions of

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. As can be seen from decisions from the Court of Appeal 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 of the Court. Therefore we find having regard to all obtaining factors including the fact that the documents challenged have signatures of the applicants by way of thumbprint, we find 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 derogates the better performance of duties of the Court in effect hinders substantial justice, which we find may not be the case in every circumstances. Therefore, we find that the circumstances of this case for the reasons stated herein, the provision cannot be said to be mandatory to the applicants, being the ones whose names appear in the chamber summons and the affidavit. Therefore we find the objection raised falls by reason that the defect is curable.

We move to the issue of failure to comply with Rule 6 on titling of the application, we are aware that Rule 6 uses the word shall. Taking into consideration all the factors, we find that this falls within the ambit where the word shall might not mean mandatory since the purpose is for consistency in application, and it does not provide a duty as such. We find the error curable.

Moving to the second issue raised by the Court failure to cite section 36(1) of the EOCCA. In **DPP vs Li Ling Ling**, Criminal Appeal no 508 of 2015 (unreported) the Court of Appeal (at pg. 11) stated:

*"It is the position of the law that in an economic crime case, matters of bail are governed by ss. 29 and 36 of the Act. Whereas s.29 empowers the courts to entertain bail applications, s.36 provides for the manner in which such power should be exercised. In principle therefore, the two sections must be applied together when an application for bail is under consideration".* The Court of Appeal then considered and adopted the holding in the case of *Edward D. Kambuga* (1990) TLR 84, where this Court stated as follows:-

*"We agree with Mr. N.D. who argued for the Republic that sections 29 and 35 [now 36] serve different purposes. Section 29 provides the powers to grant bail in economic case whereas section 35 lays down the extent to which that power should be exercised. The two sections should therefore be read and applied in tandem. They cannot be separated.."* The Court of Appeal in **DPP vs Li Ling Ling** (supra) went on: *"Section 36 of the Act which provides for the right to bail also lays down the conditions governing grant of bail."*

From the holdings above, it leaves no doubt that when applying to be granted bail, for persons charged with economic offences it is necessary to cite the two provisions. This being the case what is the consequence of failure to cite both

provisions? There are various cases which have considered this. In this Ruling, our concern is non citation of a relevant provision, we find pertinent to be guided by the decision in Civil Application No. 3 of 2015, **Elly Peter Sanya vs. Ester Nelson** (unreported) Court of Appeal Mbeya, held: "*In our jurisprudence, it is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent (Robert Leskar vs Shibesh Abebe, Civil Application No.4 OF 2006 (unreported).*

The above decisions shows the importance of citing both section 29(4)(d) and 36(1) of EOCCA to be seen as having properly moved the Court to hear and determine an application for bail for an economic offence, therefore failure to do so without doubt renders failure to properly move the Court. Rules are there to bring consistence and certainty and to be followed. This is being the case, there is no other root to undertake but to find the application incompetent for failure to properly move the Court to hear and determine the application. The application is therefore struck out. Ordered.



Winfrida B. Korosso  
Judge  
4th July 2018