

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMEMRCIAL APPLICATION NO.68 OF 2021**

**BETWEEN**

**FURAHA TRADING COMPANY LIMITED ..... APPLICANT**

**AND**

**AFRI TEA AND COFFEE**

**BLENDERS (1963) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**YUSUF MULLA ..... 2<sup>ND</sup> RESPONDENT**

**SHAIN POYARRA ..... 3<sup>RD</sup> RESPONDENT**

**Date of Last Order:08/07/2021**

**Date of Ruling: 06/08/2021**

**RULING**

**MAGOIGA, J.**

The applicant, FURAHA TRADING COMPANY LIMITED by way of chamber summons has moved this court to be pleased to grant the following orders, namely:

- a. Leave be granted to the applicant to appeal to the Court of Appeal of Tanzania against the Final Orders by the High' Court of Tanzania, (Commercial Division) delivered by Hon. Magoiga, J. on 23<sup>rd</sup> April, 2021;

b. The costs of this application be in the cause

The chambers summons was accompanied by the affidavit of Mr. Anthony Fernandes stating the reasons why this application should be granted.

Upon being served with the chamber summons and accompanied affidavit, the respondents filed a counter affidavit of Mr. Abdulhakim Abdulrahim Mulla stating the reasons why this application should not be granted. Simultaneously, the learned advocate for the respondent raised three set of preliminary objection on points of law to the effect that:

1. The application is bad in law in that the Chamber summons is supported by an affidavit which was attested by a person not qualified to practice as Commissioner for Oaths in Tanzania mainland thus contravening section 3(1) (b) and 4 of the Notary Public and Commission for Oaths Act, [Cap 12 R.E 2019;
2. That the name of the 1<sup>st</sup> respondent in the application is not that of the 1<sup>st</sup> respondent which featured in the petition and proceedings before this court in Miscellaneous Commercial Cause No. 44 of 2017;
3. That the affidavit of Anthony Fernandes is defective for being admitted before this honourable court on a different date from that of the Chamber summons.

The facts leading to this application are imperative though in brief to be stated. The applicant and 1<sup>st</sup> respondent are shareholders of Kito Trading Company Limited. In the course of their business, misunderstanding ensued as the company was being operated prejudicial to its objectives. In the circumstances, the applicant petitioned against the above named respondents praying, among others, for buying the shares held by Kito General Trading Company Limited. The 1<sup>st</sup> respondent, among others, in response counter-offered to buy the shares of the applicant after determining the net value of the company. This court, in its preliminary orders found that indeed the company was ran prejudicial to its objects, among others, and ordered that valuation be done to pave way for final orders. Upon issuance of the final orders, the applicant has preferred this application for orders as contained in the chamber summons, hence, this ruling.

The applicant is enjoying the legal services of Mr. Juvenalis Ngowi, learned advocate, while the 1<sup>st</sup> defendant is enjoying the legal services of Mr. Said Nassor, learned advocate.

The application was heard by way of written submissions and I thank and commend the learned advocates for parties' for the industrious

input on the matter. In determining the application, I will start with the preliminary objections on points of law. If the points are sustained that will mark the end of the matter. But in case I overrule the preliminary objection, I will go into the merits of the application for leave.

Mr. Nassor learned advocate for the respondents arguing first limb of objection told the court that, the affidavit in support of the application is bad for being attested by a person who do not qualify to practice as Commissioner for Oaths in Tanzania mainland contrary to sections 3(1), (b) and 4 (1) of the Notary Public and Commissioner for Oaths,[Cap 12 R.E.2019] which requires the person to have certificate to practice as Commissioner for oaths. According to Mr. Nassor, the affidavit in support of the application was attested by Mr. Ahmed Barakat an Attorney at Law in Dubai and Dubai being not a jurisdiction where Attorneys at Law are allowed to attest document to be filed in Tanzania makes the said attestation of no legal effect and renders the entire affidavit defective. In support of the point, Mr. Nassor cited the case of MILLICON (TANZANIA) N. vs. JAMES ALAN RUSSEL AND 2 OTHERS, CIVIL APPLICATION NO.44 OF 2016, DSM (CAT) (UNREPORTED) in which it was held that:

**“.. since there was no compliance with the section, in the context of Tanzania law, the court cannot take judicial notice of the seal of a Notary Public and Commissioner for Oaths of Robert Scott Kerrs as a person lawfully entitled to attest the affidavit of Martin Frechette. The affidavit of Martin Frechette is, therefore, defective for having an invalid attestation ... I uphold the preliminary objection on the attestation of affidavit of Martin Frechette and struck out the application seeking for extension of time to file revision with costs.”**

On the foregoing, Mr. Nassor urged this court to find merits in the point and strongly urged this court to strike out the application which will be rendered incompetent without proper affidavit to support it.

On the other part, Mr. Ngowi replied that looking at the point and submissions made, according to him, same do not qualify to be point of preliminary objection in the eyes of law because they are not based on a pure point of law because it needs evidence to establish it. In support of that argument he cited the famous case of MUKISA BISCUITS COMPANY LIMITED vs. WEST END DISTRIBUTORS LIMITD [1969] EA 696 in which it was held that:

**“A preliminary objection must consist of appoint of law which can be pleaded, or which arises by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit.”**

According to Mr. Ngowi in the absence of admission that a person who witnessed the affidavit is not qualified to practice in Tanzania, there would be a need of evidence from responsible officer establishing this fact. In support of that line of argument, Mr. Ngowi cited the case of NATIONAL INSURANCE CORPORATION OF TANZANIA AND ANOTHER vs. SHENGENA LIMITED, CIVIL APPLICATION NO.20 OF 2007, DSM (CAT) (UNREPORTED) in which it was held that:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion.”**

On that note, Mr. Ngowi concluded that the point do not qualify to be preliminary objection and urged this court to overrule the point and proceed to determine the application on merits.

Having carefully listened and considered the rivaling submissions and having read the authorities cited and visited the relevant laws in question, I am inclined to adopt the very issue that was discussed in the case of MILICOM (T) N.V vs. JAMES ALAN RUSSEL BELL AND 2 OTHERS (supra) for obvious reason that it was dealing with similar situation to this at hand that, **'whether this application which is accompanied by an affidavit attested in Dubai is competent?'** The attestation and oaths taking in affidavit in Tanzania is regulated by the Notary Public and Commissioner for Oaths Act, [Cap 12 R.E.20019], in particular, sections 3 (1) and (2) (a) and (b) and 4 which provide and for easy of reference I beg to reproduce hereunder.

***3. Persons entitled to practise as notaries public and commissioners for oaths.***

***(1) Any of the following persons shall, except as provided in subsection (2), be entitled to practise as a notary public and Commissioner for Oaths in Mainland Tanzania in accordance with the provisions of this Act and to levy fees in accordance with the First Schedule—***

***(a) an advocate; and***

(b) a person entitled to practise as a notary public in England, Scotland, Northern Ireland or the Republic of Ireland.

(Emphasis mine)

**Section 4. Enrolment and granting of certificates.**

**(1) Any person mentioned in section 3 who is entitled to practise as a notary public and commissioner for oaths shall, on application to the Registrar of the High Court and payment to him of the prescribed fee, and upon signing a roll to be kept by the Registrar, be granted a certificate in the form in the Second Schedule, which certificate shall, subject to the provisions of section 5, entitle him to practise as a Notary Public and Commissioner for Oaths in Mainland Tanzania so long as it is in force.**

Guided by the above section whose wording are very clear, and looking at the affidavit in dispute which do not state the qualification of the Attorney in law indeed renders the whole affidavit defective.



affidavit. In other words in the absence of affidavit there is nothing to discuss and see in the circumstances of this application which can spare it. Thus the other objection becomes nugatory in the circumstances.

In the upshot I uphold the 1<sup>st</sup> limb of preliminary objection on point of law on attestation of the affidavit of Mr. Anthony Fenandes and strike out the application seeking for leave to appeal to the Court of Appeal of Tanzania with costs.

It is so ordered.

Date at Dar es Salaam this 06<sup>th</sup> day of August, 2021.



**S. M. MAGOIGA**

**JUDGE**

**06/08/2021**