

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

MISC.COMMERCIAL APPLICATION NO.43 OF 2022

(Arising from Commercial Case No.117 of 2016)

ALOYCE KISSENGA MCHILI.....APPLICANT

VERSUS

ERICK KUNEZA RUTAKONYA1ST RESPONDENT

BEST MICROFINANCE SOLUTION LTD.....2ND RESPONDENT

GEOFFREY WILLIAM MALAMIA.....3RD RESPONDENT

VERONICA ALOYCE KISSENGA.....4TH RESPONDENT

REDMNA GINWAS HAMAY.....5TH RESPONDENT

Date of the Last order: 04/08/2022

Delivery of the Ruling: 15/09/2022

RULING

NANGELA, J.,:

The Applicant herein has approached this Court by way of a chamber summons supported with an affidavit. The chamber summons was brought under section 11(1) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019]. In her chamber application the Applicant is seeking for the following orders:

1. That, this Court be pleased to grant the Applicant extension of time within which to file a Notice of Intention to Appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania (Commercial

Division) at Dar-es- Salaam, (Hon. Songoro, J.), dated 9th March 2018 in the Commercial Case No.117 of 2016 between **Erick Kuneza Rutakonya vs. Best Microfinance Solution Limited and 40thers.**

2. Costs of this Application be in the cause.
3. Any other relief as the Court may deem fit and just to grant.

The 1st Respondent filed a counter affidavit to contest the application. The rest of Respondents did not file counter affidavits. Apart from filing his counter affidavit, the 1st Respondent did as well file a Notice of Preliminary Objection. His objections were to the effect:

1. That, subject to the provisions of Order XXIII (1) (3) of the Civil Procedure Code, Cap.33 R.E2019, this trial Court has no jurisdiction to deal with the Applicant's case, and
2. That, the Affidavit in support of the Chamber Application is defective for being verified by the Commissioner for oath who has an interest with the 3rd Respondent.

On the 23rd June 2022, the parties' advocates appeared before me. The Applicant on the material date, enjoyed the legal services of Ms Hafsa Sisya, learned advocate while Mr Francis Makota, learned advocate as well, represented the 1st

Respondent. The 2nd, 3rd, 4th and 5th Respondents were absent, unrepresented.

On the material date, this Court directed the learned advocates to dispose of the preliminary objections by way of written submissions. A schedule of filing was given and having complied with it, this Court will now consider such submissions and determine the merits or otherwise of the objections.

In his submission, Mr Makota dropped the first objection and concentrated on the second. He submitted that, his objection is based on the requirements set out in section 7 of the Notary Public and Commissioner for Oaths Act, Cap.12 [R.E 2019]. I will refer to it in brief, herein after, as "**NOPCOA**". He also relied on the case of **CALICO Textile Industries Limited vs. ZENON Investments Ltd and Others** [1999] TLR 100.

He contended that, the affidavit supporting the applicant's application has been attested by Advocate Ambrose Menance Nkwera who is also representing the 2nd, 3rd and 5th Respondents in the present matter. In view of that fact, he contended that, the law is clear, that, Mr Nkwera is disqualified from exercising the powers of an attesting officer in as far as the supporting affidavit is concerned. He contended that, such an irregularity is incurable and cannot be cured even by the oxygen principle and the matter has to be struck out for want of a proper affidavit.

In reply to the submissions by Mr Makota, it is the submission of Ms Hafsa Sisya, learned advocate for the Applicant, that, Mr Nkwera attested the affidavit prior to the case being filed in Court. She contended that, it was not in the mind of the Counsel for the Applicant to foresee that Mr Nkwera would be instructed to represent the parties to this case. She has distinguished the **CALICO Case** (supra) stating that, in that case, the affidavit was attested by a person who had interest to serve as a beneficiary of the proceeds of assets involved in the case.

Ms Sisya has urged this Court to be persuaded by the ruling of the High Court, Land Division, in the Misc. Appl. No. 116 of 2021 between **Mariam Adallah vs. Adolph Mwakanyuki**, and make a finding that Mr Nkwera has never appeared to represent any party in Court. She, as well, urged this Court to be guided by the Oxygen Principle and bail out the application since, if there be any defect; it has not gone to the roots of the application itself.

Ms Sisya found support in the case of **Madam Mary Silvarius Qorro vs. Edhith Donath Kweka and Another**, Civil Appeal No.102 of 2016 (CAT) (unreported) as well as the decision in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No.55 of 2017 (CAT) (unreported). She urged this Court to, thus, dismiss the preliminary objection.

In a brief rejoinder submission, Mr Makota rejoined by stating that, in essence, the Applicant's counsel has conceded that the Affidavit is defective having been attested by Mr Nkwera who is appearing as well for the 2nd, 3rd and 5th Respondents. He contended, however, that, the attempt by the Applicant's counsel to place reliance on the case of **Mariam Adallah vs. Adolph Mwakanyuki**, (supra) is to mislead the Court. He insisted that, the test under section 7 of the "**NOPCOA**" remains intact.

I have taken time to carefully consider the merit or otherwise of the preliminary objection which the 1st Respondent has raised. It is with no doubt that Mr Ambroce Nkwera, Advocate, was the attesting Commissioner for Oath who attested the affidavit filed by the Applicant and, that, he has also turned out to become a counsel for the 2nd, 3rd and 5th Respondent. Mr Makota has contended that, that fact alone is sufficiently fatal to the application. Ms Sisya sees it otherwise, arguing that, at the time Mr Nkwera had not been engaged to represent the 2nd, 3rd and 5th Respondents and, hence, that alone suffices to absolve him from any associated blame.

In my record, it does seem that, Mr Nkwera appeared before me twice and the third time he sent Ms Mariam Mabina who held his brief. In all these three times Mr Nkwera appeared for the 2nd, 3rd and 5th Respondents. According to section 7 of the "**NOPCOA**", the law provides as follows:

“No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is an advocate or in which he is interested.”

As it was clearly pointed out in the CALICO case (supra) the above cited provision creates two situations in which a Commissioner for oaths is disqualified, namely:

- i. S/he shall not exercise any of her/his powers in any proceedings in which he in an advocate to the parties.
- ii. S/he is also barred from exercising such powers in proceedings or matters in which he is interested.

In the present case, it is clear that Mr Nkwera exercised his powers before he was engaged as an advocate. One of the previous cases decided by this Court, and, which have had discussion centred on section 7 of the “NPCOA”, which I can rely on is that of **David W.L Read and 50others vs. The National Agricultural and Food Corporation and 50others-** Civil Case No. 51 of 1997, High Court, at Arusha (unreported).

The case involved a motion floated to the Court that the advocate who was representing one of the defendants had attested a document forming part of the pleadings. In the course of arguments, reference was made to section 7 of the “NPCOA”.

The Court deliberated on the matter and asked itself the question:

"Assuming Mr Kisusi was exercising his power as a Commissioner for Oaths...would that occasion have constituted sufficient cause in law to bar him from acting for any of the parties to it in this suit?"

In agreeing with the reasoning of Mroso, J (as he then was) in the case of **M/s Shahins Ltd vs. Everwear Ltd Arusha**, HC, Civil Case No.74 of 1987 (unreported), the Court stated as follows:

"I understand the ban in section 7 cited above refer to a situation in which **after proceeding of matter is before the Court**, an advocate exercises his powers of Commissioner for oaths knowing that he is an advocate for a party in the proceedings and (sic) matter. **The section does not impose a ban on an advocate in respect of all proceedings, past,** present or future, in which he was or will be an advocate." (Emphasis added)

Considering those words (especially those which I have laid emphasis on) in light of the present objection and the submissions made in support of it, I find that, Mr Nkwera attested the affidavit before the matter was filed in Court and

that past act cannot bar him from being engaged by the 2nd, 3rd and 5th Respondents.

In no way do I find that the affidavit is defective. What is prohibited under the Act is if the attesting officer did so after proceeding of matter is before the Court, which is not the fact in this case. For that matter, the objection does not have merit and it must fail.

In view of the above findings I will settle for the following orders:

1. That, the objection raised by the 1st Respondent is devoid of merits and is hereby dismissed with costs.
2. The parties are to proceed with the hearing of the application.

It is so ordered.

DATED ON THIS 15TH DAY OF SEPTEMBER 2022



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HON. DEO JOHN NANGELA
JUDGE