

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

LAND CASE NO. 33 OF 2020

**FATMAN ABDALLAH SALUM,
NASSOR MOHAMED NASSOR,
ABDALLAH NASSOR ALLY,
MUNDHIR MOHAMED NASSOR** (the duly
appointed Legal Personal Representatives of the late
MOHAMED NASSOR ALI alias
MOHAMED NASSORO ALI AL- ALAWY).....PLAINTIFFS

VERSUS

**MELCHISEDECK SANGALALI LUTEMA.....DEFENDANT
THE TANZANIA FEDERATION OF
COOPERATIVES LIMITED.....1ST THIRD PARTY
IMPACT PLAN ASSOCIATES.....2ND THIRD PARTY**

Date of Last Order: 07.09.2021
Date of Ruling: 04.10.2021

RULING

V.L. MAKANI, J

This ruling is in respect of a preliminary objection that was raised by the 1st Third Party that this honourable court should strike out the Amended Plaintiff with costs on account of being drawn and filed by Deogratius J. Lyimo Kiritta as an advocate who has a conflict of interest in the suit in terms of Regulation 35(1) of the Advocate

(Professional Conduct and Etiquette Regulations) (the **Regulations**) as interpreted by this court in **Misc. Cause No. 816 of 2017 in the matter of Korduni Meliyo vs. Arusha Aviation Services Limited.**

Ms. Bernadetta Shayo represented the 1st Third Party in support of the preliminary objection said according to the Amended Plaint, Advocate Deogratias John Lyimo Kirrita appears to be the advocate retained to appear for the plaintiff. She, however, pointed out that in paragraphs 8,9 of the Written Statement of Defence (the **WSD**) and Counterclaim that was filed by the Defendant, it is reflected that the said Mr. Deogratias John Lyimo Kirrita is a potential witness to the matters in controversy in the suit. She said Mr. Deogratias John Lyimo Kirrita is mentioned by name in the WSD and also in the Sale Agreement which is **Annexure MSL1** to the WSD and so he is in conflict of interest, as such he should be disqualified not only as regards the pleadings that he drew but also as regards the representation of the plaintiffs in the suit. She said Mr. Deogratias John Lyimo Kirrita belongs to be in the witness box and further that according to **Korduni Meliyo** (supra) and **Swabaha Mohamed Shosi vs. Saburia Mohamed Shosi, Civil Appeal No. 98 of 2018**

if an advocate could be summoned as a witness he should not act for a party. She said this was also stated in the case of **Marungu Sisal Estate vs. George Nicholas Efstathiou & 2 Others [2003] TLR 27**. For these reasons Ms. Shayo prayed for disqualification of Mr. Deogratias John Lyimo Kirrita from representing the plaintiffs as an advocate and the pleadings that he has filed should be expunged from the record.

In response to the preliminary objection raised, Mr. Deogratias John Lyimo Kirrita for the plaintiffs pointed out that the objection raised is not purely an objection on a matter of law but requires further evidence as the court must revisit the facts that are adduced in paragraphs 8,9 as well as Clauses 2(d) and 17 of the Sale Agreement. He said the objection does not fall within the ambit of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696**. He said while Ms. Shayo's proposition that he belongs to the witness box might be possible, but it cannot be sorted out by way of preliminary objection but shall only occur once the advocate for the plaintiff is called as a witness.

Mr. Deogratias John Lyimo Kirrita distinguished the case of **Kordduni Meliyo** (supra) saying in that case the advocate for the respondent was also a shareholder and so he was likely to be called as a witness. He also said in the case of **Marungu Sisal Estate Limited** (supra) is also distinguishable as the advocates involved were also Receivers and Managers of the plaintiff. Mr. Deogratias John Lyimo Kirrita went further to say that the basis of the objection is anticipatory and presumptive that the advocate for the plaintiff would be called as a witness. But this is not the case because until he is called as a witness there can be no violation of any rule of practice. He relied on the case of **Jafferli & Another vs. Barroisaw & Another (1970) HCD 324** which was cited in the case of **Mohamedali S. Mohamedali vs. Mohamoud Mwemusi Chotikunga & Another, Misc. Civil Application No. 9 of 2021(HC-Mtwara)**(unreported). He also relied on the case of **David W.L. Read & 3 Others vs. The National Agricultral & Corporation & 5 Others, Civil Case No. 51of 1997, Amir Abdallah Kilindo vs. Global Securities Finance & Insurance Limited, Civil Case No. 220 of 2002.**

As to the prayer that the Amended Plaint should be struck out, Mr. Deogratias John Lyimo Kirrita stated that the learned Advocate for

the 1st Third Party did not advance any reason for such discourse. He however, observed that the pleadings do not belong to the advocate but to the parties in the suit, and when an advocate, for instance, withdraws from the conduct of the suit for whatever reasons, the pleadings remain property of a party to the suit. He thus said the withdrawal of the advocate which should be in the witness box would not affect the pleadings of the plaintiffs.

Without prejudice to the submissions above, Mr. Deogratias John Lyimo Kirrita informed the court that upon the determination of the objection either way, he, Mr. Deogratias John Lyimo Kirrita intends to withdraw from the conduct of the case as an advocate and take the witness box. He said the position has been necessitated by the demise of the plaintiff, and the appointed administrators of estate recently joined as parties to the case are not very conversant with the facts of the case. He said it is also for interest of justice that the court would be presented with direct evidence.

In a brief rejoinder Mr. Sylivester Shayo for the 1st Third Party said since Mr. Deogratias John Lyimo Kirrita has in his last paragraph of the submissions stated that he intends to withdraw from the conduct

of the case and take the witness box, then the court should make a finding that the plaintiff concedes to the preliminary objection and that his advocate will take the witness box.

I have gone through the submissions by Counsel for the 1st Third Party and the plaintiff. Indeed, according to the last paragraph of the plaintiffs' submissions it is apparent, despite the reasons given, Mr. Deogratias John Lyimo Kirrita is ready to withdraw from the conduct of the case so that he takes the witness box. However, on the other side, Mr. Shayo did not address the issue as to whether the pleadings filed by Mr. Deogratias John Lyimo Kirrita were tenable. In my considered view, and as correctly said by Mr. Deogratias John Lyimo Kirrita, the withdrawal of the advocate would not affect the pleadings drawn and filed by him as pleadings do not belong to the advocate but to the parties unless the advocate who did the drawing and filing of the said pleadings is not on the roll. It is also obvious that Mr and Ms. Shayo did not find it necessary to respond to the arguments raised on this issue in the rejoinder, hence in a way they agreed that there was no need to expunge from the records the pleadings already filed in court.

In the result the preliminary objection succeeds in part that Mr. Deogratias John Lyimo Kirrita shall as of this date withdraw from the conduct of this case and may appear as a witness to support the plaintiffs' case. The pleadings drawn and filed by him on behalf of the plaintiffs shall remain on record. Costs shall be in the cause.

It is so ordered.


V.L. MAKANI
JUDGE
04/10/2021

