

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO.281 OF 2016

PAULO JOSEPH MNYAVANO.....APPLICANT

VERSUS

ANDREW MKANGAA RESPONDENT

RULING

Date of Last Order: 12/03/2018

Date of Ruling: 25/05/2018

L.L.Mashaka, J.

This Ruling is in respect of the legal issue raised by the Court *suo motu* upon Counter Affidavit opposing this application for revision filed by the applicant. The issue was whether Counter affidavit has properly moved the Court in terms of Section 44 (1) of the Advocates Act, Cap 341, R.E 2002 for lack of name of drawer.

The applicant was represented by Mr. Selemani Almasi, Advocate while Mr. Abdallah Shaibu, Advocate represented the respondent.

Learned Counsel for the respondent submitted that Section 44 of Cap 341 R.E 2002 has to be read together with Section 43 of the same Act. That Section 43 has highlighted that the requirement of endorsing a name is when it is prepared by unqualified person.

Following that response, the Court granted the respondent to file written submission on the same. Both respondent and applicant had to file written submission. According to the schedule order. However the applicant did not file reply to the respondent's submission as ordered.

The respondent stated reproducing the provisions of Section 44(1) of the Advocates Act that:-

"every person who draws or prepares any instrument in contravention of Section 43 shall endorse or cause to be endorsed thereon his name and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings."

That the wording of Section 44 of the Act implies that it has to be read together with Section 43 of the Act which provides that:-

"Any unqualified person who, unless that the act was done for, or in expectation of any fee, gain or reward either directly or indirectly, draws or prepares any instrument

(a) Relating to movable or immovable property or any legal proceeding.

(b)

(c)

shall be liable on conviction to a fine not exceeding one million shillings or twelve months imprisonment or both shall be incapable of maintaining any action for any costs in respect of drawing or preparation of such instrument or any matter connected therewith."

That their understanding was that the requirement of that provision of endorsement is only where an instrument is drawn by an unqualified person in expectation of a fee or gain. That in their case the Advocate drew Counter Affidavit and according to Section 44 of the Advocates Act, an Advocate does not fall under the category of an unqualified person thus it was not mandatory to endorse the Advocate's name as the drawer of the instrument and as a matter of fact advocates are not the category of people targeted under Section 44.

He referred this Court to the case of **Shayaan Filling Station Vs. Maheri Wambura Sogon**, Tribunal Appeal No. 6 of 2011, that:-

"However under Section 43 read together with Section 44 of the Advocates Act, the requirement for endorsement is only where an instrument is prepared by any unqualified person for fee or gain."

Also in the case of **The Editor of Nipashe Newspaper & Another Vs. Martin Nashokigwa & Another**, Misc. Application No. 23 of 2014, High Court of Iringa, the Court stated that:-

"the proper interpretation of the said provision is that they only deal with unqualified persons who prepare documents for fee and not professional..."

The respondent also referred this Court to the case of **George Humba Vs. James Kasuka**, TBR Civil Application No. 1 of 2015, CAT at Mwanza, where the Court held that:-

"It seems that if section 43(1) provides for a punishment for unqualified persons who do the things specified in the section ,

it is curious and perhaps nonsensical that section 44 provides as it does....in the present case, the notice of motion shows a legible signature of Mr. Kayaga as an Advocate of the Appellant and that it was signed at Tabora on 9th May, 2015. At any rate, Mr. Kayaga as already pointed out was not an unqualified person targeted in section 43....we are of the considered view that the first ground for objection cannot be sustained and we dismiss it".

That the situation in **George Humba's** case was the same as their position save that in the said case it was the Notice of motion that was in issue while in the present case it is the Counter affidavit. That this Court should adopt the decision of the Court of Appeal.

That this Court should capture the intention of the Parliament on the said provisions 43 and 44 of the Advocates Act that the drawer of the instrument should endorse his or her name, that the Parliament intended on identifying the particular drawer of the document and perhaps to create a binding liability on the drawer. That the Counter affidavit shows the eligible signature of the advocate who drew it despite the fact that it does not show the name of the drawer.

Learned Counsel for the respondent emphasized that the firm D.K.M Legal Consultant (Advocates) as it appears on the counter affidavit, was not endorsed as the drawer of the instrument but rather the firm appears as an address for the drawer for purpose of service only. They therefore prayed that the preliminary objection be dismissed. But in the alternative should the Court find that failure to endorse the name of the drawer render the Counter

Affidavit defective, prayed that they be given leave to refile the same as per decision in the case of **Omary Ally Omary Vs. Iddi Mohamed and Others**, HC at Dar Es Salaam, Hon. Masati, J (as he then was) that: *"in appropriate cases, where the defects are minor the court can order an amendment."*

Having heard submission by the respondent and gone through records at hand, the issue for determination is whether or not pleadings filed in Court in this case counter affidavit need no name of the drawer thereto and especially where there is an address of a law firm and no name of drawer. This Court has been confronted at different times with similar issues; in the persuasive cases, amongst them the case of **Lucas A Nzegula (Son and Heir of Zuhura John) Vs. Isaac Athuman and Royal Insurance (T) Ltd**, Civil Appeal No. 66/2008, High Court [unreported] at p. 11 per Hon. Mihayo, J (as he then was) held that:-

"Two as I have said above, the submissions by the respondent were filed by C & M Advocates. It would appear the advocate who signed as Advocate for the second respondent is one Oscar Epaphra Msechu telling by the rubber stamp used. Now, C & M Advocates is not an Advocate in terms of section 2 and 6 and 8 of the advocates Act (Cap 341 R.E 2002). C & M Advocates cannot therefore file a document. The document must be filed by an individual advocate having the conduct of the matter "for and on behalf " of C & M Advocates."

The cited case above was quoted in the case of **Omari Ali Omari Vs Registrar of Titles**, Misc. Application No 90 of 2014, High Court Land Division, at Dar Es Salaam [unreported] per Hon. Mansoor, J.

Also persuaded by the case of **Ramadhani Sood Balenga Vs Hans Aingaya Macha**, Land Case No. 66 of 2013, where the Court held that:

"The plaint in question was signed by "C.E.R.W & Co Advocates and Global Chambers. These are partnerships or firms, duly registered under the Business Name Act, Cap 214 R.E 2002 and they are composed with Advocates as partners. The partners in these law firm or partnership are Advocates who are enrolled as Advocates and they hold in their individual names certificates to practice as legal practitioners. With respect, these Firms or Partnership are not legal practitioner or advocates recognized by the Advocates Act and thus they are not persons entitled to practice as advocates under the Advocates Act. C.E.R.W & Co Advocates and Global Law Chambers are not Advocates or legal practitioners recognized by the law. There are not any such persons as C.E.R.W & Co. Advocates or Global Law Chambers called to the bar and enrolled under S.2 of the Advocates Act and their names are not registered in the roll of Advocates. C.E.R.W & Co. Advocates and Global Law Chambers cannot legally sign and or file any pleading in the Courts.

The endorsement of Court pleadings is an irregularity in procedure and so the pleadings endorsed by persons not

enrolled as a legal practitioner or advocates renders such process/pleadings defective."

In the case of **Lucas A. Nzegula (supra)** was in relation to written submissions filed in Court. In this present case the firm D.K.M Legal Consultants (Advocates) who is clearly shown to have drawn and filed counter affidavit as rightly held in the above cited cases is not a registered Advocate under Sections 2, 6 & 8 of Cap 341, RE 2002.

Despite the fact that Learned Counsel cited the decision of the Court of Appeal, though he failed to provide the same to this Court, however as per the cited paragraph by Learned Counsel in written submission, it shows that there was a name of Mr. Kayaga as an Advocate for the appellant and there was a legible signature of the same. In this application, it is not known who is the drawer to appreciate that the endorsed signature is of an advocate.

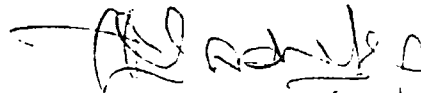
The Counter Affidavit drawn and filed by the respondent's law firm which obviously have registered Advocates according to Sections 2 and 3 of the Advocates Act ought to have shown his/her name thereto for the same be endorsed by a qualified person. As it is D.K.M Legal Consultants (Advocates) is not a qualified person as required under the Advocates Act Cap 341 RE 2002.

Therefore Counter Affidavit is defective and accordingly struck out.

For meeting good ends of justice, using powers vested in this Court under Rule 55 (1) and (2) of the Labour Court Rules, Government Notice No.

106/2007, hereby grant the respondent leave to file proper Counter Affidavit within 7 days from today.

It is so ordered.

A handwritten signature in black ink, appearing to read 'L.L. Mashaka', with a horizontal line extending to the left.

L.L. Mashaka

JUDGE

25/05/2018