

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

**REVISION NO. 07 OF 2023**

(From the decision of the Commission for Mediation and Arbitration at Temeke in Labour Dispute No.  
CMA/DSM/TMK/235/2021, Chuwa, P.M.: Arbitrator, Dated 22<sup>nd</sup> November, 2022)

**BETWEEN**

**MOSES GILBERT KITIIME ..... 1<sup>ST</sup> APPLICANT**

**KADAWI LUCAS LIMBU ..... 2<sup>ND</sup> APPLICANT**

**MUUMIN CHAULEMA ..... 3<sup>RD</sup> APPLICANT**

**AZIZI SALUM MWESHA ..... 4<sup>TH</sup> APPLICANT**

**FATUMA AKILI MTONGWELE ..... 5<sup>TH</sup> APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF EAGT ..... RESPONDENT**

**RULING**

17<sup>th</sup> April – 31<sup>th</sup> May, 2023

**OPIYO, J.**

Before the hearing of the main application, applicant through their advocate, one Cheba Kameya, raised a preliminary objection having two grounds that: -

1. The affidavit of the respondent is wrong and legally defective because the person who prepared and submitted the oath has an interest in this case.



2. The respondent's notice of opposition is erroneous and legally flawed because the person who prepared and submitted the opposition statement has an interest in this case.

Both parties were represented by Learned Advocates. while Mr. Cheba Kameya represented the applicant, Mr. Andrew Miraa was for the respondent.

The hearing proceeded orally. Mr. Kameya submitted that the affidavit was drawn and filed by the one from Cetha & Sons Attorneys (Advocates) who gave the applicants their dismissal letter (as seen in page 2 of the decision), whose procedure as admitted by the respondent was followed under the supervision of the same law firm (as seen in page 7 of the decision) also as the respondent's witness stated at page 3 of the decision that Cetha & Sons Attorneys (Advocates) by the person named Celestine Kayambo wrote a termination letter to the second applicant.

He continued that, regulation 35 of Advocates (Professional Conduct and Etiquette) Regulations, 2018, advocates are not allowed to engage in a matter to which they have conflict of interest. In his view, Cetha & Sons



Attorneys (Advocates) has interest in the matter so they had to come as witnesses not representative of the parties. For him this is not only a conflict of interest but also a misconduct and unethical practice which can destruct process of attaining justice. He then prayed for the counter affidavit and preliminary objection raised by the respondent be struck out. Also, for the court to give warning on such unethical and misconduct practices by the advocate.

Against the preliminary objection Mr. Miraa responded by attacking the preliminary objection raised for being baseless on the following grounds: one is that the preliminary objection has not been raised on the proper documents. That is the documents are in Swahili which are against rules made under section 84A of the Interpretation of Laws Act which state the use of English language in court is insisted. That, rule 3 to the schedule talks about circumstances. He stated that, the law applicable in this matter are written in English that means the language to be used is English. He then prayed for the preliminary to be struck out.

He however, continued to argue on the preliminary raised by stating that that the advocate failed to prove if the advocates who drew the termination letters to the applicants have conflict of interest in the matter in that he has benefit in the outcome of the matter. He continued

that the advocate for the respondent made reference on the decision of CMA and talked about letters written by the advocates, which they did not bring in court and not part of evidence they are supposed to bring.

He continued that, when the matter needs proof it is not fit for preliminary objection to support his point, he referred to the case of **Mukisa Biscuits Manufacturing V. Wetern Distributors Ltd** [1969 E.A. 696] which states that preliminary objection has to be on pure point of law. He was of the view that the preliminary objection raised by the respondents' advocate is not a preliminary objection as it requires facts to be ascertained in its determination.

He contended further that, they have failed to see how drawing and filing can result in conflict of interest. He argued that, the advocate for the respondent did not cite the law dealing with drawing and filing but on commissioner for oaths, that is section 7 of Cap 12 R.E. 2019 which prevents advocates presiding over the matter they took conduct of as commissioner for oath and not in drawing and filing the documents.

He elaborated that the advocates drew termination letter (exhibit D1) and the letter which gave notice of meeting that resolved to terminate the employment of the applicants were not part of the meeting, but they

made reference to the outcome of the meeting terminating their employment. In his view, the advocate has no interest in the outcome of the meeting or this matter as they were not part of the decision. He then prayed for the preliminary objection to be dismissed as it was done in the case of **Philips Samson Chigulu T/A Agent V. Market Insight Ltd and 4 Others**, Civil Application No. 9 of 2021, High Court at Songea.

In rejoinder Mr. Kameya did not talk on the issue of pleadings as the matter at hand is on the preliminary objection raised and not pleadings. He then submitted over the reply to the preliminary objection raised that they did not bring evidence but they referred to the decision of CMA which from party of pleadings, thus their objection is on pure point of law.

He stated that advocate Celestine Kayombo directly involved in preparation of documents relating to proceedings at CMA including open statement and letter appeared as an advocate of the part. He continued that Cap 12 is not applicable in their matter, their preliminary objection is on regulations which does not only cover their conflicts of interest but





their professional conduct. He then prayed for the preliminary objection to be sustained and the counter affidavit be struck out.

Before embarking on the determination of the matter the counsels for the parties were asked to address the court on additional information for clarification of the matter in relation to actual participation of the Cetha and Sons Attorneys and Advocates in the decision making process in applicants termination. Mr. Kameya stated that as per the minutes of the Disciplinary Committee dated 3<sup>rd</sup> July, 2021, advocate Didace Kanyambo was one of the members in the meeting as his name appears in the list. He added that looking at the award, it was noted at Pg. 15 that the same advocate fully participated in termination process and he also represented the respondent in the labour dispute before CMA.

He argued that the firm is actually barred from such representation as one of its partners fully engaged in the whole process, making him having interest in its outcome. He insisted for the affidavit drafted by firm to be to be struck out.

On his part Mr. Rugaiya, leaned counsel, representing the respondent on that particular date stated that the applicants advocate has not shown

the gist of the conflict of interest he is claiming against them. To him, that connotes that no conflict of interest is created in the circumstances, because if there was, the counsel would have shown the same. He argued that, a mere preparation of documents does not rise to a conflict of interest claimed by Mr. Kameya. That, it is not shown that Kanyambo testified before CMA in relation to the matter to bar them acting on their behalf for conflict of interest. It is only if he could have testified when the conflict of interest could have developed, he argued. Therefore, he brushed away the preliminary objection for being baseless.

He further stated that in the minutes the advocate participated merely as an advocate of the respondent and not as decision maker. That makes him not developing any conflict of interest in regard to the outcome of the matter as argued by Mr. Kameya, he contended. He thus, urged the court for the dismissal of the preliminary objection.

After scrutiny of rival parties' submissions, this Court have been called to address on whether the advocate for the respondent Didace Kayombo from Cetha & Sons Attorneys (Advocates) has conflict of interest over this matter.

As gathered above, in dealing with the issue raised the advocate for the applicants stated that the counter affidavit drawn by the advocate for the respondent should be struck out as the second applicant received a termination letter from the same law firm. Whereas the advocate for the respondent stated that the advocate for the applicant failed to prove the conflict of interest insinuated. He then continued that the preliminary objection has to be on point of law and not to be supported with evidences.

On the issue whether the applicant's preliminary objection is on a pure point of law, my take on the onset is that, it is. It is my settled finding that the preliminary objection raised on conflicts of interest is a point of law because it is provided under regulation 35 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018. The gist of the objection is confined to four corners of the pleadings; no evidence is to be called in proving the objection as argued by the counsel for the respondent.

On the gist of the objection, the arbitrator in the page 25 of the award stated that according to exhibit D1 the 2<sup>nd</sup> applicant was informed that the work has been completed and their obligation has reached to its



end. Looking at the said exhibit D1, I have come to realize that termination letter of the 2<sup>nd</sup> applicant was written by Cetha & Sons Attorney (Advocates) on behalf of the respondent's and signed by them through their advocate Didace Celestine Kanyambo. The termination letter was not signed by the respondent as the award stated and was to notify the 2<sup>nd</sup> applicant not to be the member of the building committee. The letter went on to stop the 2<sup>nd</sup> applicant's allowances and ordered him to return all the documents and instruments of the respondent. What has to be noted is that at all the time the advocate indicated that the he was acting on under the instruction of the respondent. the question now is as to whether such situation raises the conflict of interest prohibited by the law cited.

The above analysis raises the question as who terminated the applicants between the respondents and Cetha & Sons Attorneys (Advocates). It is noted above that the capacity of advocate Kayombo of Cetha and Sons Attorneys (Advocates) all along remained as a representative of the respondent. Even in the alleged meeting in which the resolution to their termination was reached, their presence is noted as that of the representative of the one they are representing here, the respondent. They have never switched roles between the conflicting parties. I am

aware that the laws governing the relationships between employer and employee specifically connotes that, the one with the mandate to terminate the employment contract between the employer and the employee is the party to it (to mean the employer or the employee). The employer can act himself or through a duly instructed attorney. Thus, Cetha & Sons Attorneys (Advocates) as representative acted under such capacity. Their presence in the committee as such does not make them part of decision maker. And even if it did make them as such, it does not constitute conflict of interest if they still stand on the side of those they were representing in the meeting. Powers of the attorney is determined by the donor. Therefore, if the respondent chooses to make the attorney write the letter of termination on her behalf communicating what it had been resolved, it does not make the donee the one who made the decision. The decision still remains of the respondent. Suppose, the respondent could have chosen one of its members of the committee who participated fully in the decision to represent it in this matter, could applicant still hold the issue of conflict of interest on his part? I bet not, because it is furtherance of the same interest.

In my considered view therefore is that, by the advocate signing a termination letter of the some or all applicants on behalf of the employer

did not disqualifies his competence of acting on behalf of the same employer. I do not see how his participation in the meeting and even drafting a termination letter establishes any interest conflicting with the outcome of the matter, as correctly argued by Mr. Rugaiya. May be if it was proved that he stood for him in as a witness. In the case of **Jefferali & Another versos Borrison & Another, {1971} E.A. 165,** as quoted in approval in the case of **Rift Valley Co-op Union & Another versus Registered Trustees of Diocese of Mbulu, Civil Appeal No. 12 of 2007, Court of Appeal of Tanzania, at Arusha, (unreported) supra,** that:-

*"It is a rule of practice that an Advocate should not act as a counsel and a witness in the same case, but the rule is not violated until the Advocate is called as a witness and that the court cannot make an order to prevent an anticipated violation."*

In other words, firm's professional services to the respondent in this case are not compromised until if one of them is proved to have testified for or against the respondent. So far, they are eligible to represent the respondent and there is nothing suggesting any conflict of interest on part of the respondent's counsels or their firm. No breach of regulation

35 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018 (Supra) has been proved by Mr. Kameya. The prohibition is if the advocate attests the documents or testified on behalf of the party he is representing.

In the case of

Based on the above finding, the preliminary objection lacks merits, it hereby overruled.



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**M. P. OPIYO,**

**JUDGE**

**31/05/2023**

