

# **IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAAM MAIN REGISTRY  
(AT DAR ES SALAAM)**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 17 of 2011**

**SABAS WILLIAM KIWANGO.....APPLICANT**

**VS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

## **RULING**

Date of last Order: 02-02-2012  
Date of Ruling: 15-03-2012

**JUMA, J.:**

This Ruling arises from a Notice of Preliminary Objection which the Respondent Attorney-General filed to contend that this Court has not been properly moved to lift an order suspending legal practice of the Applicant.

The Applicant (Petitioner) Sabas William Kiwango describes himself as an advocate under suspension and would like this Court to lift his suspension pending his filing of a reference to this Court. Before his suspension, the Petitioner practiced as an advocate of this Court and his enrolment number is 422. He states that on 15th August 2005

Judge Thomas Mihayo suspended his practice, accusing him that he had acted unprofessionally by:

*"(i) misleading the court into issuing a garnishee order for Tshs. 219,395,504.75 while knowing well that there is no court decree to that effect; and  
(ii) attaching a sheet purporting to show the applicant's claims against the respondent knowing well that the sheet had not been adjudicated upon."*

Further, the Petitioner states that the order suspending him was referred to the Hon. Attorney General (Respondent herein) in order for the Respondent to file a Reference to this Court in terms of section 22-(2) (b) of the **Advocates Act, Cap. 341**. The Petitioner is aggrieved that more than five years has elapsed, and the Respondent has not referred the matter to this Court. Mr. Kiwango has employed sections 22 (2) (b) and 28 of the **Advocates Act** to move this Court to lift the order imposed by Justice Mihayo suspending him from practice. He would further like this Court to allow him to

resume his practice as an advocate of this Court and courts subordinate hereto.

On 12th September 2011 the Respondent filed its reply to the petition prefacing it with a notice of a preliminary objection contending that this Petition before me is not maintainable in law. According to the Respondent, the Petitioner did not cite proper provisions of law to move this Court. In addition, Respondent contends that this petition is bad in law because its filing contravened the provisions of section 29 (1) of the **Advocates Act**.

At the hearing of the preliminary objection the Respondent was represented by Ms Sylvia Matiku the learned State Attorney. The Petitioner appeared in person.

Submitting on the citation of enabling provision, Ms Matiku contended that section 22-(2) (b) of the **Advocates Act** is not proper provision to employ since it is about when a Judge of the High Court can suspend an Advocate. According to the learned State Attorney, it is not clear what the Petitioner wants this Court to do under the cited section 22-(2) (b) since he has already been suspended.

Ms Matiku has also taken exception to the general way the Petitioner has cited section 28 of the **Advocates Act** without identifying its specific subsection. This way of citation does not properly move this Court to grant the orders the Petitioner craves for. The learned State Attorney observed that sub-section (2) (a) of section 28 covers suspension of an advocate which is different from removal of an advocate from the Roll of Advocates covered under sub-section (2) (b) of the same section. The learned State Attorney invited me to seek the guidance of the Court of Appeal in the case of **Edward Bachwa & 3 Others vs. AG- Civil Application No. 128 of 2006**; where it laid down the principle that wrong citation of the law, section, subsection and/or paragraphs of the law or non-citation of law will not move the Court to do what is asked and renders application incompetent.

Responding to the contention that he has not cited proper provisions, the Petitioner submitted that he cited section 22-(2) (b) as an enabling provision which provides for reference to be filed to question the disallowance of a suspension of an advocate by the High Court. With regard to his failure to specify appropriate subsection and paragraphs

of section 28, the Petitioner conceded the general way he cited section 28 does not enable the filing of his petition. But the Petitioner hastened to refer me to the provisions of the Constitution as expounded by the Court of Appeal decision in **Samson Ng'walida vs. The Commissioner General Tanzania Revenue Authority, Civil Appeal Number 86 of 2008** directing courts to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice.

With regard to the second point of objection alleging the contravention of the provisions of section 29 (1) of the **Advocates Act, Cap. 341**, Ms Matiku submitted that the Petitioner failed to accompany his Petition with a supporting affidavit. The learned State Attorney asked this Court to strike out the petition. The Petitioner conceded that indeed his petition has not complied with section 29 in so far as lack of supporting affidavit is concerned. But the Petitioner thinks that his failure to file a supporting affidavit is curable under Article 107A (2) (e) of the **Constitution** which directs that in dealing with criminal or civil cases the courts should

administer substantive justice without undue regard to technicalities.

From submissions of the learned Counsel the main issue calling for my determination is in essence whether this petition is properly before this Court. It is common ground that Mr. Kiwango has come to this Court through the avenues provided by sections 22 (2) (b) and 28 of the **Advocates Act**. Let me begin with the totality of section 22 which covers disciplinary powers of Judges of High Court to deal with misconduct or offences by advocates. Through paragraph (b) of subsection (2) this Court has both the power to suspend an advocate and also the power to disallow any such suspension of an advocate. The relevant section 22 provides:

*22.-(1) Nothing in this Act contained shall supersede, or interfere with the powers vested in the Chief Justice or any of the Judges of the High Court to deal with misconduct or offences by advocates.*

*(2) Without prejudice to the generality of the foregoing subsection, notwithstanding that no inquiry may have been made by the Committee—*

*(a).....*

*(b) any Judge of the High Court shall have power to **suspend any advocate** in like manner temporarily, pending a reference to, **or disallowance of such suspension** by, the High Court; [emphasis added]*

It is clear to me that section 22 (2) (b) is applicable to both cases of suspension of an advocate and also disallowance of any such suspension. In so far as his prayers for disallowance of his suspension is concerned, it is my finding and holding that the Petitioner has cited proper provision when he employed section 22 (2) (b) of the **Advocates Act**.

Let me move on to section 28 which the Petitioner cited. This section 28 of the **Advocates Act** provides for avenue for a suspended advocate to apply to this Court for variation of the order that had suspended him. Section 28 must be read together with section 29 to appreciate the totality of power of this Court to vary the suspension order and the procedure to be followed by a petitioner. Section 29 clearly directs that an application to vary the suspension order shall be by way of a

petition supported by affidavit and served on Attorney-General. Sections 28 and 29 state:

*28 (1) Subject to the provisions of subsection (2), any person who, in accordance with the provisions of this Act or otherwise by the High Court, has been suspended from practising during a specified time or whose name has been removed from the Roll, **may apply to the High Court for an order, in the former case, to set aside the order or to reduce the period of suspension and, in the latter case, to set aside the order or for re-admission.***

*(2) The right to apply under subsection (1) shall be subject to the following limitations—*

*(a) in the case of an order of suspension, no application shall be made until after the expiration of two years from the date of such order or of half the period of suspension, whichever is the less, and when an application has been made and determined no further application shall be made until after the expiration of two years from the date of such determination; and*

*(b) in the case of an order removing a name from the Roll, no application shall be*



*made until after the expiration of two years from the date of such order and when an application has been made and determined, no further application shall be made until after the expiration of two years from the date of such determination and, in the case of subsequent applications, until after the expiration of two years from the date of the determination of the last previous application:*

*Provided that in the event of any new material fact coming to light since the making of the original order of suspension or removal from the Roll, which fact might have influenced the Court or the Committee in making the order, the person affected may, at any time, apply to a Judge in Chambers for permission to apply for reconsideration of the original order, and if the Judge is of the opinion that such fact should be placed before the Court or the Committee which made the original order, whether or not he considers that such fact would have influenced the original decision, he may grant such application, and where such application is granted –*

*(a) if the original order was an order made by the High Court, the High Court shall proceed to reconsider the order;*

*(b) if the original order was an order made by the Committee, the Committee shall proceed to reconsider the order. [Emphasis added].*

*29. (1) Every application under section 28 shall be by petition and shall be accompanied by a supporting affidavit setting forth the grounds upon which the applicant relies.*

*(2) A copy of such petition and affidavit shall be served upon the Attorney-General not less than seven days before the day of hearing. [Emphasis added]*

The above-cited section 29 is crystal clear with regard to what is demanded of an advocate who is applying for variation of his suspension order. The concerned advocate must move this Court by filing a petition supported by an affidavit which state the grounds upon which he relies upon in his petition. Ms Matiku has asked this Court to strike out this petition because of this defect. The Petitioner has conceded that he filed his petition without any supporting affidavit. The Petitioner has hastened to urge this Court to

save his petition by through reliance on Article 107A (2) (e) of the **Constitution**.

I will with due respect agree with the learned State Attorney that this Petition is not properly before this Court because it lacks supporting affidavit. Any petition seeking to vary orders that had suspended an advocate must comply with mandatory procedure prescribed by section 29 of the **Advocates Act**. The law in Tanzania is now settled that the scope of Article 107A (2) (e) of the **Constitution** does not extend to make any mandatory requirements of statutory provisions to become redundant. The Court of Appeal elaborated the scope of Article 107A (2) (e) in the stand it took in the case of **Zuberi Musa v Shinyanga Town Council, Civil Application No. 100 of 2004 (unreported)** when it stated that:-

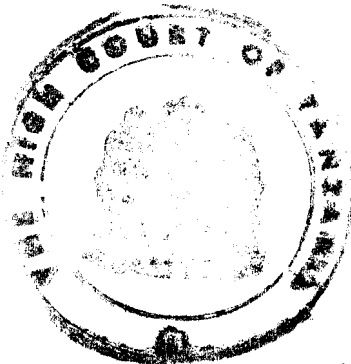
*"...article 107 A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that **it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure***

*which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements.*” **[Emphasis is added]**

In other words, as a guide, Article 107A (2) (e) of the **Constitution** does not take away the duty of courts take cognizance of clear statutory words in section 29 (1) that every application under section 28 shall be by petition and shall be accompanied by a **supporting affidavit setting forth the grounds upon which the applicant relies.**

Consequently, the preliminary objection is hereby sustained and this petition is struck out and Respondent is awarded costs.

**DATED at DAR ES SALAAM this 15<sup>th</sup> March, 2012**



  
**I.H. JUMA**  
**JUDGE**