

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE SUB-REGISTRY OF ARUSHA]**

**AT ARUSHA**

**MISC CIVIL CAUSE NO. 3815 OF 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS  
OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE DECISION OF THE 1<sup>ST</sup> RESPONDENT THROUGH ITS  
LETTER WITH REFERENCE NO. JC/NAC.30/02/2024 DATED 20<sup>TH</sup> FEBRUARY  
2024 TO SUMMON THE APPLICANT TO APPEAR BEFORE IT IN APPLICATION  
NO. 02 OF 2024 BETWEEN THE 2<sup>ND</sup> RESPONDENT VERSUS THE APPLICANT  
ON ALLEGATION OF PROFESSIONAL MISCONDUCT.**

**BETWEEN**

**PETER MICHAEL MADELEKA.....APPLICANT  
VERSUS**

**THE ADVOCATE'S COMMITTEE.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

15<sup>th</sup> & 25<sup>th</sup> March, 2024

**TIGANGA, J**

This is the second ruling in this matter. The first one was delivered by this court on 12<sup>th</sup> March 2024. Both rulings emanate from the issues raised by the applicant in this application which in principle were challenging the right given to the respondent to file the counter affidavit and appear to defend the application at hand. In the ruling dated 0n 12<sup>th</sup> March 2012, the applicant raised two issues. One, that the law does not

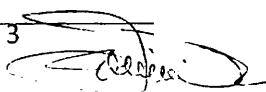
allow the application for leave to be heard inter-partes, and two, that the State Attorney who drew the joint counter affidavit was incompetent to do so because in terms of Notice No. 3 (1), (2), and (3) of the Attorney General (Appointment of Law Officers and State Attorneys) Notice of 2020, which lists the names of all State Attorneys, the name of the said Edwin Joshua Webiro does not appear as one of the listed State Attorneys. He on that base prayed that, in the absence of the names of that person, then the joint counter-affidavit is incompetent and liable to be struck out for being prepared and filed by the person whose name is not on a list.

The court in its ruling dated 12<sup>th</sup> March 2024, this court found the two issues devoid of merits and consequently overruled them. One may ask oneself why I decided to start my ruling with the historical background of what has already been decided. The reasons as to why will soon come out as I go along in this ruling.

On 15<sup>th</sup> March 2024 when the application at hand was called for hearing, the applicant once again came up with another issue raised as the preliminary objection challenging the locus of the State Attorneys who appeared in court on that day, particularly Edwin Joshua Webiro and Leyani Mbise on the ground that their names are not gazetted in the government gazette as required by section 24 (4) of the **Office of Attorney General Discharge of Duties Act** [Cap 268 R.E 2019] read

together with paragraph 6 (3) of the **Office of Attorney General (Appointment of Law Officer and State Attorneys) Notice** 2020. GN. No. 1011 of 2020. These laws are to the effect that, all State Attorneys after being appointed and kept on the Roll, should mandatorily be gazetted. According to him, it is on record that, State Attorneys who appeared before this Court in this application, their names appear in G.N. No. 583B, which was published on 26/09/2022 vide Government Gazette No. 38 volume 103 of 26/09/2022. In his view, that gazette is not there and will never be there. While very mindful of the decision of this court in the case of **Peter Michael Madeleka vs The Advocates Committee and Another**, Misc Civil Cause No. 3815/2024 in which this Court in its ruling, agreed that Mr. Edwin Joshua Webiro is in the Roll of State Attorneys but the Court did not say that his name was gazetted, he said.

That being the case, he invited the Court to visit the official website of the Judiciary TanzLII to see whether the said Gazette No. 38 Volume 103 of 26/09/2022 has in it, the Government Notice No. 385B of that date. If the Court does not find the Gazette on the TanzLII website, then the State Attorney who appeared before this Court will have no locus to appear and for that reason, all which have been done by the State Attorney who was not gazetted, and whatever they have done in respect of this application should be struck out and nullified.

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Replying to the submission made by the applicant, Mr. Edwin Joshua Webiro, learned State Attorney who appeared for the applicant submitted by just reminding the Court that, an issue that he has the capacity and locus to appear on behalf of the Solicitor General to represent the Attorney General has already been decided by this Court in the case of **Peter Michael Madeleka vs Advocates Committee and The Attorney General** (supra) where the Court stated that Edwin Joshua Webiro has a locus to represent the Attorney General. The court held so after having noted the Government Notice No. 583B of 2022 which is called, "Hati ya Uanzishwaji ya Daftari la Mawakili wa Serikali ya Mwaka 2022" and it was gazetted in Special Supplement Government Gazette No. 38 Volume 103 dated on 26/09/2022.

He went on to submit that, according to this Government Gazette, the provision of Rule 7 (1) provides that:

*"uwepo wa Jina la Mwanasheria yeyote katika Daftari la Mawakili utakuwa uthibitisho kamili kuwa mtu huyo ni Wakili wa Serikali.*

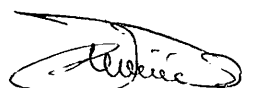
*(2) Majukumu ya kisheria yaliyoahirishwa katika Aya ya 6 ya Sheria ya kanuni hizi, hayatatekelezwa na mtu yeyote ambaye jina lake halipo kwenye daftari la Mawakili."*

And since the Government Gazette which comprises, the names of the said State Attorney was visited by the Court before it gave its Ruling

dated 12<sup>th</sup> March 2024, then this Court is *functus officio* because it has already decided the same issue. In his view, the argument by the Applicant that the GN has never been published, while it was published on the date he has already mentioned takes the issue to be incompetent to be a preliminary objection because it needs the evidence to prove whether the same was published/Gazetted or not, for this reason, that contravenes the guiding principle in **Mukisa Biscuit Manufacturer vs West End Distributor Ltd** (1969) EA 696 in which the defunct Eastern African Court of Appeal states that, where the Preliminary Objection needs evidence then that lacks the quality of being the preliminary objection, he argued.

In his view, when the applicant required the Court to pass through the Judiciary website to satisfy itself on the raised issue, he relied on the Court decision that was given by this Court when it visited the <http://oagmis.agctz.go.tz> website comprising names of all State Attorneys.

He went on to submit that, since all those who are there are officers of the Court, according to section 59 of the Evidence Act (supra) the Court is required to take judicial Notice of officers of the Court. According to section 59 (1) (i) since the names are there then the Court may take judicial notice, an act that does not amount to finding the evidence.



While about to conclude his submission, he was of the considered view that, the Applicant has misled himself, and as long as this court had decided this issue and ascertained that the names are on the website, for that reason;

- i) The Court is *functus officio*, as it cannot be called to decide on the same issue which it had already decided.
- ii) Even if the preliminary objection would have been raising a separate issue the said Preliminary Objection (PO), raises an issue that requires evidence and cannot qualify to be a preliminary objection in terms of the **Mukisa Biscuit** case.
- iii) The Court visiting the website when it was composing its ruling dated 12<sup>th</sup> March 2024 was just taking Judicial Notice, unlike the request posed by the applicant in which the Court is asked to verify whether the G.N was Gazetted or not which amounts to the collection of evidence to ascertain the fact in dispute.

He in the end prayed that the preliminary Objection (PO) be overruled with costs so that the application could proceed with the hearing on merits.

In rejoinder, the applicant strongly disputed the argument that the court is *functus officio* to decide the issue at hand. He said in the decision of **Peter Madeleka vs Advocate Committee** (supra) decided by this

Court on 12/03/2024, the court did not decide as to whether the names of the State Attorneys were gazetted or not.

He referred to page 7 paragraph 1 of the ruling, where the court decided about the existence of the name in the Roll of State Attorney. He said the issue he had come up with, at the moment relates to section 24 which requires that the State Attorney should be gazetted in the Government Gazette before they are allowed to practice. For that reason, this issue has not been decided by this Court or any other Court, therefore your Court cannot be *functus officio* for an issue which it has never decided, he said.

Regarding the issue as to whether the issue he raised qualifies to be a preliminary objection worth its name. He submitted that it is a point of law because it relates to the non-compliance with section 24 (4) of the Attorney General (Discharge of Duties) Act.

In further support of the contention, he cited the case of **Attorney General vs Mohamed Liundi and Dar-es-Salaam Water Sawarage Corporation**, Misc Civil Application No. 130/2022 High Court Dar-es-Salaam (unreported) Tanzlii in which this Court when confronted with an akin situation ruled out it to be a point of law. In his further view, the fact

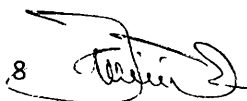
that the issue of Gazettement is mentioned in the law, makes it to be a point of law.

In his further argument he said, it is also important for the court to note that statutory law is superior to the Rules, the Rules would not have superseded the supremacy of the statutory law.

He said the invitation made to the court to look at paragraph 7 (1) of the "Hati ya Uanzishwaji wa Daftari la Mawakili wa Serikali." He said is superfluous because they are not gazetted therefore the court has nothing to look at.

The other issue is whether the presence of the names makes them qualify to practice and referred the Court to Section 59(1) (i) of the Evidence Act to take judicial notice of the existence of the website. On that, I submit that the Court cannot take Judicial Notice of something that does not exist, for section 24 (4) does not say that the names be found on the website, for the website is not a Government Gazette.

In the end, he prayed that since it is a requirement of the law for all State Attorneys to be gazette, he invited the court to satisfy itself on the existence of Government Notice No. 538B in Gazette No. 38/2022, Also whether there is a Government Notice No. 538B in which the names of all State Attorney, specifically those appearing, in this case, are listed.

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Having satisfied itself, he prayed the court to find that they have no locus and that whatever they have done should be struck out from the record.

Before I embark on discussing the merit of the application, I need to answer why I decided to preface this ruling with the historical background of the issue which has already been decided. The reasons are not farfetched, when the current issue was raised, the counsel for the respondent opposed it on the ground that this court is *functus officio* because the issue of competence of the said Edwin Joshua Webiro has already been decided in the ruling of this court dated 12<sup>th</sup> March 2024 in the case at hand. The applicant contends that this issue of non-gazetation of the State Attorney was not raised and was not decided by the ruling dated 12<sup>th</sup> March 2024. Whether the same is new or not can be resolved based on what was raised on 08<sup>th</sup> March 2024.

As earlier pointed out the applicant raised two issues, **One**, is that the law does not allow the application for leave to be heard *inter-partes* in terms of Rule 5 (2) of the **Law Reform (Fatal Accident and Miscellaneous Provision) Judicial Review Procedure and Fees, Rules 2014**, and **two**, that the State Attorney who drew the joint counter affidavit was incompetent to do so because, in terms of Notice No. 3 (1), (2), and (3) of the **Attorney General (Appointment of Law**

**Officers and State Attorneys) Notice of 2020**, which lists the names of all State Attorneys, the name of the said Edwin Joshua Webiro does not appear as one of the listed State Attorneys.

In the current issue, although the issue raised challenges the competence of the said state Attorneys, the challenge is not on the grounds of the previously raised issues. While in the former issued, the applicant raised the issue of the requirement of the hearing *exparte* in terms of Rule 5 (2) of the **Law Reform (Fatal Accident and Miscellaneous Provision) Judicial Review Procedure and Fees, Rules 2014**, and the complaint that the Edwin Joshua Webiro does not appear as one of the listed State Attorneys in terms of Notice No. 3 (1), (2), and (3) of the **Attorney General (Appointment of Law Officers and State Attorneys) Notice of 2020**, in the current issue the complaint is that the State Attorneys who appeared, in this case, have not been gazetted in the government gazette in terms of section 24 (4) of the **Attorney General (Discharge of Duties) Act**.

That means looking at the provisions upon which the two sets of issues were raised, that is Rule 5 (2) of the **Law Reform (Fatal Accident and Miscellaneous Provision) Judicial Review Procedure and Fees, Rules 2014**, and Notice No. 3 (1), (2), and (3) of the **Attorney General (Appointment of Law Officers and State**

**Attorneys) Notice of 2020** in the first set of the issues in the decision dated 12<sup>th</sup> March 2024 as well as section 24 (4) of the **Attorney General (Discharge of Duties) Act** in the second set of the issues raised, it can be concluded that this matter is not *functus officio*. *Secondly*, is the ground upon which the competence of the State Attorney is so challenged, while in the first set the competence is challenged based on the nonlisting of the State Attorneys in the list, in the second set the grounds are on the non gazettation of the state Attorneys. That leads to the conclusion that the applicant this court is not *functus officio* to determine the issue raised.

Now having resolved the first issue, next is the merit of the issue raised. From what has been submitted by the parties to this application on the issue at hand, two main issues are to be determined

To be on the same page, I find it pertinent to reproduce section 24(4) **of the Attorney General (Discharge of Duties) Act Act** [Cap 268 R.E 2019]

*“The Deputy Attorney General **shall cause to be published in the Gazette, the names of all persons appointed to be Law Officers and State Attorneys.**”*

From the wording of the provision, the requirement to publish the names of the State Attorneys in the government gazette, in terms of section 24(4) of the **Attorney General (Discharge of Duties) Act** [Cap

268 R.E 2019] has been made a mandatory function of the Deputy Attorney General, but the law has not made it clear as to what will be the consequences if he fails to publish the names in the government. The law does not state that the failure to gazette the names of the State Attorneys will disentitle the un-gazetted state Attorney from practicing.

However, according to section 24(3) of the same law, it is apparent that once a person has been appointed as a Law Officer or State Attorney he should not practice unless he has been instrumented by the Attorney General to act as such, the instrument which will direct the nature of functions the officer will discharge.

16B (1) and (2) of the same law requires the Attorney General to establish and keep a Roll of all State Attorneys in the order of which shall be according to precedence of such State Attorneys as between themselves.

Further to that, in a special the Government Notice published in a special supplement to the Special Gazette of the United Republic of Tanzania GN No.583B of 26th September 2022, Supplement No.38, in Vol. 103, Printed by the Government Printer, Dodoma by Order of Government as ISSN 0856 – 034 made under sections 24(3) and 16B of the **Attorney General (Discharge of Duties) Act** (supra) established the register

"Roll" of State Attorneys, titled "HATI YA UANZISHWAJI WA DAFTARI LA MAWAKILI WA SERIKALI YA MWAKA 2022"

Under paragraph 6(1) it is provided that, all lawyers whose names have been entered in the roll will be State Attorneys in terms of section 24(3) of the Attorney General (Discharge of Duties) Act (supra) will have the right of appearing before all courts within the United Republic. Under - subparagraphs (2)(a)(c) and (d) they will also have the capacity to advise the government, to prosecute and defend all criminal cases for and on behalf of the Republic after being conferred the instrument by the Director of Public Prosecutions. Also, they will be able to prosecute or defend all civil cases after being instrumented by the Solicitor General.

Paragraphs 7(1) and (2) provide that the fact that the name of a lawyer is in the Roll shall be sufficient proof that that person is a State Attorney and shall be entitled to perform the functions prescribed under paragraph 6 of this Notice and a person whose name is in the roll shall not be entitled to perform the function.

From these laws it is apparent that what entitles the State Attorneys to be able to practice are as follows:

- i. The fact that his/her names are in the Roll of State Attorneys,
- ii. That he has been instrumented by either the Attorney General in terms of section 24(3) of the Attorney General (Discharge

of Duties) Act (supra) or Director of Public Prosecutions or Solicitor General in terms of paragraph 6(c) and (d), respectively.

- iii. Therefore, in compliance with the requirement of section 24(3) of the Attorney General (Discharge of Duties) Act (supra), the Attorney General vide GN. No. 583B has given an instrument to Mr. Edwin Joshua Webiro who is one of the State Attorneys on the Roll of State Attorneys with Roll No. No. 2047 as can be ascertained in through the website, <http://oagmis.agctz.go.tz> as indicated in GN. No. 538B of 2022 dated 26<sup>th</sup> September 2022 and since this GN was made under section 24(3) then by virtual of that GN, he was given an instrument to appear in terms of that provision.

That means publication in the government gazette is not one of the criteria in law. The next issue is whether the state attorney in question was gazetted in the government gazette. In tackling this issue, it should be noted that, although it has already been resolved that non-gazetation does not prevent the State Attorney from appearing in court, I still find it important to resolve the issue as to whether they were gazetted.

In resolving that issue, I find it pertinent to look at the meaning of the government gazette and to trace the legal and conceptual philosophy

of publishing information in the government gazette. Looking at the provision of section 24(4) of the Office of Attorney General (Discharge of Duties) Act imposes an administrative function directing the Deputy Attorney General who, according to section 7 of the same Act is the administrative head of the Office of the Attorney General, with duties of carrying out the general supervisory role of Law Officers and State Attorneys in the Ministries, Government departments, agencies, and local government.

He also has the duty to administer legal functions performed by Law Officers and State Attorneys in the Office of the Attorney General and be responsible for the discipline of Law Officers and State Attorneys in the Office of the Attorney General.

In other words, the Deputy Attorney General is the Chief Administrative Officer of the office of The Attorney General with one of his duties being to publish in the government gazette every State Attorney and Law Officer on his or her date of employment. That means it is not expected to find one and a single government gazette containing all names of the State Attorneys and Law Officers for they were not employed on the same date. In my interpretation of the law, the requirement is more administrative and had the legislature intended that the gazetation

would affect the appearance in court, it would have specifically provided so.

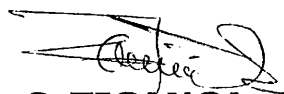
Furthermore, even the applicant himself did not cite any provision suggesting or providing that non-gazetation affects the audience of the State Attorney in Court especially where the State Attorney in question has been instrumented by the respective authorities to appear in court and represent the Government.

That being the position, I find the issue raised by the applicant to be devoid of merit and to be based on a misconception of the law. It is thus dismissed for want of merit. I consequently order the application to proceed with a hearing on merit.

It is accordingly ordered.

**DATED** and delivered in **ARUSHA** this 25<sup>th</sup> day of March 2024



  
**J. C. TIGANGA**  
**JUDGE**