

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

**[ARUSHA SUB-REGISTRY]**

**AT ARUSHA**

**MISCELLANEOUS CIVIL APPLICATION NO 813 OF 2024**

**BETWEEN**

**MILLENIUM GENERAL SUPPLIES (T) LTD \_\_\_\_\_ PLAINTIFF**

**VERSUS**

**NAS TYRE SERVICES (T) LTD \_\_\_\_\_ 1<sup>ST</sup> RESPONDENT**

**SHASHI INVESTMENTS LTD \_\_\_\_\_ 2<sup>ND</sup> RESPONDENT**

**COURT BROKERS AND AUCTION MART**

**RULING**

*19/02/2024 & 01/03/2024*

**BADE, J.**

This is a Ruling on the preliminary objection raised by the Respondents couched in the following terms:

- i) The Application is bad in law and incompetent for being prepared signed and filed by an unqualified advocate who has no valid practicing certificate contrary to section 39(1)(b) and 41(1) of the Advocates Act Cap 341 RE 2019 of the laws of Tanzania.
- ii) The Application is misconceived and bad in law as it has been overtaken by events.

The Application being contended is for a stay of execution, and it was filed under a certificate of urgency based on the fact that the execution proceedings are underway. The parties in this matter were both represented by legal counsel with Ms. Neema Oscar learned counsel representing the Applicant and Mr. Franklin Chonjo learned counsel representing the 1st Respondent, while Mr. Manchale Fred Lusenga (the Court Broker appearing in person for the 2<sup>nd</sup> Respondent.

As is the norm the court first heard the submission by the learned counsel for the Respondent prosecuting the Preliminary Objections. He submits that the laws cited in section 39(1) (b) of the Advocates Act provide for a valid practicing certificate. He argued that the Application was filed by Advocate Neema Oscar who also prepared the said application, and that at the time she was undertaking all of these; she had not renewed her Practicing Certificate, which was obvious on the TAMS system which gave a negative result when the respondent inquired about the status of Ms. Oscar. In further argument, he maintains that the person who had attested the documents on the affidavit as prepared by Counsel Neema Oscar had no valid certificate as per the TAMS. The system in TAMS did not recognize their renewal of the

certificate, concluding that their filing of the documents and attesting such documents was against the law as prescribed by the cited laws that regulate the conduct of the legal practitioners.

In an effort to substantiate his assertions, the counsel for the Respondent supplied an extract from TAMs system to substantiate his claim, which the advocate for the Applicant objected to its admission, but I had deferred her objection and asked her to make her submission against the said admission together with her response to the main submission on Preliminary objection for expediency.

The counsel for the Respondent also relied on the ruling of this court in the case of **Zakayo Ole Meida vs Lopulul Village Council and Others**, [2021] TZHC 9498 (TANZLII) where his Lordship Robert, J. is quoted as saying while he agreed on the principle that a preliminary objection cannot be raised on matters requiring evidence to substantiate; but since the other side did not dispute the fact that at the filing of the dispute before him in March 2021, a person .... who drafted and filed the plaint had no valid Practicing Certificate in force as per the law. He approvingly quoted in turn a decision of this court in the case of **Wellworth Hotels and Lodges Ltd vs East Africa Canvas Ltd and 4 others**, CC No 5 of 2020, HC (supplied

in court) which held "...this is not an issue that needs one to call for evidence since no one needs to prove that which is obvious when a fact is clear; thus concluding that the point raised by the learned counsel qualified as a point of preliminary objection, and held the documents filed were without legal validity and proceeded to strike them out as incompetent.

On the basis of these authorities on the reasoning that the circumstances are not dissimilar, the Respondent's counsel urged this court to find the Application before this court also lacks legal validity as it has been filed by an unqualified person.

On another note, the counsel for the respondent insisted that upon striking out of the said Application for a Stay of execution, the respondents should be awarded their costs as per section 30 of the Civil Procedure Code Cap 33 R.E. 2019 since his client had incurred costs. He pressed on that his client had to file a counter affidavit and instructed him to appear and defend the Application / prosecute the Preliminary Objections, and had to travel from Dar es Salaam to defend this case, they are entitled to their costs.

Arguing the second point of preliminary objection, the respondent's counsel contends that the Application for a stay of execution is bad in law as it has

been overtaken by events since the Application for Execution at the trial court had already been granted. He also insisted that there is an order of attachment of the property which has also been mentioned on the Application for Stay of Execution that the court had already ordered an order of attachment and inventory of the Applicants/Judgment debtor properties. He thus urges this court to find the Application before the court as being misconceived and the same be struck out with costs.

Responding, the applicant's counsel was of the view that both preliminary objections lack the necessary requisites to be termed as points of preliminary objections as they need evidence to be substantiated. While this was her general view, she proceeded to respond to the first point of objection that when she was filing the documents in court, she was validly a practitioner, and so was the person who attested the documents, who was fit to do the attestation.

Ms. Neema maintained that for a preliminary objection to qualify as such, they need to meet the requirements as per the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors Ltd**, 1969 EA 697 where it was stated "... A preliminary objection is in the nature of

what used to be a demurrer. It raises a pure point of law which if argued on

the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.... and that it consists of a point of law which has been, or which arises by clear implication out of the pleadings, and which if argued as the preliminary point it may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that they are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Relying on this authority, she reasons that the 1st preliminary objection had to be substantiated, which meant that the 1st respondent had to bring in documents to substantiate the said fact (as witnessed by the documents that the counsel for the respondent had supplied in court as he was submitting) making the issue argued invalid as a preliminary objection.

She maintained further in protest that the said documents that have been brought to substantiate these facts arise in an electronic transaction which has a specific law with a specific way of bringing it in court and as evidence. She takes objection to the fact that the counsel for the respondent has not supplied the court with a certificate regarding its authenticity as required by the provision of the law of the Electronic Transactions Act, Number 13 of

2015, Chapter 442 of the laws of Tanzania, which is the primary legislation governing electronic transactions.

She agitates further that he was not the person who created the said document, neither was he a witness in the case for him to be in a position to tender it, nor is he an originator of the document nor an addressee. Furthermore, the document itself is not even an original document for purposes of the Evidence Act.

She referred this court to the decision by the Court of Appeal of Tanzania while interpreting section 39 of Cap 341 of the laws in **Alliance Insurance Corp Ltd vs Arusha Art Ltd**, Civil Appeal No 297 of 2017, [2018] TZCA 294, where the court ruled on pg 08 that the issue that a matter is filed by an unqualified person needs evidence to substantiate, and that as a principle would not qualify as a point of law, urging that this court is bound by this decision of the Court of Appeal, as opposed to the persuasive authority supplied by the counsel for the Respondent.

Arguing further, Ms. Oscar points to section 38(1) of the Advocates Act Cap 341 which prescribes the circumstances that will maintain a Practicing

Certificate as valid if issued on the 1<sup>st</sup> day of Jan to the 1<sup>st</sup> day of Feb to an advocate who held a valid Practicing Certificate on the preceding year.

She thus argued that the documents in court were brought in in January and in her view, she had the qualifications to practice as an advocate as per the section of the law cited, while her practicing certificate was being renewed, since she had held a valid practicing certificate the year previous.

In the quest to distinguish the case cited for the respondent's position, she argues that the documents filed in court as interpreted by the authority that the Respondents counsel has supplied are clear that the parties had filed their documents outside the allowed time of grace, while she had filed the documents in the present case within the grace period time that is allowed by section 38 of the law.

On the second limb of the preliminary objection, she conceded to be true that in the Resident Magistrate Court which heard and determined the case, there was an order of execution granted, but she was quick to point out that the pendency of the said order does not preclude the Applicants from presenting its Application, insisting that the properties of the Applicant are not yet sold; and that there is a pending Application for Revision before this

court which awaits a hearing. She concludes that this preliminary objection has the same fate as the previous one that it lacks the prerequisites for being a preliminary objection as it must be substantiated while being argued as such, thus praying for both preliminary objections to be overruled and dismissed. She also prays that costs be in the cause of the matter.

Rejoining, the counsel for the Respondent while conceding to the requirements as per the case of Mukisa Biscuits (*supra*), he still maintained that a preliminary point of objection must be grounded on a point of law, and it is his view that both preliminary points of objection are grounded in law as per the laws cited earlier, and thus they should qualify as such.

He also retorts that the Court of Appeal case that was cited by the counsel for the Applicant had different circumstances than the present case since the Court had decided on whether a juristic person or a natural person could draft or sign a document, and this issue was the basis of such a decision, and nuanced a distinction that it did not decide the issue whether an advocate who had filed documents with no valid certificate does not amount to a point of law.

He also agitates with the issue of the grace period maintaining that it is not stated anywhere if an advocate while on grace period can file or draft documents as an advocate, arguing that if that was the intention of the legislature, the law would have been clear that such an advocate could actually draft and file a document in court. The law is still incitive that for an advocate to do so, they have to have a valid Practicing Certificate, and that in his view, is the position of the law.

On the second limb of the preliminary objection that the application before the court now being overtaken by events, he chimed in that since the advocate has conceded on the application for execution having been granted and attachment order being made, it is his view that the court is now functus officio as whatever is granted after this will be of no use to the Applicant as matters have progressed further.

Having heard the rival arguments, this court is called upon to determine whether the points raised as preliminary objections are tenable and sustainable. In **Soitsambu Village Council vs Tanzania Breweries Limited and Another**, Civil Appeal No. 105 of 2011, CAT, (TANZLII) the Court of Appeal was clear in its decision that a preliminary point of objection needs to be free from facts calling for proof or requiring evidence to be

adduced for its verification. Nevertheless, the counsel for the respondent put a spirited argument and felt that he needed to substantiate the allegation of fact that the Applicant's counsel had no valid practicing certificate. That was a counterproductive move as demonstrated by the objection preferred by the counsel for the applicant, that I firmly sustain, and which cement the point as put forth by the Court of Appeal in the **Soitsambu case** (supra). While this conclusion seems to have cut short the argument on this point, I would weigh in the arguments as they unfold further, lest I should find myself condoning an illegality by allowing an unqualified person without a valid practicing certificate to practice law.

The position of the law in this country is made clear under sections 39(1)(b) and 41 (1) of the Advocates Act, Cap. 341 (R.E. 2019) that persons without valid practicing certificates in force and unqualified persons are prohibited from acting as advocates. The Court of Appeal did not mince its words in this position as they proceeded to struck out the documents filed in the case of **Edson Osward Mbogoro vs Dr. Emmanuel John Nchimbi and Another,**

*"...if an advocate in this country practices as an advocate without having a current practicing certificate, not only does he act illegally but*

*also whatever he does in that capacity as an unqualified person has no legal validity, We have also taken the liberty to say that to hold otherwise would be tantamount to condoning illegality."*

According to the cited case, the referred Tanzania Advocates Management System (TAMS) reported that by March, 2021 when the learned counsel for the plaintiff filed his plaint on that case had yet to renew his practicing certificate. Hitherto, I am convinced that this is distinguishable since the learned counsel on this matter had drawn and filed the documents on the instant case while on a grace period between 1st of January to 1st of February on the year preceding the expiry of the Practicing Certificate. This is the position of section 38(1) whose proviso is expressive that:

*38.- (1) Every practicing certificate shall, subject as hereinafter provided, take effect on the day on which it is issued by the Registrar:*

*Provided that, every practicing certificate issued between the first day of January and the first day of February in any year to an advocate who held a valid practicing certificate on the thirty-first*

*day of December of the preceding year shall have effect for all purposes from the first day of January in that year.*

One would naturally ask then what is the meaning of being on a grace period? Grace Period means the 30 days following the expiration of a license when the license is still considered to be active. (See <https://www.lawinsider.com/dictionary>), it is also described as a period of time beyond a scheduled date during which a required action (as payment of an obligation) may be taken without incurring the ordinarily resulting adverse consequences such as penalty or cancellation; Additional time scheduled or allocated to complete a task, such as complying with a regulation, meeting an obligation, or obtaining an agreement without incurring a penalty (as per the Blacks Law Dictionary).

In a Ugandan case of **Huq vs Islamic University**, [1995-1998] 2 EA 117 (SCU), the majority decision of the Supreme Court in this case was:

*"....an Advocate who practiced without a valid Practicing Certificate after a grace period, practiced illegally, and that all proceedings taken by such an Advocate and documents signed by him were invalid because to say otherwise would amount to a perpetuation of illegality."*

I could not agree more that an advocate without a valid Practicing Certificate is practicing illegally; however, the concern is the period in time over when exactly the practicing certificate would have expired and make whatever actions undertaken by the advocate become illegal. It is my view that as fortified by the Supreme Court of Uganda even though only in persuasion, the advocate can still practice during a grace period without incurring legal consequences. See also **Marco Elias Buberwa vs Agnes Kokushekya Buberwa**, HC-Misc. Application No. 253 of 2022 (unreported), wherein it was held that an attorney whose practicing certificate is yet to be renewed enjoys a month's grace period, during which he can lodge a document and enter appearance in court. In that case I find the first point of preliminary objection to be without any merit and consequently it is overruled.

As I turn to determine the second point of the preliminary objection, that the application is overtaken by event and thus bad in law, I am of the view that the basis of the fact that the trajectory on whether or not the applicant's Application for Revision will be found tenable by the court is discretionary on judicious basis upon the court hearing the applicant. In my understanding, the Application for Stay is predicated on the Application for Revision. On that one, the court is moved under prevailing circumstances to examine the

correctness, legality and propriety of the regularity of the proceedings and findings of the execution and proceedings prior to it. That too cannot be said to be contained in a point of law and bundled as a preliminary objection as at the end of the day, it is the court in its discretion that will be moved to determine if the proceedings and findings of the lower court are in order or otherwise, and that cannot exclude a scrutiny on evidential basis of the proceedings and its emanating decision. In the Court of Appeal in

**Jacqueline Ntuyabaliwe Mengi vs Abdiel Reginald Mengi & Others**

(Civil Application 332 of 2021) [2021] TZCA 583 while overruling a point of objection not dissimilar to this one stated:

"..... It does not require extra efforts for one to reach to the premise ..... that is not worth a ground of preliminary objection. This is because it requires some facts and evidence whose determination, does not lead to nullification of the whole application or dispose of the application."

In that regard it is my finding that the second limb of preliminary objection is without merit and it is thus overruled. Costs to follow cause.

It is so ordered.

**DATED at ARUSHA this 01st day of March 2024**

  
**A. Z. Bade**  
**Judge**  
**01/03/2024**

Ruling delivered in the presence of the Parties and or their representatives  
in chambers on the **01st** day of **March 2024**



  
**A. Z. BADE**  
**JUDGE**  
**01/03/2024**