

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 502 OF 2016

NIC BANK TANZANIA LTD APPLICANT

VERSUS

PRINCESS SHABAHA CO. LTD RESPONDENT

**(Application for Extension of time to apply for stay of execution from
the decision of the High Court of Tanzania at Dar es Salaam)**

(Mansoor, J.)

**dated the 16th day of September, 2016
in
Commercial Case No. 94 of 2015**

R U L I N G

10th & 25th May, 2017

LILA, J.A.:

NIC Bank Tanzania Limited, the applicant, has, by way of a notice of motion filed under Rule 10 of the Court of Appeal Rules, 2009 (the Rules), brought this application seeking for extension of time to apply for stay of execution of the Judgment and decree of the High Court of Tanzania (Commercial Division) (Mansoor, J.) dated 16th September, 2016 in Civil Case No. 94 of 2015. The application prompted the respondent to file a notice of preliminary objection to the effect that:

- 1. That applicant has failure (sic) to submit written submissions to the Court within sixty (60) as provided by Rule 106 of the Court of Appeal Rules thus rendering the application incompetent before this Court.*
- 2. That the application is hopelessly time barred.*

For easy reference and better understanding and resolution of the matters subject of this ruling, a background information of the matter before this Court is of crucial importance.

The applicant filed this application on 8/12/2016. The parties first appeared before the Court (Mwangesi, J.A) on 20/2/2017. On that day Mr. Ambrose Malamsha, informed the Court that he could not represent his client, the respondent, because he was suspended. He asked the Court to adjourn the hearing of the application to enable the respondent engage another advocate. The hearing was accordingly adjourned to another date to be fixed.

On 25/4/2017, the application was called again for hearing before me. Mr. Malamsha reiterated his earlier position that he was under suspension hence he was incapable of representing the respondent. As Mr. Hamza Mringo who introduced himself as the Director of the respondent company was in attendance, Mr. Malamsha was denied

audience by the Court and instead, Mr. Hamza Mringo was accorded opportunity to address the Court. He again prayed the hearing be adjourned to allow Mr. Abraham Senguji, learned advocate, who had taken over from Mr. Malamsha, attend Court. He said Mr. Senguji was then bereaved. Hearing of the application was, again, adjourned to 10/5/2017 for hearing.

When the application was called on for hearing on 10/5/2017 Mr. Adronicious Byamungu, learned advocate, appeared for the applicant and the respondent was represented by Mr. Abraham Senguji, learned advocate.

When hearing was about to start, Mr. Byamungu sought direction of the Court under Rule 4 (2) of the Rules regarding the validity of the notice of preliminary objection that was before the Court. He said, he could not, on the authorities of this Court, raise a preliminary objection in respect of the validity of the preliminary points of objection as doing so would amount to raising a point of preliminary objection over another point of preliminary objection which would amount to pre-empting the existing notice of preliminary objection.

Bearing in mind the nature of the argument Mr. Byamungu raised which touched on the validity of the notice of preliminary objection which was about to be heard, invoking the discretion under Rule 4 (2) (a) of the Rules, I permitted Mr. Byamungu to raise the argument he had and I directed the advocates for both sides to submit on both the validity of the notice of preliminary objection and the notice of preliminary objection raised by the respondent. So as to expedite trial, it was agreed that the notice of preliminary objection be heard first followed by the objection sought to be argued by Mr. Byamungu.

At the outset Mr. Senguji, first informed the Court that he had decided to abandon the 2nd point of objection and that he would argue only the 1st point of objection.

Submitting on the 1st point of objection Mr. Senguji was short and straight that the applicant filed an application for extension of time on 2/12/2016 but did not completely file written submissions in support of the application as required under Rule 106 (1) of the Rules which mandatorily requires the written submissions be filed within sixty (60) days after lodging the notice of motion. He added that the applicant did not even file an application for extension of time to file such submissions as provided

under Rule 106 (9) of the Rules. He pointed out that under that Rule, where the applicant fails to file written submissions and does not file an application for extension of time to do so, the Court may dismiss the application. In support of his contention he cited the Court's decisions in **Edina Mwakapalila V. Fatuma Rashid**, Civil Application No. 94 of 2015 and **Mechmar Corporation v. V.I.P Engineering and Marketing**, Civil Application No. 9 of 2011 (both unreported) in which the applications were dismissed following non-compliance with the mandatory requirements of Rule 106 (1) of the Rules. He accordingly urged the Court to dismiss the application.

In response, Mr. Byamungu informed the Court that the notice of motion was not filed on 2/12/2016 but was filed on 8/12/2016. He also conceded that the applicant did not comply with the requirement of Rule 106 (1) of the Rules by not filing written submissions within 60 days which time expired on 7/2/2017. He also said up to 17/2/2017 the applicant had not filed an application for extension of time to file written submissions and he could not do so after that date as the applicant had already filed the notice of preliminary objection and filing an application for extension would have amounted to pre-empting the notice of preliminary objection filed.

Regarding the prayer that the application be dismissed for non-compliance with Rule 106 (1) of the Rules, Mr. Byamungu, submitted that it would be improper for two main reasons. **Firstly**, that Rule 106 (a) of the Rules gives the court the discretion to either dismiss the application or permit hearing of the application to proceed without submissions. **Secondly**, he said, the respondent did not file an affidavit in reply contesting the application and in two occasions (on 20/2/2017 and 25/4/2017) when the matter was called on for hearing, the respondent did not show any indication to controvert the application. In support of his arguments he referred the Court to the decision in **Khalid Mwasongo v. UNITRANS (T) LTD**, Civil Appeal No. 56 of 2011 (unreported) where the Justices stated that where there is no prejudice caused to the adverse party hearing can proceed without written submissions. He said, in the instant matter there is no prejudice caused as the applicant did not object to the application by filing an affidavit in reply. He prayed the point of preliminary objection be overruled and the Court should to order the hearing of the application to proceed.

In his short rejoinder, Mr. Senguji, reiterated his earlier submissions and had very little to add. He said that in the case cited by Mr. Byamungu

there was an appeal pending while in this case there is none and there is no application for extension of time to file submission. He further said the respondent have filed an affidavit in reply. He insisted that failure to file written submissions prejudiced the respondent.

After closing the submissions on the preliminary point of law raised by the respondent, hearing of the advocates on the validity of the notice of preliminary objection followed.

Arguing on the validity of the notice of preliminary objection Mr. Byamungu contended that the notice of preliminary objection was lodged on 20/2/2017 and at the foot it is indicated that it was drawn by M&N Law Associates which is the name and style under which Mr. Ambrose Malamsha was practicing law. He said, the record shows that on that date (20/2/2017) Mr. Malamsha appeared before Mwangesi, J.A. and informed the Court that he had been suspended from practicing effective 17/2/2017. He argued that from then (17/2/2017) Mr. Malamsha was incapable to practice law hence the notice of preliminary objection filed on 20/2/2017 was drawn and filed by an incompetent person. He said the notice of preliminary objection is therefore invalid and cannot be acted upon by the Court. He further said, on 25/4/2017 Mr. Malamsha came personally to

this Court and reiterated the position that he was suspended effective 17/2/2017 and the Court denied him audience and his representation was not recorded. He asked, if the Court denied him audience how could it act on a document drawn and filed by Mr. Malamsha? He was of the view that, it would be a contradiction. He prayed the notice of preliminary objection filed on 20/2/2017 be struck out.

In opposition, Mr. Senguji, complained that Mr. Byamungu did not follow a proper procedure to raise the objection in that he did not comply with Rule 107 (1) of the Rules which requires the adverse party be given three clear days. He said, the notice of preliminary objection which was filed on 20/2/2017 was served on the applicant on 21/2/2017, just a day after it was filed, hence the applicant had time till 7/5/2017 to file the notice of preliminary objection but he did not do so. He prayed the same be rejected.

By way of a rejoinder, Mr. Byamungu submitted that Mr. Senguji did not argue anything on the competence of the notice of preliminary objection. He stated further that he was permitted by the Court to raise the objection after he had sought direction under Rule 4 (2) of the Rules. He reiterated his earlier submission that the authorities of the Court

prohibit raising a preliminary objection over a preliminary objection that's why he did not file any notice of preliminary objection as required under Rule 107(1) of the Rules.

I have given due consideration to the arguments by both sides. Though short, but are clear and exhaustive on the issues subject of the Court's decision.

However, before dwelling into the merits of the objections raised by both sides, I find it prudent that I should keep the record clear on some few issues raised by the advocates for both sides. **One**, according to the record, the notice of motion was filed on 8/12/2016 as rightly submitted by Mr. Byamungu not 2/12/2016 stated by Mr. Senguji. **Secondly**, the record shows that the respondent filed an affidavit in reply on 4/5/2017 and it is in the record. **Third**, Mr. Byamungu, sought direction of the Court under Rule 4 (2) of the Rules before he was permitted by the Court to raise the objection because the issue Mr. Byamungu wanted to raise touched on the competency of the notice of preliminary point of law filed by the respondent. Mr Byamungu would not file a notice of preliminary objection. Doing that, would, definitely, have amounted to raising a preliminary objection over a preliminary objection which is condemned by the Court in

various decisions, to mention but one is that of **Method Kimomogoro v. Board of Trustees Tanapa**, Civil Application No. 1 of 2005 (CA) (unreported) where the Court categorically stated:

*"This Court has said is a number of times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another objection or trying to rectify the error complained of" (see also **Almas Iddie Mwingyi, Shahida Abdul Hassanal Kassam**).*"

The above being the legal position the applicant could not, in the circumstances, raise an objection by filing a notice of objection as Mr. Senguji seemed to suggest. There is no provision in the Rules which provides for what should be done in the circumstances in which Mr. Byamungu found himself after doubting the competence of the notice of preliminary objection filed by the respondent. It is because of this that Mr. Byamungu resorted to Rule 4 (2) particularly sub-rule (a) of the Rules to seek the directions of the Court. That Rules in terms provides:

(2) Where it is necessary to make an order for the purposes of

(a) ***dealing with any matter for which no provisions is made by these Rules, or any other written law the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary.*** (Emphasis is mine).

Given the above position of the law, the Court allowed Mr. Byamungu to raise his concern on the validity of the notice of preliminary objection raised by the respondent.

I now turn to the merits of objections raised. For convenience, I propose to deal with the doubts raised by Mr. Byamungu on the competency of the notice of preliminary objection filed by the respondent.

It is Mr. Byamungu's submission that the respondent filed a notice of preliminary objection on 20/2/2017 and that it was drawn and filed by M & N Law Associates, the name and style under which Mr. Ambrose Malamsha practiced law. He contended that on that day (20/2/2017) Mr. Malamsha informed the Court that he was under suspension effective 17/2/2017 hence he could not represent the respondent. The same was repeated by

Mr. Malamsha on 25/4/2017, Mr. Byamungu contended. He thus pressed that Mr. Malamsha had no capacity to draw and file the notice of preliminary objection filed on 20/2/2017. He insisted that as the Court denied Mr. Malamsha audience on 25/4/2017 on the reason that he was under suspension, then the Court cannot act on the documents drawn and filed by Mr. Malamsha. He said the notice of preliminary objection is invalid.

As rightly argued by Mr. Byamungu, Mr. Senguji did not in his arguments, completely address the Court on the competence of the notice of preliminary objection filed by the respondent. He, instead, dwelt much on the procedure adopted by Mr. Byamungu on raising the objection as being improper which issue I have already resolved above that the procedure adopted was proper.

I have had ample time to examine the record. It is apparent that the notice of preliminary objection raised by the respondent was filed on 20/2/2017. It is indicated on it, that it was prepared on 17/2/2017. It is now settled that a document is said to have been lodged when it has been paid for and endorsed (see **The Tanzania Revenue Authority v. Al Naeem Enterprises Ltd**, Civil Appeal No. 29 of 2002 (unreported) cited

in the Court's decision in **21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association and Two others** (CA) [2005] TLR at page 7). For this reason the notice of preliminary objection is hereby taken to have been lodged in Court on 20/2/2017.

The record is, further, clear that the notice of preliminary objection is, at the foot, indicated to have been drawn and filed by M & N Law Associates (Advocates). There is no indication however slight that the law firm M & N Law Associates (Advocates) is a partnership firm comprising of other advocates apart from Mr. Malamsha. I am inclined in this position by the fact that in both occasions Mr. Malamsha appeared in Court (on 20/2/2017 and 25/4/2017) he did not inform the Court so. And, had the position been different, another advocate from the very firm would have had entered appearance. There is, therefore, no doubts that the notice of preliminary objection was drawn and filed by Mr. Malamsha and M & N Law Associates is the name and style under which he practiced law, as rightly argued by Mr. Byamungu.

The pertinent issue that arises from the submissions by both sides is whether such notice of preliminary objection is valid.

The record is clear that when the application was called on for hearing on 20/2/2017 Mr. Malamsha informed the Court (Mwangesi, J.A) that he was under suspension hence he could not represent the applicant and he successfully sought for an adjournment to enable his client engage another advocate. The handwritten proceedings by the justice indicates that Mr. Malamsha informed the court that he was served with a letter of suspension on 17/2/2017 though the typed order indicated 6/2/2017, most probably a typing error. All the same this fact is not controverted by Mr. Senguji. On 25/4/2017, again, when the application was called on for hearing before me, Mr. Malamsha reiterated his earlier position that he was under suspension. As he was accompanied by one Hamza Mringo, the Director of the Respondent, I denied Mr. Malamsha audience and, instead, Hamza Mringo addressed the Court. It is a fact, therefore, that Mr. Malamsha is under suspension effective from 17/2/2017 when he was served with the letter of suspension.

The issue that follows for consideration is whether Mr. Malamsha, was upon suspension, not qualified to draw and file the notice of preliminary objection.

The Advocates Act, Cap. 341 (R.E. 2002) (the Act) provides for the situations under which an advocate is not qualified to act as an advocate and the consequences thereof.

To start with, the provisions of section 26 of the Act provides for the effect of disciplinary action against an advocate. It provides:

*"26. Where under any provision of this Act the name of an advocate has been removed from the Roll or **an advocate has been suspended from practice, his practicing certificate (if any) shall be deemed forthwith to have been cancelled**, or, in the case of suspension for a period less than the unexpired period to which his practicing certificate relates, to have been suspended for such lesser period."*(Emphasis is mine).

The major import of the above provision of the law is that whenever an advocate is suspended, his practicing certificate is deemed to have been cancelled. The effect of the practicing certificate being cancelled is that it disqualifies the holder of it to practice law. That is in accordance with section 39 of the Act which provides thus:-

(1) *Subject to the provisions of section 3 **no person shall be qualified to act as an advocate unless:-***

(a) *his name is in the Roll;*

(b) ***he has in force a practicing Certificate;** and*

(c) *he has a valid business licence,*

*and a person who is not so qualified is in this Part referred to as an **"unqualified person."***
(Emphasis is mine).

All that this provision is about is that where one's certificate is cancelled it means it is not in force and the holder of it is unqualified to practice law.

The effect of being unqualified person is stipulated under section 41 (1) of the Act. *That section provides:-*

*"41 (1) **No unqualified person shall act as an advocate or an agent for suitors or, as such, issue out any summons or other process or commence, carry on or defend any action, suit or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or act as an advocate in***

any cause or matter, civil or criminal.” (Emphasis is mine).

On the strength of the above quoted provision, it is clear that an unqualified person is incapable of among other things, issuing any other process or defend any action in his name or any other person’s name. In my considered view, this covers preparing and filing any document in court intending to defend any person. I have no doubts at all that, by its nature, a notice of preliminary objection is intended to defend a party from an action.

The Act further provides, under section 41 (2), 42 and 43 for the penalty to any unqualified person who contravenes the provisions of section 41 (1) including payment of fine or imprisonment or both. The Act on the other hand does not provide for effects of documents prepared and/or filed by an unqualified person. The Act, therefore, predominantly subjects an unqualified person who acts as advocates to criminal liabilities and sanctions.

Faced with a situation whereby an unqualified advocate drew a charge and instrument of guarantee, the Court of Appeal of Kenya at Nairobi in the Case of **National Bank of Kenya Ltd and Wilson Ndolo**

Ayah [2009] eKLR 1, considered the validity of such documents in relation to section 34 of the Advocates Act, Cap. 16 laws of Kenya. That section provides that:

"34 (1) No unqualified person shall, either directly or indirectly take instructions or draw or prepare any document or instrument

(a)

(b)

(c)

(d)

(e) For which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f)

Nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of such document or instrument."

Though couched in different terms, in my view, contextually, section 34 (1) of Cap. 16 laws of Kenya bars unqualified person from acting as an

advocate and charging fees. For that matter it resembles our section 41 (1) of the Act.

As is the case in our jurisdiction, even the Advocates Act, Cap. 16 Laws of Kenya had, then, no provision spelling out what are the effect of documents prepared and filed by unqualified person (advocate). However, expounding on the purpose of section 34 of Cap. 16 Laws of Kenya, the Court of Appeal in **National Bank of Kenya Ltd v. Wilson Ndoto Ayah** (supra) stated:

"Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by an unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The

grievance of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him. There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interest of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law."

Actually, simply stated, the position taken by the Court of Appeal of Kenya is to the effect that any document prepared or filed by unqualified advocate is invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities. In fact, the Court of Appeal of Kenya adopted what was stated by Wambuzi, C.J.,(as he then was) in the

majority decision in the Ugandan Case of **Hug v. Islamic University in Uganda** [1995 -98] EA 117 in which section 14 (1) of the Advocates Act of Uganda which was similar to section 34 of the Advocates Act, cap. 16 of Kenya laws was under consideration. In that case Wambuzi C.J, (as he then was) categorically stated:-

"Any documents prepared or filed by such an advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities."

In the present application I have held above that Mr. Malamsha drew and filed the notice of preliminary objection at the time when he was under suspension. While under suspension, under section 26 of the Act his practicing certificate was deemed to have been cancelled. He had, following his practicing certificate been deemed cancelled, under section 39 of the Act, no practicing certificate in force at the time of drawing and filing the notice of preliminary objection. He was an unqualified person hence he had no capacity to act as an advocate and draw and file the notice of preliminary objection under section 41 of the Act.

Upon my thorough consideration of our section 41 of the Act and considering that section 14 (1) of the Advocates Act of Uganda and section 34 of the Advocates Act of Kenya Cap. 16 of laws of Kenya contextually resemble our section 41 (1) of the Act, I am of a considered view that the reasoning and position of the Kenyan and Ugandan Courts on the whole purpose of section 34 and 14 (1), respectively, is acceptable. I would add that suspension will not serve any useful purpose if suspended advocates would still be allowed to continue drawing legal documents and or filling documents for any official use including in our Courts whether it be with or without a fee. I, therefore, agree and fully associate myself with the findings by the Courts of the above two jurisdictions. I accordingly find that Mr. Malamsha, being an unqualified person, had no capacity to act as an advocate hence could not draw and file in Court the notice of preliminary objection for the respondent. His acts contravened the provisions of sections 26, 39(1) and 41(1) of the Act). On the provisions of the law and authorities cited above, his act was illegal hence the notice of preliminary objection he drew and filed on 20/2/2017 is invalid. It cannot be acted upon by the Court.

Having resolved that the notice of preliminary objection filed by the respondent is invalid there is no reason to consider the submissions on such a notice of preliminary objection.

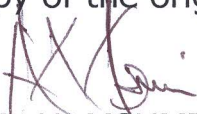
In view of the above firm finding, I find the purported notice of preliminary objection filed by the respondent on 20/2/2017 invalid for being drawn and filed by an unqualified person. The Court cannot act on it. It is hereby accordingly struck out. In the circumstances of this case, I hereby order each party to bear its own costs.

DATED at DAR ES SALAAM this 25th day of May, 2017.

S. A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL