

**IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA
CIVIL CASE NO. 31 OF 2021**

FASTER (Fts) COMPANY LIMITED APPLICANT
VS

L.T SOLUTION (SMC-PRIVATES)
COMPANY LIMITED RESPONDENT

RULING OF THE COURT

31/08/2021 & 07/09/2021

Kazi, J.,

This is an application for an interim injunction which has been preferred under sections 70 (1) c & e) & 129 and Order XVIII Rule 3 and Order XLI 2(1) of **the Civil Procedure Decree** Cap 8 (the CPD) of the Laws of Zanzibar and any enabling provision of any other law which is applicable.

Respondent, through the service of Mr Haji Tetere, the learned counsel, raised two preliminary points of objection that: -

1. Application is incompetent for failure to move the court under a proper provision of laws.

2. The affidavit in support of the application is defective for being attested and signed by an unqualified commissioner for oath.

Mr Saleh H. Said, the learned counsel, appeared for the applicant. By order of the court, the preliminary objection was disposed of by way of written submissions.

The essence of Mr Teterere's submission on the first point of objection was that section 70 (1) c & e of the CPD talks about the supplementary proceeding in which the Judgement Debtor is summoned into court for questioning by a Judgement Creditor who has not received payment. Therefore, he argued, it does not apply to the existing circumstances of this application. Mr Teterere submitted further that section 129 of the CPD is an inherent power of the court, it applies in a case where there is no specific provision provided for the relief sought, and Order

XVIII of the CPD is talking about the notice of the application to be served to opposite party while Order XLI 2(1) is nonexistence under the CPD.

Mr Tetere, the learned counsel, argued that the applicant in his chamber summons prayed for the injunctive relief. Injunctive relief under the civil procedure is provided under Order XLIV Rule 1 (a) & (b) and Rule 2 (1). He maintained that none of these provisions was cited in the chamber summons. He, therefore, stated that is to say the application is made under the wrong provision of laws, and that renders the application to be incompetent. To support his submission, he cited **Robert Leskar vs Shibesh Abebe**, Civil Application No. 4 of 2006 CAT (Unreported), and **China Henan International Co-Operative Group vs Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005, CAT (Unreported).

On the second preliminary objection, Mr Tetere contended that the chamber summons and its affidavit supporting the application were drawn and prepared by advocate Swaleh M. Mziray from Apex Attorney. The commissioner for oath who signed and attested the said affidavit is Saleh A. Said, also from Apex Attorneys. Mr Saleh Said also represents the applicant in this application, which is contrary to our legal tradition and practice. He cited section 7 of the Notary Public and Commissioner for Oath Act of Tanzania to support his stance.

Mr Tetere went further, arguing that Mr Said, a learned advocate, cannot represent the applicant and at the same time exercise his duties as commissioner for oaths in the same proceeding as doing the same is contrary to the principle of natural justice of *Nemo iudex in causa sua*. He argues further that, in Tanzania mainland and according to section 7 of the Notary Public and Commissioner for Oaths Act, the commissioner for

oath working in the firm or office which drew or drafted the affidavit is disqualified from administering the oath and barred from being the advocate in the same proceeding. In Zanzibar, however, following the repeal of **the Notary Public Decree** Cap 29, we don't have a pari materia provision. He added that, in principle, where our procedural law lacks some material, the court can conveniently adapt procedures obtained in comparable jurisdictions. To cement his position, he cited **Calico Textiles Industries Limited vs Zenon Investments Limited and others**, Misc. Civil Cause No 10 of 1998, TLR 1999 at pages 100-129, and **Monica Mabula and others vs Mwasi Amoni Warioba and others**, Civil Revision No. 7 of 2020, HCT (Unreported).

In concluding, Mr Tetere urged this court to strike out this application with costs.

In opposing the point of objections, the applicant begins his submission by claiming that the respondent has not filed his written submission on time; hence this court cannot rely on non-existing submission. This claim, however, with due respect to Mr Said, is baseless as court records clearly show that the respondent filed written submission in chief on 17 August 2021 as per the order of this court.

In reply to the submission made by Mr Tetere, the learned counsel, concerning the first point of law, Mr Said, the learned counsel for the applicant, submitted that the application is properly made, reflecting the intended provisions of law except that there is an error or typing error to it which cannot be relied on as a fundamental error to ruin the whole application. He added that an error during typing is considered not fatal. Therefore, an omission of V when citing Order XLIV by mistake on the applicant's application is not fatal to the extent of barring the court from

entertaining the application. Mr Said submitted further that, for the application to be considered incompetent for failure to move the court under a proper provision of the law, it is required that none of the provisions cited is incorrect and or there is no any provision cited at all to move the court, in this matter, he added, it is only part of the provision which is by typing error contended to be wrong while remaining provisions are proper and enough to move the court. Finally, Mr. said cited **Gilbert Mwakatuma vs Francis Mwakyendege**, Land Review No. 1 of 2020 (Unreported), To support his argument.

Regarding the second preliminary point of law, the counsel for the applicant contended that the view that a commissioner for oaths from the law firm cannot be commissioner for oaths and advocate at the same time has no legal basis since the same is a matter of practice and not a matter of law. He submitted further that the firm represents the

applicant through her advocates. Mr Said is among the advocate of the said law firm. Still, being a commissioner who attested affidavit of the applicant cannot be a barrier to hindering Apex Attorneys as a law firm from representing the applicant.

He concluded his submission by urging the court not to be tied up with technicalities in the dispensation of justice.

From the rival submissions of the parties in this application, the question to be considered is whether this application for interim injunction is competent before me.

As rightly submitted by the learned counsel for the respondent regarding the first point of law, the applicant has wrongly moved this court by citing a non-existing provision of law. Our Civil Procedure Decree has no Order XLI 2(1). Therefore, Order

XLI 2(1) has been wrongly cited as the enabler of the instant application.

The applicant claimed that there was a typing error; hence letter V was omitted in the said order. To me, this is a very flimsy reason that I cannot stomach. As for the cited case of **Gilbert Mwakatuma** (Supra), the same is distinguishable since the applicability of overriding objective principle is found in **the Civil Procedure Code**, Cap 33 R.E 2002 of the Laws of Tanzania. On the other hand, the CPD, Cap 8 of the Laws of Zanzibar, is still silent concerning the overriding objective principle.

The law regarding the instant matter is well settled that the wrong citation and non-citation of the enabling provision of law renders an application incompetent. This position has been stated in several cases when the court faced circumstances similar to this application. In

Zanzibar Petroleum LTD and others vs Ali Muradi Dilshad, Civil Case No 66 of 2021, HCZ (Unreported), I had this to say when I encountered similar matter: -

“... it is worse that not only applicant cited the wrong provision of law, but even the piece of the legislation cited to move the court is not existed, apparently that alone renders this application incompetent as the court cannot be moved under non-existing law.”

See also **Bahadir Sharif Rashad and 2 Others vs Mansour Sharif Rashid and Another**, Civil Application No. 127 of 2006, CAT at Dar es Salaam (Unreported), **Majura Magafu and another vs The Managing Editor**, Majira Newspaper and another, Civil Application No. 203 of 2015 – [2018] TZCA 264 at www.tanzlii.org.

As stated above, since the applicant cited non-existent law to move the court in this application, this application is incompetent.

I would have ended here since this ground alone suffices to dispose of this application, but I am compelled to consider the second point of law in the interest of our jurisprudence.

As for the second point of law, the question that needs an answer is whether an affidavit filed in support of this application was attested and signed by an unqualified commissioner for oath.

It is not disputed that the affidavit, which Fakh Abdalla Pandu deponed, was drawn and filed by one Swaleh M. Mziray and attested by Saleh Ali Said. It must be understood that Mr Mziray and Mr Said, learned advocates, are colleagues working together in the law firm traded as Apex Attorneys. Based on that, the learned counsel for the

respondent submitted that this is contrary to our legal tradition and practice, and the principle of natural justice that a person cannot be a judge in his own case. The learned counsel for the applicant did not deny that the affidavit was drafted and attested by the same advocates who represent the applicant. Still, according to his submission, he sees nothing wrong.

As rightly submitted by the respondent and as it is overt in the case file records, the affidavit in support of the chamber application has been drawn and filed by Mr Swaleh M. Mziray, an advocate from the Apex Attorneys, and the Commissioner for Oaths, who attested the said affidavit was Mr Saleh Ali Saidi, also an advocate from Apex Attorneys. Before me, when this case was called on 03/08/2021 applicant was represented by Mr Swaleh Mziray, who prepared and filed the applicant application, and on 10/08/2021 and 31/08/2021 applicant was

represented by Mr Saleh Ali Said, who was notarized applicant affidavit. Since Mr Said and Mr Mziray, are learned advocates from the same law firm that represents the applicant in this case, it is incontrovertible that they save the same interest. At this juncture, therefore, the question is whether an advocate who is a notary can notarize his client or client from his law firm.

Unlike other jurisdictions, in Zanzibar, the law is silent, there is no provision in **the Advocate Act** No 1 of 2020 which regulates the conduct of the Commissioner for Oaths and Notary Public, similar position was in the repealed Notary Public Decree Cap 29. Based on this gap in our jurisprudence, Mr Teterere found his arguments on this point on persuasive authorities from Tanzania Mainland such as, first; section 7 of **the Notary Public and Commissioner for Oaths Act**, Cap 12, which provides that: -

“No Commissioner for Oaths shall exercise any of his power as commissioner for Oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested”.

Second; the case of **Calico Textiles Industries Limited** (Supra), which provides that :-

“To the extent that the commissioner for Oaths who attested Mr. Mkono’s affidavit has an interest in the affairs of applicant the affidavit the affidavit contravened the provisions of section 7 of the Notary Public and Commissioner for Oaths Ordinance Chapter 12, and therefore defective and the application was invalid ab initio”

And third; the case of **Monica Mabula and others** (Supra), where the High Court of Tanzania had this to say: -

"I am of the considered view that, a firm or office drawing and filling the affidavit in the court has interest in the proceedings thereto. For that reason, a commissioner for Oaths working in the firm or office which drew or drafted the affidavit is disqualified from administering oaths".

The position above, as alluded to by Mr. Tetere, is settled in East African Countries as apart from Tanzania, Kenya and Uganda have similar provisions in their laws. See Section 4 of **the Oaths and Statutory Declaration Act** Cap 15 of the Laws of Kenya, and Section 4 of **the Commissioner for Oaths** (Advocates) Act Cap 5 of the Laws of Uganda.

In addressing a similar matter, the High Court of Kenya observed the following in the case of

Caltex Oil (Kenya) Ltd vs Stadium Service Ltd & Another (2002) eKLR.

"I still stand by what I did say in the case of James Francis Kariuki & another v United Insurance Co. Ltd. HCCC No. 1450 of 2000 that such an affidavit sworn in violation of Section 4 (1) of the Oaths and Statutory Declaration Act is for all intents and purposes not an affidavit as envisages in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not present a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.... I feel certain in my mind that whatever way one looks at those affidavits, they were simply not affidavits at or for purposes of the law".

Guided by the laws as mentioned above and decisions, I am persuaded to hold that an advocate enrolled in Zanzibar as a Notary Public and Commissioner for Oaths cannot either notarize affidavits or pleadings signed by his client or client retained by his law firm or exercise any of his power as commissioner for oaths in any proceeding or matter in which he is interested, or he is the advocate for any of the parties. I hold this view for a simple reason that, an advocate, either solo or in the law firm, has a direct and indirect financial and beneficial interest in the affidavit, pleadings or any documents of his client or clients of his law firm and therefore, he is no longer impartial. In such situations, he must not be allowed to perform the notarial act.

From the above, it is clear the affidavit in support of this application was drafted and attested by the advocates who had an interest on it. Therefore, the same has no legal effect, and this court

cannot rely and act upon the said affidavit to support the instant application.

Having discussed both preliminary points of law, I find them meritorious and hence sustained.

Consequently, since this application is incompetent, I hereby strike out the same with costs. It is so ordered.

Dated in Zanzibar this 07th day of September 2021.

A handwritten signature in blue ink, appearing to be 'G. J. Kazi', written in a cursive style.

G. J. KAZI
JUDGE
07/09/2021