IN THE HIGH COURT OF TANZANIA

AT BUKOBA

(BUKOBA REGISTRY)

MISC. CIVIL APPLICATION NO. 45/2015

(ARISING FROM MISC. CIVIL CAUSE NO. 9/2015)

ANSBERT MUGAMBA NGURUMO .....PETITIONER

VERSUS

1. CHARLES JOHN MWIJAGE
2. THE RETURNING OFFICER MULEBA NORTH CONSTITUENCY } **.....RESPONDENT**
3. THE ATTORNEY GENERAL

RULING

10/12/2015 & 14/12/2015
BEFORE: - HON. F. N. MATOGOLO – J

Ansbert Mugamba Ngurumo, the applicant, was contesting for parliamentary seat of Muleba North constituency through the ticket of Chama cha Demokrasia na Maendeleo (CHADEMA) but he lost in the election. He was dissatisfied and has petitioned to this court for nullification of the Election, and Elections of the 1st Respondent Charles John Mwijage be declared invalid. He also joined the returning officer, Muleba North constituency and the Attorney General, second and third respondents respectively as necessary parties. The applicant through the services of Kabunga and Associates Advocates has also filed chamber summons under S. 111 (3) and (5) of the National Elections Act, Cap. 343. RE. 2015 and

any other enabling provision of law, in this application for security for costs the applicant is praying for the following orders:-

1. *That, the honourable court be pleased to exercise its discretionary powers for determination of the amount payable or any other form of security for costs to enable the petitioner access to justice before this court.*
2. *That, the honourable court be pleased to exercise its discretion by making an order that the applicant/petitioner be exempted entirely from payment of any form of security for costs.*
3. *Any other orders/relief as may be necessary to meet the ends of justice.*
4. *Costs of the application to be in the course. The application is supported by the affidavit deponed by Mr. Kabunga advocate of the applicant.*

The chamber summons was served to the respondents who filed counter affidavits.

The 1st respondent through his advocate Mr. Adronicus K. Byamungu also filed notice of preliminary objection on point of law that the application is not accompanied by any or competent affidavit. So he prayed the same to be struck out. On the date of hearing of the preliminary objection, Mr. Adronicus Byamungu submitted in support of the preliminary objection. He stated that the chamber summons filed by the applicant on the second page, it states that the application is supported by an affidavit dully sworn by the applicant's principal officer. But if you peruse the entire application there is no such affidavit dully sworn by the applicant's principal officer.

Instead there is attached the affidavit of Aaron Kabunga. Mr Byamungu said Aaron Kabunga is neither the applicant nor the applicant principal officer. Mr. Kabunga is only the counsel advocating for the applicant. Therefore it can be concluded that the application/chamber summons is not supported by any affidavit as stated in the chamber summons Mr. Byamungu submitted further that as a matter of principle, the supporting affidavit must be the one mentioned in the chamber summons and not any affidavit. Under those circumstances therefore he said the entire application is liable to be struck out for being incompetent. And in any event if it is found that the affidavit of Kabunga advocate is properly in support of the application still he submitted that the application will still be defective for being supported by the affidavit of counsel representing the applicant instead of the applicant himself. He said it is now settled principle of law that an advocate can only swear and file an affidavit in proceedings which he appear for his client for matters which are in the advocates personal knowledge, such as proceedings pertaining to what transpired in court. He relied on the decision of the Court of Appeal of Tanzania in the case of ***Lalago Cotton Ginneries and Oil Mills Company Ltd. V. The Loans and Advance Realization Trust,*** Civil Application No. 8 of 2003. That in no any circumstances, Mr. Kabunga could swear on personal finances of the applicant and political affairs of the applicant's party which are the only grounds in support of the application be struck out.

Mr. Ngole principal State Attorney who represents the 2nd and 3rd respondents had nothing to add but subscribed to what Mr. Byamungu has submitted.

Mr. Aaron Kabunga advocate for the petitioner/applicant on his part submitted that the preliminary objection raised by the 1st respondent's counsel has no merit, the same is misconceived with no leg to stand. He said in the first place the preliminary objection was hinged on the competence of the affidavit but the counsel is submitting on the chamber summons on which he furnished no notice. He therefore asked this court to overlook completely the submission made on the issue of chamber summons. But he also said in case this court finds otherwise, the chamber summons contains prayers on which the application is hinged. He said he has never come across any decision of the court of appeal or this court or any law which talk s about defect in chamber application. That the learned counsel is inventing new law, but he did not cite any law to the effect that the defect of the chamber summons can affect the application. He also said normally the deponent has to swear for matters which are of his, personal knowledge, the argument that the advocate cannot be able to know economic status of the petitioner or affairs of petitioner's party and cited case of ***Lalago Cotton Ginneries*** has no legal base. That this being a court of law cannot hazard for what the advocate for the 1st respondent intended to say. He has not cited any paragraph of the affidavit which offends the law. He has just given a sweeping statement leaving to the court to sort out the grain from the chaffs. Mr. Kabunga said even that could stand, the decision in ***Lalago case*** does not support his contention. That decision did not strictly provides that an advocate cannot swear for matters which are not of his knowledge which are from his client. But page six of the said judgment clearly provides that if there are information from

other sources, he has to depone and verify that the deponent believe the same to be true. He said it appears the learned counsel did not read the entire page 6 of the judgment. That the information which the deponent has received from other persons are indicated in the verification clause of the dependent. Mr. Kabunga further submitted that paragraph 2 of his affidavit disclosed that the deponent had been briefed with all the facts pertaining to the petition. Further in his verification clause he disclosed which information he received from other persons and believed them to be true. That even if you look at O. XIX. R. 3 (1) of the Civil Procedure code cap. 33 RE. 2002, an advocate or any other party besides the applicant himself can swear for matter of information on interlocutory applications, the information which he believed to be true. There is no any provision in the Election Petitions Rules which prescribes how an affidavit should be made. That S. 22 of the National Election (Election Petitions) Rules, imports the applicability of the CPC, it is the law which governs Election petitions Proceedings. He also said in civil suits an advocate can swear affidavit for his client thus he is not barred.

Mr. Kabunga stated that the application was made under S. 111 (3) (6) of the National Elections Act Cap. 343 RE. 2002. In that section there is no where an advocate is barred to swear an affidavit of his client's application. He further stated that the position of law is that if an affidavit is defective for whatever reasons, a party has to be given leave to amend the application. He said that was held in the case of ***DDT International Ltd V. Tanzania Harbours Authority*** Civil application No. 8/2001 CAT.

On the issue that Mr. Kabunga as an advocate cannot know economic position of the petitioner, or affairs of the petitioner party he said the learned counsel did not cite any paragraph of the affidavit which offends the law. But should there be any, the position of the law now is that if there is defective part of the affidavit, the court can ignore or expunge it without affecting the affidavit itself. He cited the case of ***Attorney General V. SAS Logistics Ltd,*** Criminal application No. 09/2011. CAT at Mwanza, to support that argument. He said in that case, the Court of Appeal reterated its decision in ***Phantom case.***

Mr. Kabunga stated further that this court is the fountain of justice. And that Election petitions are very crucial and are of Public interest. The law on election petition has put it clear that irregularities should not affect the petition. This minor irregularities should be ignored in order that the court can hear the merit of the case, and this is in accordance to S. 29 (2) of the National Election (Election petitions) Rules.

Mr. Kabunga learned counsel concluded his submission by requesting this court to dismiss the preliminary objection as the learned counsel for the 1st respondent has failed to substantiate the same and to convince the court that the same has merits.

Mr. Byamungu learned counsel in his rejoinder submitted that the counsel for the applicant had misconceived the preliminary objection, that their preliminary objection is not on the affidavit of Mr. Aaron Kabunga. But is on the whole application as is worded. The first basis is on the chamber summons which plainly states that the application is supported by the affidavit of the principal officer of the applicant. The chamber application is

therefore not supported by the affidavit as stated in the chamber summons itself. Instead an affidavit of Aaron Kabunga was annexed to it who is not the applicant's principal officer. That is why he says the application is no accompanied by any or competent affidavit. He retereted that if the affidavit of Aaron Kabunga will be taken to be supporting affidavit then the application is incompetent in terms of O. XLIII Rule 3 of the CPC. The supporting affidavit should be that referred to in the chamber summons. As regard to the second limb of objection, Mr. Byamungu said the objection raised is not against certain paragraphs of the affidavit. But against the entire affidavit. That is Mr. Kabunga is incompetent to swear that affidavit in terms of the authority of ***Lalago Cotton Ginneries*** case and he insisted, that case has to be read as a whole. That in ***Lalago's case*** the Court of Appeal had decided that an advocate cannot swear affidavit on matters of the knowledge of his client. But has to swear for matters pertaining the proceedings of the case, although Mr. Kabunga is relying on paragraph 2 of his affidavit, but that paragraph does not turn the counsel into a witness. Briefing by a client cannot turn him into a party. He will remain an advocate, and this is the spirit of O. XIX r. 3 (1) of the CPC. Mr. Byamungu disagreed with the suggestion by Mr. Kabunga, for a court to grant leave to amend the affidavit, the reason he gave is that the application is incompetent and not just part of the affidavit. There is nothing to be amended. On the reliance by Mr. Kabunga on section 29 (2) of the National Election Act that irregularities in election petitions should not defeat the petition he agreed on that but submitted further that the petitions are regulated by law and should be conducted within the

parameters of the law and the law applicable should not be the law of the jungle.

Having narrated the rival submissions by the counsels from both sides, the question which call for determination by this court is whether the application before this court is competent or not.

Mr. Byamungu first attack on the applicant's application is based on the statement on the chamber summons that the application is supported by an affidavit duly sworn by the applicant principal officer.

Secondly that Mr. Aaron Kabunga as an advocate cannot swear an affidavit for matters which are of personal knowledge of his client, the applicant.

In the first argument Mr. Byamungu says the application has not been supported by any affidavit or competent affidavit. Mr. Kambuga advocate in his reply to what was submitted by Mr. Byamungu submitted on the supporting affidavit, asked this court to overlook the submission on chamber summons on the ground that the objector did not furnish notice on it. But if the court will overlook it, he said the chamber summons only contains prayers on which the application is hinged. But also Mr. Kabunga appeared to attack Mr. Byamungu to invent new law, as to his knowledge there is no any law or decision of the court about defect of chamber summons. I am not sure if Mr. Kabunga grasped properly what Mr. Byamungu was challenging. His argument is that in the chamber summons it is stated that the same is supported by the affidavit deponed by the applicant's principal officer. The question here is who is that principal officer of the applicant deponed the affidavit. I believe the petitioner and applicant in this application by the name of Ansbert Mugamba Ngurumo is

a natural person and not a juristic person or body corporate whereby he can be represented by his principal officer. It is on this basis the 1st respondent counsel argues that the chamber summons is not supported by any affidavit. It is therefore not a new thing which need separate notice. There is no any affidavit deponed by the applicant principal officer as is stated in the chamber summons, the affidavit which is attached to the chamber summons is the one deponed by Mr. Kabunga advocate. Now, can we say that Mr. Kabunga as an advocate is the principal officer of the applicant or applicant himself. I think the answer is no. An advocate cannot be the principal officer of his client whom he represent, the principal officer for the purpose in which it was stated in the chamber summons must be the officer with the most authority of the officers being considered for some purpose. According to Oxford Dictionary of Law 5th Edition, the principal officer is defined to be a person selected or appointed by the Board of directors to manage the daily operation of the corporation.

As Mr. Ansbert Mugamba Ngurumo is not a juristic person or body corporate no one can be his principal officer. Even Mr. Kabunga advocate by virtue of being an advocate representing him cannot be his principal officer Mr. Kabunga remains a counsel advocating for the petitioner/applicant. If there is no such affidavit of that principal officer of the applicant, can the chamber summon be said to have been supported by an affidavit if so the affidavit deponed by whom.

It was correctly submitted by Mr. Byamungu that the chamber summons is not supported by any affidavit, if the affidavit intended is that of the

principal officer of the applicant. There is no such affidavit attached to the chamber summons.

It is a requirement of law that applications must be made by chamber summons supported by affidavits, unless otherwise provided. This is provided for under O. XLIII. Rule 2 of the Civil Procedure Act, Cap. 33 RE. 2002. The requirement itself is couched in mandatory form because of the word ***shall*** which is used. I am not aware of any law exempting the application such as this at hand from being supported by an affidavit.

The affidavit of the principal officer mentioned in the chamber summons itself was not attached. But the affidavit which was attached there to is the affidavit deponed by Mr. Kabunga advocate.

The question to ask ourselves is whether it is proper for the applicant's application to be supported by the affidavit deponed by his advocate, Mr. Kabunga for that case. This question takes us to the second part of the preliminary objection whether the application is accompanied by a competent affidavit.

Mr. Kabunga learned counsel contention is that the chamber summons is supported by the affidavit which was deponed by himself. On the other hand Mr. Byamungu argued that the advocate who represent, the petitioner/applicant cannot swear an affidavit to support the application by the applicant, because there are facts which are of the applicant's personal knowledge and not to the knowledge of the advocate Mr. Byamungu relied or to decision of the court of appeal of Tanzania in the case of ***Lalago cotton Ginneries*** (supra). However Mr. Kabunga appears to suggest and that is his position that there is nothing wrong for an advocate to prepare

and swear such an affidavit. The reasons he gave are that the ***Lalago Case*** does not support the objector's contention as the decision in that case did not strictly provide that an advocate cannot swear for matters which are not of his knowledge and which are from his client. He said page six of the said judgment clearly states if there are information from other sources he has to depone and verify that the deponent believe the same to be true, and that is what he did. He went further and state that in paragraph 2 of the affidavit he disclosed that the deponent had been briefed with all the facts pertaining to the petition and the application. Further that in the verification clause he disclosed which information he received from other persons and believed them to be true. He said even O. XIX Rule 3 (1) of the CPC permits an advocate or any other persons authorized by a party to file pleadings. By that analogy he does not see the reason why he can be barred to swear for matter of information on interlocutory application the information which he believe to be true. Mr. Kabunga stated further that the CPC apply in election petitions by virtue of S. 22 of the National Elections (Election Petitions) Rules, which import applicability of it. The CPC permits advocates to file applications and swear affidavit on behalf of their clients. That this application was made under. S. 111 (3) (5) of the National Electins Act Cap. 343 RE. 2015, that section there is no where an advocate is barred to swear affidavit for his client's application in rejoinder Mr. Byamungu in respect of the second limb of objection he said he did not attack certain paragraphs of the affidavit but the entire affidavit which is said to support the chamber summons is incompetent under the authority of ***Lalago case,*** that an advocate cannot

swear affidavit on matters to the knowledge of his client except for matters he know pertaining to the proceedings of the case. Mr. Byamungu went further and states even if we assume that the affidavit deponed by Mr. Kabunga is competent but which he denies, paragraph 2 of the affidavit relied upon does not turn the counsel into a witnesses. Briefing by his client cannot turn him into a party, he will remain advocate unless for matters relating to the proceedings.

Let me now look at the law and see what is directed therein and let me start with O. XIX of the CPC. O. XIX rule 3 (1) provides:-

> "*Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted. Provided that the grounds thereof are stated"*

What does this mean, my understanding is that a deponent is only allowed to depone on matters of his knowledge and which is able to prove, and where he believes on information availed to him from other person or sources he has to give reasons for so believing. O. XIX r. 3 was the subject of discussion in the case of ***Cordura Ltd Osterbay Hotel V. Jubilee Insurance Company Of Tanzania Ltd*** Miscellaneous Civil Case No. 21 of 2002 High Court (unreported), Nsekela, J (as he then was) stated:-

> *". . . I agree with Mr. Kesaria that as the matter of prudence and practice an advocate should not swear/ affirm an affidavit on behalf of his/her client if the latter is available.*

There are also several cases by this court on the subject. There is no reason or ground given why Mr. Kabunga has take up the matter and swear an affidavit while the applicant himself was present. In the absence of an affidavit sworn by a party himself it is doubtful whether an advocate can by his own affidavit prove all statements of information and belief. But it should be remembered also that an affidavit is a substitute to oral evidence and it is subject to the rules of evidence like any other evidence. The swearing of affidavit by an advocate is a practice which is discouraged by courts.

Now going back to ***Lalago case,*** the relevant part of the judgment and which is relied upon by Mr. Byamungu is found at page 5 of the typed judgment which reads:-

> *"An advocate can swear and filed an affidavit in proceedings in which he appears for his client but on matters which are in the advocates personal knowledge only. For example he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally know what transpired during those proceedings. . ."*
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> The court continued:
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> *An affidavit or counter affidavit which an advocate swears and files in proceedings relating to his client is not privileged and must conform to the usual form relating to affidavits. . .* "

The court also sought inspiration from the CPC because the same does not apply in the court of appeal but clearly said O. XIX (3) (1) of the CPC which provides that affidavits shall be confined to such fact as the dependent is able of his own knowledge to prove, except on interlocutory applications, in which statements of his belief may be admitted, provided that the grounds thereof are stated, the Court of Appeal recognized that provision as a good law.

Mr. Kabunga though stated that the decision of that case does not assist the counsel for the 1st respondent in his preliminary objection he did not explain how it does not assist the objector apart from saying that he did not read the whole of page 6. By reading the entire judgment, the same also discourage the practice by advocates to prepare and swear affidavit for their client's application. That decision being given by the Court of Appeal is binding on me. In that case, the counter-affidavit under consideration was declared incompetent. The principle of law laid in that case should be applied in this case. There is another argument by Mr. Kabunga that the Election petitions pieces of legislation do not bar an advocate to swear for the application of his client. And that there is no provision in the Election petitions Rules which provides how an affidavit should be made, that by the importation of applicability of the CPC under rule 22 of the National Elections (Election petitions) rules, then an advocate can prepare the application and swear the affidavit of his client. It appears the learned counsel is relying on O. VI r. 14 of the

CPC which permits a party or his advocate or any other person authorized by the party to file pleadings.

However S. 111 (2) and (5) of the National Elections Act recognizes the petitioner who can file petition and an application for security for costs. The petitioner does not include his advocate or any other person whom he can authorize to file pleadings. There is no such definition in the relevant laws covering the advocate for a petitioner to be a petitioner also. And more so as it is expressly explained under rule 11 (1) of the National Elections (Election petitions) Rules that the procedure for deposit of security for costs shall be regulated by section of the National Election Act, if so I don't see the applicability of O. VI. R. 1 of the CPC at this particular stage of an application for security for costs. But even the rule itself provides in mandatory form that the procedure is to be regulated by the National Elections Act and not any other law.

Now by taking into account the applicant's failure to annex the affidavit mentioned in the chamber summons that is the affidavit by the applicant's principal officer and by annexing the affidavit deponed by Mr. Kabunga advocate which is incomplete as have hold here in above, it follows therefore that the applicants application is incompetent. If so what is the remedy. Mr. Byamungu prayed for it to be struck out. But on the other hand Mr. Kabunga has forcefully argued that it is not necessarily for it to be struck out but the applicant can be given opportunity to amend it. He supported that argument by citing the decision in the case of ***DDT International***

Ltd V. Tanzania Harbours Authority (unreported) and ***Attorney General V. SAS Logistics Ltd (Supra)*** in which it was held defective affidavit in verification clause or any part a party is to be given leave to amend. The decisions relied upon by learned counsel are very clear they are about where the defect is in verification clause or any one part or paragraph of the affidavit. But the affidavit in the case at hand by taking into account both limbs of the preliminary objection, the whole affidavit turned to be defective. There is not any paragraph to be severed and which to be retained. There is therefore nothing the applicant can amend as the defect renders the whole application incompetent. But Mr. Kabunga learned counsel tirelessly implored upon this court not to strike out the application. And submitted that election petitions are crucial and of public interest and should not be affected by minor irregularities. The same should be heard on merits in accordance to S. 29 (2) of the National Elections Rules. This provision provides as follows:-

> *"(2) Where there has been any non-compliance with any of the provisions of these Rules or any other procedural irregularity, the court may require the petitioner, subject to such terms as to costs or otherwise as the court may direct, to rectify the non-compliance or the irregularity in such manner as the court may order".*

This would be possible had the time limitation provided under S. 111 (3) of the National Election petitions Act, permit but the time now is not on the side of the applicant.

The learned counsel has also asked this court not to adopt the strict compliance on the requirements of the laws and rules of procedure. On the same ground that election petitions are very crucial and of public interest. I agree that election petitions are very crucial and of public interest. However there is no law directing in mandatory terms for courts not to have strict compliance to the requirements of the law. In actual fact, it is emphasized that courts should construe the election petitions strictly. In the case of ***Prince Bagenda V. Wilson Masiiingi & Another (1997) TLR 200*** HC the court has this to say:-

> *"An election petition must be construed more strictly than a plaint in a civil suit . . . because among other things, the right to file an election petition is not a common law right but a statutory"*

Again in ***Manju Saium Msambya V. The Attorney General & Kifu Guiam Hussein Kifu,*** Civil Appeal No. 2 of 2002 it was held:-

> *. . . "The reason for putting the standard that high is not far to seek. An election is the exercise of the constitutional right and the fulfillment of an obligation by the citizenly. It is perhaps the only occasion when the people are enabled directly to participate in the running the affairs of their country. Courts, therefore have a duty*

to respect the people's conscience and not to interfere in their choice except in most compelling circumstances".

It is therefore important that court should construe strictly the election petitions laws. S. 111 of the National Election Petitions Act Cap. 343 RE. 2015 provides an opportunity to the petitioner to knock the doors of the court by filing an application for determination of the amount payable as security for costs. The court doors are always open. The problem which happened with the present applicant is on the entry process. The documents he filed could not enable him realize what he had intended, this is very unfortunate to the applicant, for had he prepared and filed valid documents perhaps at the end of the day the court would give a relief to him to have access to justice. This is unfortunate result because the court doors are always open for petitioners to make applications for determination of an amount payable as security for costs.

But before ending up, let me say a word that, in election petitions it is of great essence that election petitions are disposed of justly, fairly and expeditiously while at the same time ensuring strict compliance by petitioners with the strict requirements in the electoral laws and rules of procedure in election petitions. But failure to so comply with the requirement the petitioners with find themselves blocking their way like the case at hand. I have hold above that the application before this court is incompetent. The preliminary objection raised by the counsel for the 1st respondent is sustained and the application is struck out with costs.

F. N. Matogolo –Judge
14/12/2015

Date: 14/12/2015

Coram: Hon. F. N. Matogolo – J

Applicant – Present

1st Respondent: Absent

2nd Respondent: } Mr. Ngole PSA

3rd Respondent: }

B/Clerk: Tatu

Mr. Ngole - Principal State Attorney

My lord I appear for the 2nd and 3rd respondent

Mr. Adronicus Byamungu

My lord I appear for the 1st respondent

Mr. Kabunga Advocate

My lord I appear for the petitioner applicant

Court: Ruling delivered

F. N. Matogolo –Judge
14/12/2015