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An advocate is barred to represent a party in case he acted as an attesting officer

* Advocate is barred from representing a party in a case where he has attested a doc.

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 19 OF 2011**

**GREYSON LUDOVICK KIONDO......................................PLAINTIFF**

**VERSUS**

**TWIGA BANCORP LTD..................................................DEFENDANT**

**RULING.**

**(5.04.2012 & 22.04.2012)**

**Nyangarika J.**

The plaintiff is natural person while the defendant is a corporate entity registered under the **Companies Act [Cap. 212 R.E.2002]** of the laws of Tanzania. The former claims from the latter a total sum of **Tshs. 200,000,000** or any other high sum in damages for breach of duty and mishandling him in relation to the operation of a bank account, an apology and withdrawal of the publications in news papers, aggravated damages and costs, plus, "**further Tshs. 1,000,000** per day from **1/2/2011** being the date the plaintiff formerly demanded for withdrawal of the publications which is alleged that the defendant has neglected to pay heed to".

The plaintiff is enjoying the legal services of Mr. Byamungu, learned counsel, whereas the defendant's is under the legal services of Mr. Zhake, learned counsel.

All things, including preliminary stages, were *ceteris Paribas* ,until on the eve of the hearing, when, Mr. Zhake, before hearing could commence, by way of expression of worry, raised what he termed as "a point of direction". For all purpose and intent, Mr. Zhake worry is "whether Mr. Byamungu, counsel for the



Erik Kanga

plaintiff, having attested one of the document attached in the defense, is competent or not to continue representing the plaintiff in the case". Mr. Zakhe, stated that per the loan agreement attached in the written statement of defense, Mr. Byamungu, learned counsel for the plaintiff, attested it as a witness, a circumstance which accords him interest in the case and therefore incompetent to appear in the suit as an advocate for the plaintiff.

On the other hand, while conceding to have attested the said loan agreement, Mr. Byamungu, boldly holds that the cause of action is not based on the loan agreement but breach of duty. On the alternative, he argue that since there is no formal objection filed to enable him to prepare himself for that purpose; he sought and was granted an adjournment by this court so that he can prepare himself and address the court on the question of his competency to represent the plaintiff.

Hearing was therefore set on the **25/4/2012**. Come that day, Mr. Byamungu, embarked with a statement that in these proceedings, he is not exercising his powers as a notary public and commissioner for oath, and neither he is interested in the case except representing his client( plaintiff).

Referring to the definition of the term "interest" under **section 7 of Chapter 12 of Tanzania, (Revised Edition 2002) and Black's Law Dictionary 8$^{th}$ Edition, at page 828,** Mr. Byamungu further submission was that there is nothing in these proceedings which fits in the definition to show his interest. It was Mr. Byamungu contention that he only attested the signature of the plaintiff, an act which cannot disqualify him from conducting these proceedings. He argued that there is no possibility that he will be called as a potential witness in this case as feared by Mr. Zhake. Mr. Byamungu went ahead to divulge that the subject of conflict of interest is not new in this country. He referred me to the Case of **Gandesha vs. Killindi** offee Estate Ltd& Another (1969) EA 299(HCT) at page 303, where the court quoted **Halsbury's law of England, Vol.3, page 102** that " a barrister should not act as a witness and counsel in the same case" . Mr. Byamungu submitted that in this case he has no apparent reasons to believe that he would be called as a witness.

In a lamenting tone, Mr. Byamungu went on to contend that he had been engaged in the pre-litigation stages including writing the demand notices, drawing pleadings which were read by the defendant's counsel, and made several appearances in pre trial proceedings more than a year ago, only to meet this objection without notice and at the 11th hour before hearing. Mr. Byamungu equated the "point of directions" raised by Mr. Zhake, to be a tactical delay on trial of the case calculated to derail the case and deny him of his earning, because, in his view, there is nothing shown which could prevent him from representing his client and gain a living through instructions fees.

From another front, Mr. Byamungu submitted further that the court cannot make an order to prevent an anticipated violation and as such it is until he is called as a witness in this case, that ,he can be disqualified from representing the parties. He footed this submission on the case of **Jafferari &Another vs. Borrisow (1971) EA 165(HCT) at Arusha.** On this line of argument, Mr. Byamungu went on to fault the objection that it does not show grounds on which he could be disqualified such as what information he holds which would divulge in prejudice of the defendant and to the benefit of the plaintiff.

Expressing further his discontentment with the objection, Mr. Byamungu submitted that the loan agreement is not contested in this case and that he did not draw it or advise his client on it, but only attested the plaintiff's signature. Mr. Byamungu went on with his attack on the objection that it was lacking basis whatsoever, designed to derail the trial and deprive the plaintiff a fair hearing through a counsel of his own choice and deprive him(counsel) his livelihood in terms of instructions fees. On that note, Mr. Byamungu prayed for the objection to be dismissed with costs and further that the plaintiff be awarded costs for the adjournment of the trial, which had it been not for the frivolous objection, it would have been on its second day.

On his side, Mr. Zhake responded that he did not raise an objection but rather he is seeking court's directions regarding the document, in which Mr. Byamungu, who is representing the plaintiff, was involved and that he had in mind a provision of the law against a counsel who was involved in attesting a document to be involved in the conduct of the litigation. Mr.Zhake went on to insist that the cited cases by the counsel by analogy signify that the counsel has interest. It was also his submission that the said cases cited by Mr. Byamungu are irrelevant and distinguishable from this case because they are referring to the issues of conflict of interest which would arise if a commissioner for oath would have attested the documents for both parties, which was not the case in this suit.

Mr. Zhake contended further that he raised the point also for the purposes of regularizing the proceedings. He insisted that the point is not frivolous but has merit. Stating further, Mr. Zhake said that **section 7 of Cap. 12 R.E 2002,** is clear, and prayed that the point be sustained, submission by Mr. Byamungu be held irrelevant and his prayer for costs should not be entertained.

I have keenly followed competing arguments from both counsels for and against their respective positions on this take. My superficial eye reveals that in order to ascertain the correct position, I will have first to subject both arguments to the scales of law and justice.

But before I pitch into the merits and demerits of the contention, I think, it is apt to clear the status of the point raised, as to whether it is a preliminary objection on points of law, or a case stated for opinion of the court or a point for direction from the court.

Mr. Zhake ,counsel for the defendant, said that, in his mind he did not wish that point to be taken as a preliminary point of objection but rather he was seeking direction from this court in line with the provision of the law (possibly **section 7 of Cap.12 R.E 2002** regarding the competence of the plaintiff's counsel in handling the case while his signature appears on one of the documents appended to the WSD. Alternatively, he says it is a preliminary objection and was raised timely.

Before deciding on the status of issue raised, let me first remind the cousels on the general principles for calling a court to decide on preliminary objection. It is now settled that there are only two categories of the issues, which can be decided as preliminary issues. Those issues of law relate to the jurisdiction of Court and bar to the suit created by any law for the time being in force.

Apart from the above, no other issue can be decided as preliminary issue and consequently such issue must be left to be decided along with the rest of the issues. The object of this obviously is to avoid a piecemeal trial and procrastination of litigation.

While summing up the ratio, the Allahabad High Court of India in the matter of **Manager, Bettiah Estate v. Bhagwati Saran Singh has observed in para 12 as** under:

"Only an issue of law can be decided as a preliminary where it is such that its decision does not necessitate investigation into facts and it relates either to the jurisdiction of the Court or to the suit being barred under any prevailing law, and that, in the opinion of the Court, the decision of the issue will result in the decision of the whole or a part of the suit. The discretion in this regard must always be exercised on the basis of sound judicial principles.

It may, however, be made clear that even if an issue of law can be decided as a preliminary issue as aforesaid, the Court is not always bound to decide it as a preliminary issue and can in its discretion, postpone its decision also along with other issues whether of law or fact.

The whole purpose behind this discretion is to restrict piecemeal decision at intermediate stages on preliminary issue alone and thus avoid procrastination of litigation. The discretion aims at abridging the proceeding in the suit rather than permitting prolongation thereof. (See also **Mukisa Biscuits Manufacturing Company Limited Versus West End Distributors Limited [1966] E.A 696)**

With that solid background in mind, I now move on to decide whether the point raised is preliminary issue or not. Mr. Byamungu, whose competence to represent the plaintiff is in question, conceded that he only attested the signature of the plaintiff and he never acted as a witness to that document. In other words, he is charging that his previous dealings with the plaintiff in relation to the said documents are not in any way related to these proceedings and neither can anything leading to that document be called into question for which the learned counsel would be required to testify. The counsel maintains that he never advised the plaintiff on the incumbent loan agreement, never perused or negotiated it and more so that this case is not on the said agreement but on breach of duty.

Apparently to disentangle the prime first question regarding the status of the contention, I must establish the circumstances leading to the learned counsel's attesting the said document, and the extent of his involvement in execution of that document, and further in what capacity was he involved as such.

In my considered view, venturing into that exercise would require a fully fledged hearing of the parties involved, together, with examining the document itself. That alone, suffices to disqualify the contention herein as a preliminary point of law.

In addition, an objection must emanate from the plaint and not from the defense as is the case now. Thus, the exercise of determining the status of this contention in itself does not agree to the formula of calculating what amounts to the preliminary objection on a point of law.

Therefore, the point raised by Mr. Zhake does not amount to a preliminary objection and if it was not for the other reason which I embarked on, that point alone would have been sufficient enough for me to pen-off here.

But, alternatively, Mr. Zhake has argued that he is seeking for this courts' direction having entertained doubt on the competence of Mr. Byamungu, to represent the plaintiff. Thus, according to him, **section 7 of the Cap. 12** bars such appearance by a counsel interested in the case to act as an advocate for that same party.

**Section 7 of the Notaries Public and Commissioners for Oaths Act Cap.12 R.E,** is couched in the following language:

> ***"No commissioner for oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to any of the parties or in which he is interested.***

Without much interpolation here the law bars advocates or commissioners for oaths, acting as a commissioner for oath, in any proceedings or matter in which he is an advocate to any of the parties or in which he is interested.

As such, in order to bar an advocate in this case, what has to be established is;

i. Did the matter before this court predate the attestation of the loan agreement by the learned counsel so as to establish his capacity when attesting the document?

ii. If yes, does a mere attestation or discharge of duties or powers of commissioner for oath make him an advocate for such party or to have an interest?

The first hurdle can be crossed by highlighting the functions of a Notary Public or Commissioner for oaths or rather an advocate, as appears on **section 10(1) of cap 12,R.E 2002,** which reads as follows:

**Section10:Certain public officers to have powers of a notary public and commissioner for oaths G.N. No. 3 of 1971; Act No. 13 of 1972 Schedule; G.N. No. 32 of 1971; Act No. 9 of 1996 Sch.**

***(1) Every officer to whom this section applies shall have the powers and duties of a notary public in respect of administering oaths, taking affidavits, attesting signatures and certifying copies of documents and shall also have all the powers and duties of a commissioner for oaths under this Act.***

The document is said to have come into existence before things between the parties herein fell apart. But the issue here is does the mere attestation in itself make a commissioner for oath acting as such an advocate of the party or interested in the case. There should not be confusion here between a commissioner for oath, a Notary Public and an advocate. All advocates are commissioners for oaths but not all commissioners for oaths and Notaries Public can neccessarily be advocates (See **section 10(c ), (d), (e) of Cap. 12, R.E 2002).**

Regarding the conflict of interest, it was Mr. Byamungu argument that in order to uphold the objection (had it been so qualified), a conflict of interest thereof must be established. He went further to quote the definition of the term "interest" as found in the **Black's law dictionary(Supra)** and contended that since he has never acted for the plaintiff in any capacity whatsoever, particularly in the case before me, there could be nothing to disqualify him from representing the plaintiff on the grounds of conflict of interests.

In order to know whether the legal services rendered by Mr. Byamungu, learned counsel, disqualify him, it is better to understand the meaning of the word; 'legal service' because Advocates, Notary public and Commissioner for oath renders legal services. The definition of the word " Notary Public" and " legal service" is as described in the **Dictionary of English Law Volume 2 by Earl Jowitt, that, a Notary Public is** "an officer who takes note of anything which concern the Public, he attests deeds or writing to make them authentic..."

In our case at hand, Mr. Byamungu, concedes that he attested the signature of the plaintiff in the loan agreement. The loan agreement was between the plaintiff and the defendant. The Jurat or block of attestation of the loan agreement reads:

**SIGNED and DELIVERED by**

**Sgd.**

**the said GREYSON LUDOVIC KIONDO}** **Greyson J. Kiondo**

**BORROWER**

**who is known to me personally this**

**13th day of January,2009**

**Full Name: ADRONICUS BYAMUNGU**

**Signature: ( signed and stamped with the stamp**

**Of ADRONICUS K. BYAMUNGU**

**ADVOCATE,NOTARY PUBLIC &**

**COMMISSIONER FOR OATHS,**

**DAR-ES-SALAAM)**

**Postal Address: P.O BOX 2243**

DAR ES SALAAM

**Designation:** ADVOCATE.

Therefore, it is clear from the Jurat or block of attestation of the loan agreement that Mr. Byamungu, learned counsel, attested the signature of the plaintiff one, Greyson Ludovic Kiondo, who was known to him personally.

The purpose of **section 7 of cap.12 R.E2002** is to ensure the independence of a commissioner for oaths as an officer of the court and to avoid any possible clash of interest in the discharge of his duties as a commissioner for oaths.

The history of commissioner for oaths goes back to very early times in English law where Lord Chancellor, may from time to time , by commission signed by him, appoint practicing solicitors or other fit and proper persons, to be commissioner for oaths, with power, in England or elsewhere, to render legal services or administer oath or take any affidavit for the purposes of any court in England or elsewhere, but that commissioner may not act in any proceeding in which he is solicitor to any of the parties to the proceedings or in which he is interested.

The functions and duties of Notaries Public and Commissioner for oaths fall within the ambit of the term "legal service' as used in **section 10 of chapter 12 R.E 2002.** Therefore a commissioner for oaths cannot render legal services and also act as an advocate to any of the parties to the proceedings (see **Project PlanningConsultants (Tanzania) versusTanzaniaAuditCorporation [1974] L.R.T NO.10 [H.C].** The legal services rendered by Mr. Byamungu makes him to have an interest in the matter by virtue of such a service of attesting signature so as to make it authentic to the defendants Bank, especially in cases where it appears that he is personally known to the plaintiff.

Here it is not the question of denying a lawful earnings as suggested or denying a party a right to engage an advocate of his choice as argued, but rather it is on the operation of law under **section 7 of Chapter 12 of the Laws of Tanzania, Revised Edition, 2002**, and to see to it that the commissioner for oath who had rendered legal services, acts impartially while handling briefs in courts of law.

Attestation is a very serious business. It is a declaration by a witness that an instrument has been executed in his or her presence according to the formalities required by the law. It is not the same as an acknowledgement, or a statement by the maker of a document that verifies its authenticity, no. It is an act of witnessing an instrument of writing, at the request of the party making the same, and subscribing it as a witness. The law is that once a document is executed and attested by the person by whom it purports to be executed and attested, then, the court presumes that the signature and other part of such a document was duly executed and attested.

In my considered view, if the complain by Mr. Byamungu, is on being denied fees, then, I think, with respect, he received his legal fees when he attested the loan agreement lest he did that service on charity basis. However, If Mr. Byamungu wanted to retain the plaintiff as his future client so that he can get instructions fees as is the case now, then he was supposed to abstain from attesting each and every document which comes on his way. He should instead adopt the habit of advising his would be potential retainer clients (like the plaintiff) to have their documents attested by another advocate so that he can be free to take those briefs in future. Just as a good farmer does not eat all his harvest but retains some for the future, anticipating draught seasons, a good litigation lawyer does not attest all the contracts or documents which come on his way but abstain such exercise for future clients especially if the market appears competitive.

In view of the foregoing, Mr. Byamungu, having rendered legal services to the plaintiff in respect of the loan agreement, which is now the genesis of the dispute between the parties in this case, has an interest, and therefore cannot appear as advocate for him in these proceedings.

The plaintiff is advised to look for another able advocate of his choice for future dealings in this case.

Order accordingly.

**K.M Nyangarika.**

**Judge**

A Dar es Salaam,

$22^{nd}$ day of May, 2012

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