IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 2 OF 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR PREROGATIVE ORDERS

OF

CERTIORARI AND PROHIBITION BY HEKIMA MWASIPU, FRANK ANDREW CHUNDU AND DEOGRATIAS COSMAS MAHINYILA

AND

AND IN THE MATTER OF THE TANGANYIKA LAW SOCIETY (TLS) IMPOSING EAST AFRICAN LAW SOCIETY (EALS) COMPLUSORY MEMBERSHIP AND FEES

AND

IN THE MATTER OF THE TANGANYIKA LAW SOCIETY (TLS) MAKING PAYMENT OF THE EAST AFRICAN LAW SOCIETY (EALS) FEES MANDATORY PRE-CONDITION FOR RENEWAL OF ADVOCATES PRACTICING CERTIFICATE

AND

IN THE MATTER PF THE TANGANYIKA LAW SOCIETY (TLS) IMPOSING PAYING OF THE EAST AFRICAN LAW SOCIETY FEES A MANDATORY CONDITION FOR GETTING ADVOCATES IDENTITY CARDS

BETWEEN

HEKIMA MWASIPU.....1ST APPLICANT

FRANK ANDREW CHUNDU.....2ND APPLICANT

DEOGRATIAS COSMAS MAHINYILA.....3RD APPLICANT

VERSUS

TANGANYIKA LAW SOCIETY (TLS).....1ST RESPONDENT

EAST AFRICAN LAW SOCIETY LIMITED.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

16th March 2023 & 26th May 2023

MZUNA, J.:

Hekima Mwasipu, Frank Andrew Chundu and Deogratias Cosmas Mahinyila, referred herein after as the applicants have instituted this application for leave to file prerogative orders of *certiorari* and *mandamus* (among others) against the respondents, above mentioned.

Brief facts as per the filed affidavit and counter affidavit shows the applicants are the Registered advocates of the High court and courts subordinate thereto with Roles No. 5153,3587 and 10205 respectively. They seek for order of certiorari to quash the resolution of the Annual General Meeting of the 1st respondent passed on 28th May 2022 making the East African Law Society compulsory to every member of Tanganyika Law Society and leave to file the application for certiorari to quash the Tanganyika Law Society (Annual Subscriptions) Regulations, Government Notice No 600 of 14th October 2022 made by the Governing Council of the 1st respondent and Gazetted by the 3rd respondent making the East African Law Society Membership fees mandatory conditions for renewal of Advocates Practicing Certificates.

The sought orders seeks to challenge the Tanganyika Law Society (TLS) Annual General Meeting (AGM) resolution imposing compulsory membership to all East Africa Law Society to all individual members of the

Tanganyika Law Society because in their view, it has no mandate to compel its members to join or subscribe members to such Association (EALS) without consent from individual members of the TLS. They therefore acted in excess of their powers.

Before hearing of the application could proceed, the respondents raised preliminary points of objection couched in the following words:-

a. *The application is time barred for it is filed after the expiration of 6 months from when the alleged resolution was passed by members of the 1st respondent on 28th May 2022 in terms of Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial review Procedure and Fees) Rules, G.N No. 324 of 2014*
b. *The joint affidavit in support of the application is incurably defective for containing erroneous matters namely conclusions, arguments, beliefs, prayers, hearsay and assumptions in terms of order XIX Rule 3(1) of the Civil Procedure Code Cap 33 RE 2019.*
c. *The application is incurably defective for joining the 2nd respondent, an entity which is neither a public body nor discharge public functions.*
d. *The application is untenable in law for being filed prematurely before exhausting the available internal remedies in Tanganyika Law Society (the 1st Respondent)*
e. *The joint affidavit in support of the Application is incurable defective (sic) for contravening the provisions of Section 7 of the Notaries Public and Commissioner of Oaths.*
f. *The application is untenable in law for seeking remedies in rem rather than in personam.*

The preliminary objection was heard verbally. Both parties had representation. Mr. Edson Kilatu assisted by Mr. Selemani Matauka and Mr. Ferdinand Makore, the learned advocates appeared for the applicants. On the other hand, Mr. Francis Stolla and Alex Mgongolwa learned Advocates appeared for the 1st respondent whereas Mr. Moses Mahuna, Ms. Gigi Maajar and Mr. Jovinson Kagirwa, the learned Advocates appeared for the 2nd respondent. On his part, Mr. Erigh Rumisha, the learned State Attorney appeared for the 3rd Respondent.

I should say right from the outset that the preliminary objection (c) on issue of misjoinder of the 2nd respondent was withdrawn by Mr. Stolla, the learned counsel. The same cannot form part of the points for determination.

> Mr. Stola, in support of the 1st preliminary objection that the application is time barred cited **Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Judicial Review Procedure and Fees) Rules of 2014** which direct the application for leave to be brought within six months from the date of the proceedings, act or omission to which the application relates. This application ought to have been filed in November 2022 but the instant application was filed on 26th January 2023. It is therefore

out of time. To buttress his submission, Mr. Stola referred the case of **Hezron M. Machinya v Tanzania Union Industrial Workers and Another,** Civil Appeal No. 79/2001 Court of Appeal (unreported) at page 5 where it was emphasized that applications made under the present law must be dismissed just like those under section 3 of the Law of Limitation Act. The applicants never sought for leave. In the case of **Emmanuel S. Stephen v, The President of the United Republic of Tanzania & 4 Others,** Misc Civil Application No. 12 of 2019 (unreported) at page 9 and 10, held that the wording "shall" signifies mandatory. The first prayer touches the resolution which is the basis of other aspects. If it is time barred it erodes other prayers in the chamber summons hence the application be dismissed.

On the second preliminary objection, he said that the affidavit supporting the application is incurably defective, it contains arguments, beliefs, hearsay and assumption contrary to Order XIX Rule 3(1) of the Civil Procedure Code, Cap 33 as it was pointed out in **Chadha & Company Advocates v Arunabean Chaggan Chhita Mistry & 2 Others,** Civil Application No. 25/2013 Court of Appeal, (unreported) that the affidavit being substitute for oral evidence, should not contain,

prayers, statements of facts, hearsay and arguments or conclusions. Paragraph 4,10,11,12,14, 17 and 20 at the end of every paragraph the applicants stated leave is applied to form part of this application.

Paragraphs 13 and 15 of their joint affidavit are on legal arguments and conclusion, illegality and in excess of its powers. Paragraph 20 annexed the law GN No. 600 of 2022 as part of the affidavit which is legal conclusion. Therefore, these paragraphs should be expunged. In **Chadha & Company Advocates v Arunaben Chaggan Chhita Mistry & 2 Others** (Supra) where the case of **Phantom Modern Transport Limited v DT Dobie Tanzania Limited (1985)** Civil Reference 15 of 2001 (unreported) was cited, it was held that once the offending paragraphs are expunged, there is nothing to support the application to its merits. The application is therefore incompetent. It should be dismissed with costs.

Mr. Stolla proceeded to submit on PO (d) on exhaustion of available internal remedies within Tanganyika Law Society. That, Section 7 of Tanganyika Law Society Act, Cap 307 RE 2019 the applicants are members of the 1st respondent and Practicing Advocates in view of the Tanganyika Law Society Meetings Regulations 2020. It shows

participation of members. Regulation No. 21 (1) (c) provides for Annual General Meeting and Resolutions from Society General Meeting.

If they are aggrieved by the resolution, they ought to have presented a motion. Since there is no proof of exhaustion of internal remedies, the application is premature. It should be dismissed. The case of **Electric Supply Co. Limited v. The Attorney General & 3 Others,** Civil Application No. 54 of 2019, was cited.

Mr. Stolla on preliminary objection (e), submitted that the joint affidavit contravenes Section 7 of the **Notaries Public & Commissioner For Oaths Act,** Cap 12 because Mr. Emmanuel Phales Ukashu is an Advocate and partner to Divina Attorneys. They drew it and filed it on behalf of four applicants. In https://www.divinaattorneys.co.tz. It shows Emmanuel P. Ukashu is the partner to Divina Attorneys Law Firm. He is therefore an interested party to this matter. He is playing the role of an Advocate and Commissioner. Section 7 of Notaries Public and Commissioner for Oaths Act (Supra) prohibits a Commissioner for oath to exercise his powers 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 in. He referred to the case of **Ramadhan Nassor Mkutu & Another v. The Board of Trustees of Agricultural Fund & 2 Others,**

Misc. Civil Application No. 34 cf 35 of 2021, High Court, Tabora registry (unreported) at page 8. The Court held that the Advocate should not act as a counsel and witness in the same case. Therefore, the application is in competent, it should be struck out with costs.

In regard to preliminary objection (f) that the applicants are seeking remedies in rem not in personam, Prayer (a) to the chamber summons shows complaint on making membership of EALS compulsory to all members not in person. It is in rem. The same applies to prayer (b) and (d). If the prayer was in rem, it ought to have been a constitutional case not a prayer for judicial review. They do not have representation capacity (order) to seek remedies for the entire members. The law requires interest of the applicants not the entire members. Therefore, the application should be dismissed with costs.

Mr. Mahuna for 2nd respondent joined hands on what has been submitted by Mr. Stolla but added on Preliminary objection item (d) on alternative remedies. Section 25 of Tanganyika Law Society Act, Cap 307 RE 2019, the only means to amend or rescind resolutions is by special resolution of the Annual General Meetings. That the applicants ought to have invoked section 22 of the Act by requisition of the meeting so that

the special resolution of the Annual General meeting can alter or rescind a resolution. Regulation 6 (b) and 7(3) allows requisitioning of a meeting.

He touched as well on item (e) of preliminary objection on the contravention of section 7 of the Notary Public and Commissioner for Oaths Act. That, Divina Law Firm is registered under Business Name Act, Cap 213 of the Laws. There is a contract between her and the attestator. That, under section 190 (1) of the Law of Contract Act, Cap 345 there is "Partnership" on persons carrying on business in common with a view of profit. It forms a firm and firm name. So Okashu and Divina Attorneys are pure matters of law. The court should take judicial notice.

Mr. Rumisha, the learned State Attorney supported the submissions of Mr. Stolla and Mr. Mahuna regarding section 7 of the Notaries Public & Commissioner for Oaths Act, that there should not be conflict in interest. The section was contravened by the Applicants because there was signing of an affidavit from the same firm. A remedy is to strike out the application with costs. In support he cited the case of **Project Planning Consultancy (Tanzania) v Tanzania Audit Corporation** [1974] LRT 10.

Regarding item (a) of the PO, it was submitted that paragraph 14,16 & 20 of the affidavit talk about the resolution of May 2022. The Applicants

are out of time. The affidavit should be read together with the chamber summons prayer (a). No any other ground challenging the GN. They challenge the resolution only. The case of **P & O International Limited v. The Trustees of Tanzania National Parks (TANAPA),** Civil Appeal No. 265 of 2020 (Unreported) at page 8 paragraph 2 was cited in support.

On Preliminary objection (d) it was insisted that the application was prematurely made. They ought to have exhausted extrajudicial machinery provided by the law i.e Regulation 20 (1) and 25 of the Main Act. The case of **S. Parin A.A Jaffer & Another v. Abdulrasul Ahmed Jaffer & 2 Others** [1996] TLR 110,116 was cited to emphasize a point that they ought to have followed the alternative remedy first.

On the last PO i.e (f) there is an affidavit of three applicants only. However, the prayers in the chamber summons covers parties who are not in this case without their consent or affidavit. Therefore, this application is incompetent.

In reply thereto, Mr. Makore, submitted that the issue of time bar in the application for judicial review, the test is under section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 RE 2019 namely; One, the finality test or the last broke doctrine. Two, Ripeness test and three, Exhaustion of internal remedy test.

On the finality test, he referred to Rule 6 of the Rules which provides for six months limit. That, the decision of any agency or authority is not final, it is subjected to further deliberation. In connection to this, he said that the test is well illustrated in **Halima James Mdee & 10 Others v Registered Trustees of Chama Cha Demokrasia na maendeleo (CHADEMA) & 2 Others**, Misc. Cause No. 27 of 2022 High Court at Dar es salaam, Main Registry (unreported) at page 24 & 25 where it was held that the dates reckon from the date the applicant's appeal was dismissed.

The Court should assess whether the decision of 28th May 2022 through the impugned decision of Annual General meeting pass the finality test. Annexure SHARBU 2 of the affidavit of the applicants says at the bottom line that "to be confirmed during the society's General meeting scheduled to be held in the year 2023". Regulation 21(1) of the Tanganyika Law Society of 2020, provides for confirmation of the minutes of the previous meeting, which will be done in May 2023. The resolution was not final hence does not subject to judicial review. Section 25 of Tanganyika Law Society Act was cited in support. The Provision bars alterations until the lapse of nine months' time, therefore the Applicant cannot challenge the resolution because it does not meet the finality test. Mr. Makore submitted that the application is within time.

In addition, he said that, before confirmation of resolutions in May, the first respondent enacted the Tanganyika Law Society Annual Subscription Regulations 2022, GN 600 of 2022. The regulation was published in the Gazette which marked the final decision by the 1st respondent. It therefore, waived the right of the members of annual general meetings to confirm and approve the resolutions made on 28th May 2022. The Regulations are therefore enforceable under regulation 3 which provides for mandatory contribution of East Africa Law Society membership fees. Mr. Makore disputed the submission by Mr. Stolla and his colleagues that expunging a resolution can erode the whole application. Even the regulation can stand by itself, he argued.

Mr. Makore urged this court to find that the cause of action arose when the Tanganyika Law Society GN 600 was published on 14th October 2022. The application is in time under section 4 of the the Law of Limitation Act. It was filed within 86 days from the date of operation of Regulations. Therefore, the PO should be dismissed.

Mr. Matauka sternly objected the Preliminary Objection that the affidavit is defective. He submitted that this PO is devoid of merit. The joint affidavit does not contain arguments, conclusion. It complies with Order XIX Rule 3(1) of the Civil Procedure Code. The word crave does not

mean prayer as alleged but according to www. google.com, it means seeking permission or clarification from a person swearing an affidavit to refer that document. There is no law prohibiting a party to refer the court to annexed document in the affidavit. The term prayer according to Blacks' Law Dictionary 8th Edition at page 3725 means a request for a specific relief or damages. But they never prayed for anything other than those prayers in the chamber summons. Mr. Matauka distinguished the case of **Chadha & Company Advocates v Arunaben Chaggan Chhita Mistry &2 Others** (Supra) as the affidavit therein contained extraneous matters. Alternatively, should the Court find that there are some paragraphs containing extraneous matters, the remedy is to expunge them. The case of **Msasani Penisula Hotels Limited & 6 Others v Barclays Bank Tanzania Limited & 2 Others,** Civil Application No. 192 of 2006 Court of Appeal at Page 8 empowers this court to expunge extraneous matters.

Moreover, the Court has discretion to order the applicants to file supplementary affidavit as illustrated in **Kinondoni Municipal Council v George M. Shambwe & Another,** Civil Revision No. 6 of 2018 (Unreported) p.8 where the court applied the overriding objective

principles and allowed the applicant to file supplementary counter affidavit. Therefore, this objection has no merit.

Mr. Makore emphasized that the joint affidavit complied with Order XIX Rule 3(1) of the Civil Procedure Code. They referred this court to a website which is contrary to the rules on P.O which must be on pure point of law as well stated in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1EA 696. The case of **The Attorney General and Another v. Fatma Aman Karume,** Misc. Civil Application No. 8 of 2021, H.C Main Registry (unreported) p 13-16 was cited to emphasis a point that the court cannot be referred to TAMS in order to determine whether the advocate is a practicing advocate or not. In so doing it amounts to adducing of evidence.

On preliminary objection item (e) that the application contravened section 7 of the Notary and Commissioner for Oaths Act, according to **Mukisa Biscuits Manufacturing Company** Case, the preliminary objection must be on point of law. However, in **Karata Ernest & others v. AG,** Civil case No. 10 of 2010 Court of Appeal of Tanzania sitting at Dar es salaam (Unreported) held that preliminary objection can be mixed with facts and law. It is submitted further that the PO need not to be proved

by evidence. See **Ikizu Secondary School v Sarawe Village Council,** Civil Appeal No 163 of 2016 CAT at Mwanza (unreported). Therefore, the PO should be dismissed because the respondent relied on evidence by seeking the court to peruse the website, which its authenticity is doubtful. The issue whether Advocate Emmanuel Ukashi is a Partner at Divina Attorney need evidence to be proved that he indeed is a partner in Divina Law Firm.

The respondents through section 58 & 59 of the Evidence Act, Cap 6 RE 2019 seek this court to take judicial notice that the Advocate is a partner which is not among the circumstances in which the court is required to take judicial notice.

It is proceeded further that **Ramadhan Nassor Mkutu** case (supra) is distinguishable from the instant application at page 7 that the Advocate administered oath but in this case, there are two Advocates. It was emphasized that there is no conflicting interest in the instant application. Hence the PO should be dismissed.

Mr. Kilatu submitted on item (d) of the PO that the application is prematurely filed. That section 7 of Tanganyika Law Society Act provides that all members are bound by the internal management of the society in terms of exhaustion of internal remedies. However, there was no any

alternative remedy for the applicants other than judicial review after the publication of the GN.

On PO item (f) seeking remedy in rem not in *personam*, he said that the alleged Rule 4 of the Government Notice No. 324of 2020 provides for locus stand to file a suit when aggrieved. The respondents referred prayer (a) of the chamber summons "for every member of Tanganyika Law Society". The applicants are affected by the decision of compulsory membership of EALS. That the Applicants included every member to show the scope of the consequences of the impugned decision of the 1st respondent but it was not meant to cover everyone. Rule 4 has no limit others are also affected.

Moreover, this application cannot be filed before the Constitutional Court. Section 18(2) of the Law Reform Fatal Accidents Miscellaneous Provisions Act, Cap 310, even matters covered under the constitution are covered under judicial review. Therefore, this PO is unfounded, he argued. Therefore, Section 8 of the Basic Rights and Duties Enforcement Act, is the last resort. He prayed for the preliminary objections to be overruled with costs.

In the rejoinder, Mr. Kagirwa responded on PO item (a) on the accrual of rights and (b) finality. On accrual of rights, it is reiterated that

the impugned resolution was passed on 28th May, 2022. The time should reckon from the date when this application was filed. The publication of the GN was to implement the resolution. Reference was made under paragraph 7, 10, 12 & 13 of the joint affidavit of the applicants.

On the issue of finality, Mr. Kagirwa submitted that section 3(2) of Tanganyika Law Society Act provides that finality is after the resolution is tabled before the Annual General Meeting. Finality is not the publication of the Regulation. The Regulations will be tabled before the General Annual Meeting. This was supported by Mr. Mahuna who added that section 37 of the Tanganyika Law Society Act must be read together with Section 38 (7) of the Interpretation of Laws Act. The regulations cannot be enforceable until they are tabled before the Annual General Meeting. Therefore, the Regulation was not final. It is further submitted that the case of **Halima Mdee** (supra) is distinguishable because it dealt with the internal process. Pursuant to section 25 of Tanganyika Law Society the resolution cannot be challenged until the lapse of 9 months. That, the Applicants submissions are contradicting. The application was filed before the lapse of 9 months. The application is therefore out of time.

The submission was also supported by Mr. Mahuna who said that filing application in January 2023 while the resolution was passed on 28th

May, 2023 was out of time. The resolution once passed is final, conclusive and enforceable. It affects all members. Therefore, the application was filed out of time.

Section 31 (2) of Tanganyika Law Society Act provides for rescinding of resolution but does not affect any resolution made prior. The application for judicial review must be made within 6 months from the decision which is different from the Tanganyika Law Society Act which provides for internal mechanisms.

In regard to the affidavit, Mr. Mahuma reiterated that it contains erroneous matters and legal arguments. Therefore, the offending paragraphs should be expunged and if that is done the remaining paragraph cannot support the application. He disputed the filing of supplementary affidavit because a nullity cannot be supplemented.

On item (e) and (f) on application of Section 7 of the Notaries Public Act, Mr. Mahuma reiterated his submissions in chief. That it is a pure point of law that the advocate has interest in the matter.

On remedies in rem and *personam*, Regulation 4 of the Law reform Fatal Accidents Rules, only the affected person can approach the court not all members whose interest have not been affected. The order should

only affect the three applicants. Therefore, the preliminary objection be sustained.

I have heard and considered submissions from both parties on the preliminary objection. The respondents tasked me to determine the five preliminary objections which touches on procedural aspects like defectiveness of the affidavit [(b) and (e)]; Allegation that the application was filed prematurely as well as seeking remedies in rem [i.e. (d) and (f)]; Lastly on issue of time bar i.e (a).

Let me start with the second Preliminary objection. Under P.O (b) it is contended that the joint affidavit is incurable defective for containing extraneous matters namely conclusions, arguments, beliefs, prayers, hearsay and assumptions in contravention of Order XIX Rule 3(1) of the Civil procedure Code Cap 33 RE 2019. That provision which governs on affidavit is very clear. Order XIX rule 3(1) of the Civil Procedure Code reads;

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

In general, as the matter of practice and procedure, an affidavit for use, in court as the substitute for oral evidence, should only contain

statements of facts and circumstances to which the witness deposes either his own knowledge and should not contain extraneous matters by way of objection, prayer or legal argument or conclusions, See **Juma Busiga v Zonal Manager TPC,** Civil Application No. 8 of 2004, Court of Appeal at Mbeya. The respondents faulted Paragraph 4,10,11,12, 13,14, 17 and 20 at the end of every paragraph, the applicant stated leave is applied to form part of this application. The general rule is that inconsistencies in affidavits cannot be ignored however minor they are. The respondent urged this court to expunge the defective paragraph by applying the principle laid down in **Chadha & Company Advocates v Arunaben Chaggan Chhita Mistry & 2 Others** (supra). Mr. Makore urged this court to apply the principle of overriding objectives and allow him to file a supplementary affidavit. I agree with Mr. Makore that this court through Section 3A (2) of the Civil Procedure Code which provides that the Court shall, in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified under subsection (1).

Guided by the above principles, I expunge paragraph 4,10,11,12, 13,14 and 17 of the Applicants joint affidavit because they contain arguments, conclusion.

In the said case of **Phantom Modern Transport** (supra), the Court of Appeal held that:-

"Where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it."

Now, after expunging the above paragraphs, can the remaining paragraphs support the application? The answer is no.

Connected to that is P.O No (e) on defectiveness of the affidavit that it contravenes Section 7 of the Notaries Public and Commissioner of Oaths Act. Mr. Stolla urged this court to take judicial notice on the contractual partnership and the registration of Divina Attorneys.

I shall not be detained by this preliminary objection for two reasons; One; the fact that Advocate Ukashu is a Partner in Divina Law firm requires proof hence does not qualify as a preliminary objection. I am fortified to this view by the case of **The Attorney General and Another v. Fatma Aman Karume** (supra) which cited the case of **Alliance Insurance Corporation Limited v. Arusha ART Limited,** Civil Appeal No. 297 of 2017 CAT at Arusha (unreported) where the court held that:-

"The issue whether or not the person who signed ...is an unqualified person or not is a matter which requires evidence to ascertain and as such does not qualify as pure point of law."

The cited case of **Ramadhan Nassor Mkutu & Another v. The Board of Trustees of Agricultural Fund & 2 Others** (supra) is distinguishable because in that case the advocate one Kilingo witnessed the applicants in their respective affidavits and yet went ahead to lodge the application to which the preliminary objection was raised. In other words, the affidavits were lodged in court and indeed showed he had interest in the matter unlike in this case where one has to go beyond the filed documents.

As correctly submitted by Mr. Makore, the same does not fall under the ambit of section 58 & 59 of the Evidence Act, Cap 6 RE 2019 relating to matters the court can take judicial notice. Even assuming it falls under that category for arguments sake, still proviso 3 to section 59 of the Evidence Act is couched in the following terms:

> *"59 (3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."*

It was held in the case of **Mukisa Biscuit** (supra) at page 700 that:-

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is 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 what is the exercise of judicial discretion.***"

(Underscoring mine).

Requiring this court to ascertain or the exercise of judicial discretion cannot be termed as a preliminary point of objection. I therefore overrule this preliminary objection.

On the preliminary objection (d) which reads that the application is untenable for being filed prematurely before exhausting available internal remedies in Tanganyika Law Society, the respondent faulted the applicants for failure to exhaust available remedies pursuant to section 7 of Tanganyika Law Society Act (Supra). The Applicants stressed that there are no other internal remedies as the Regulations on the payment of fee of East African Law Society Membership is published, which bars the applicants from challenging the resolution.

I join hands with Mr. Mahuma, the learned counsel who said that under Section 25 of the Tanganyika Law Society Act, it prescribes the manner in which resolution can be altered or rescinded. Section 22 provides that the same can be done through a Special Resolution. The Applicants have dispensed with this remedy and instead filed this application prematurely. The argument that upon publication of the G.N that option is dispensed with is with due respect unjustified. Mr. Mahuna was correct in my view when he said that section 37 of the Tanganyika

Law Society Act must be read together with Section 38 (7) of the Interpretation of Laws Act. That provision though it says about laying a resolution before the National Assembly, however by all intent and purpose based on section 37(1) (a) which deals with necessity of publication in the gazette, impliedly even the present situation is covered. That provision i.e section 38(7) reads:-

> *"38(7) If a written law which empowers or directs the making of regulations by a person other than the President and requires that the regulations be confirmed or approved by the President or by any other person or institution before having the force of law, subsection (1) does not apply to such regulations unless they are confirmed or approved as so required."*

That would mean, the regulations cannot be enforceable until they are tabled before the Annual General Meeting for approval.

In the case of **Parin A. A. Jaffer and Another v. Abdulrasul Ahmed Jaffer and Two Others** (supra) P.116, this court held that:-

> *"Thus where the Law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should, in general, be exhausted before recourse is had to the judicial process."*

I fully associate myself with that holding and the logic underlying it, which is to "check the overcrowding of legal actions in the courts..." I therefore, find merit in this preliminary objection and I sustain the same.

In the preliminary objection (f) that the application is untenable in law for seeking remedies *in rem* rather than in *personam*, this argument was misplaced because as well submitted by the applicants, they did not file the application as if they represent other advocates. Instead, they said that they filed it because they are affected. Order 1 Rule 8 (1) of the CPC on representative suits says clearly that:-

> *"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on or on behalf of or for the benefit of all persons so interested, but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons..."*

I find no merits in this PO as the prayers does not include other members who are not parties in this application.

Lastly, on issue of time bar. The Applicant moved this court to grant him leave to file application for certiorari quashing the resolution of the Annual General Meeting of TLS of 28th May 2022 which made the East African Law Society Membership compulsory for each member of Tanganyika Law Society. The respondents are of the view that this

application is out of time under the prescribed time under the rules. That it ought to have been filed in November 2022 but it was filed on 26th January 2023.

It was submitted further that the resolution cannot be challenged until the lapse of 9 months pursuant to section 22 of Tanganyika Law Society Act by way of special resolution. Mr. Makore conceded that the resolution was not final. It is subject to approval on May 2023. However, the 1st Respondent published in the Government Gazette the Tanganyika Law Society (Annual Subscription) No. 600 of 2022 on 14th October 2022. Under section 4 of the Limitation Act Cap 89 RE 2019 the date reckons from the time when the cause of action arose.

Rule 6 of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial review Procedure and Fees) Rules, G.N No. 324 of 2014 set a prerequisite condition for leave before application for judicial review. The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates.

The Applicants in their chamber summons paragraph (a) and (b) prayed for certiorari against the resolution made on 28th May 2022 and leave to file the application of certiorari to quash the Tanganyika Law

Society (Annual Subscriptions) Regulations, Government Notice No. 600 of 14th October, 2022. The Applicants under paragraph 15 of their joint affidavit faulted the 1st respondent Governing Council for acting illegally to enact the Regulations empowering the 1st respondent to expel or suspend any defaulting advocate.

When then do we start to count for the six months for application under judicial review in the circumstances of this case? Is it from the date when the resolution was passed or when the GN was published? Mr. Makore, was in consensus with the respondents that the resolution passed on 28th May 2022 was not final but the GN published on 14th October 2022 was final as the GN had already been published. Regarding to rule 6, the resolution was passed on 28th May 2022 and the GN was published on 14th October 2022.

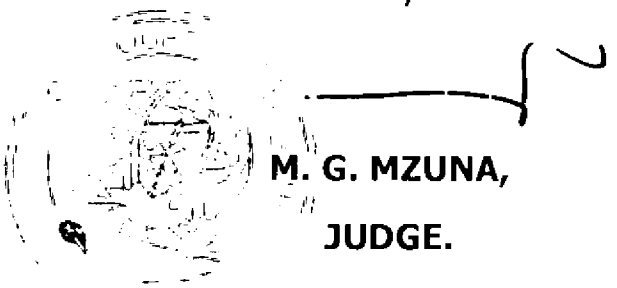
The respondents argued that the resolution was not final it is to be approved in the next Annual general meeting. However, according to Rule 6 of the Rules the application was to be filed in November, 2022 and not January 2023. Based on prayer (a) in the Chamber summons that the order for certiorari should quash resolution of AGM passed on 28th May, 2022, issue of publication came thereafter. So the real "act or omission"

must be from that date (28th May, 2022). The application for leave was filed out of time and therefore the court is not properly moved.

In regard to the GN 600 of 2022 published on 14th October 2022, as above stated, the challenging of it was prematurely filed before this court as the time set out under Rule 6 had not lapsed. They ought to have exhausted other available internal remedies in the Tanganyika Law Society Act, before recourse to this court. Therefore, I find merits in this preliminary objection.

In the upshot, I sustain the preliminary objection item (a), (b) and (d) only. I therefore strike out the application with no order for costs.

Dated at Dar Es salaam, this 26th May, 2023.



M. G. MZUNA,

JUDGE.