

## AN ANALYSIS OF JUDICIAL TRENDS IN DISCIPLINING UNQUALIFIED LEGAL PRACTICE IN TANZANIA

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### Abstract

This article has provided a considered analysis of unqualified practice in Tanzania and the approach and willingness of the judiciary in punishing it. Although the Court of Appeal set its binding precedent in *Edson Oswald Mbogoro*, it is the open door approach of this decision which is largely responsible for the nuanced approach in the discipline of advocates in Tanzania. The ensuing approach of the judiciary has been to either punish advocates alone, expunge the pleadings they have prepared and thus prejudicing litigants, avoid any form of punishment, or even issuing simple warning, and sometimes assuming the misconduct never happened. This represents mixed outcomes of unwillingness and non-uniformity in enforcing disciplinary measures for unqualified practice. Instead, the judiciary has been clear in punishing innocent litigants for the mistakes of advocates. This work recommends that upholding documents unqualified persons have prepared is a good practice in upholding the constitutional rights of innocent litigants following the persuasive decision of *Afriq Engineering*, save in cases of their complicity. The Article hopes to inspire more debate on the subject and create

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awareness both to advocates and the judiciary, hoping these legal shortcomings will not repeat in the future.

**Keywords:** *Advocates Act - Advocates Committee – Judiciary - Misconduct – Offences – Unqualified Persons – Unqualified Practice*

## 1. INTRODUCTION

The legal framework regulating diverse aspects of the legal profession of advocates in Mainland Tanzania is mainly contained in the Advocates Act<sup>1</sup> and its Regulations<sup>2</sup>, the Notaries Public and Commissioners for Oaths Act,<sup>3</sup> the Tanganyika Law Society Act<sup>4</sup> and its Regulations<sup>5</sup>, the Labour Institutions Act<sup>6</sup> and its Regulations<sup>7</sup>, the Appellate Jurisdiction Act<sup>8</sup> and its Regulations<sup>9</sup>, the Civil Procedure Code<sup>10</sup>, the Magistrates Courts’ Act,<sup>11</sup> the Penal Code,<sup>12</sup>

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<sup>1</sup> Cap. 341 [R.E. 2019].

<sup>2</sup> Some of these Regulations include the Advocates Remuneration Orders, G.N. No. 264 of 2015; the Advocates (Admission and Practising Certificate) Regulations, G.N. No. 62 of 2015; Advocates (Accounts) Regulations, G.N. No. 207 of 1956; Advocates (Professional Requirements) Regulations, G.N. No. 395 of 1990; Advocates (Disciplinary and other Proceedings) Rules, G.N. No. 120 of 2018; and Advocates (Professional Conduct and Etiquette) Regulations, G.N. 118 of 2018.

<sup>3</sup> Cap. 12 [R.E. 2019].

<sup>4</sup> Cap. 307.

<sup>5</sup> These include for example Tanganyika Law Society (Annual Subscription) Regulations, G.N. 11 of 2017; Tanganyika Law Society (Chapter) Regulations, G.N. No. 13 of 2017; Tanganyika Law Society (Elections) Regulations, G.N. No. 332 of 2016.

<sup>6</sup> Cap. 300 [R.E. 2019].

<sup>7</sup> These include: the Labour Court Rules, G.N. No. 106 of 2007; Labour Institutions (Mediation and Arbitration) Rules, G. No. 64 of 2007.

<sup>8</sup> Cap. 141 [R.E. 2019].

<sup>9</sup> For example: the Court of Appeal of Tanzania Rules.

<sup>10</sup> Cap. 33 [R.E. 2019].

<sup>11</sup> Cap. 11 [R.E. 2019].

<sup>12</sup> Cap. 16. [R.E. 2019].

and for Law Officers and State Attorneys who wish to practice as advocates, there is also the Office of the Attorney General (Discharge of Duties) Act<sup>13</sup> and its Regulations.<sup>14</sup>

An advocate in Tanzania has automatic audience in the High Court, and before courts,<sup>15</sup> institutions and tribunals subordinate to the High Court.<sup>16</sup> Concerning the Court of Appeal, an advocate lacks an automatic right of audience unless he has been in practice for at least five years,<sup>17</sup> or unless upon an application the Chief Justice or the Presiding Justice permits an advocate of less years in practice to appear for a case or cases.<sup>18</sup> The legal practice in Mainland Tanzania is not limited to Tanzanian advocates only. It includes legal practitioners from other Commonwealth jurisdictions with varying degrees of requirements and restrictions depending on the regions or countries they come from.<sup>19</sup> A lawyer becomes an advocate with the right of audience and to practice in Tanzania once his name is in the Roll of Advocates,<sup>20</sup> he has in force a practising certificate<sup>21</sup> and has a valid business

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<sup>13</sup> [Cap. 268 R.E. 2019].

<sup>14</sup> For example: the Office of the Attorney General (Discharge of Duties) Guidelines for Practising State Attorneys and Law Officers, G.N. No. 1008 of 2020.

<sup>15</sup> Here courts include the Magistrates' Courts, District Courts and Primary Courts.

<sup>16</sup> Sections 3(1), 40 of the Advocates Act; section 56(c) of the Labour Institutions Act; section 4, Order III Rule 1 of the Civil Procedure Code; section 38 of the Arbitration Act, No. 2 of 2020; Rule 23(1) of the Labour Institutions (Mediation and Arbitration) Rules.

<sup>17</sup> This excludes the Attorney General, Deputy Attorney General, Director of Public Prosecutions and all Law Officers and State Attorneys appearing in court on behalf of the Attorney General, Rule 33(1), (2) of the Court of Appeal Rules. These have the automatic right of audience.

<sup>18</sup> Rule 33(3) of the Court of Appeal Rules.

<sup>19</sup> Rule 33(4) of the Court of Appeal of Tanzania Rules; sections 8(1)(a)(ii), (iii), (b)(ii), 39(2), (3), (4).

<sup>20</sup> Sections 2, 6, 7, 8 and 9 of the Advocates Act.

<sup>21</sup> *Ibid*, Part VI.

licence.<sup>22</sup> In Tanzania, a practising advocate is also a commissioner for oaths and a notary public.<sup>23</sup>

The Mainland Tanzania legal framework also establishes institutions and persons with disciplinary powers over advocates for professional misconducts or offences contrary to the Advocates Act, its Regulations and other laws of Tanzania. These include the Chief Justice,<sup>24</sup> High Court,<sup>25</sup> High Court Judges,<sup>26</sup> Advocates Committee<sup>27</sup> and the Ethics Committee of the Tanganyika Law Society.<sup>28</sup> The imperative to discipline advocates for misconducts stems from a legal position that advocates are officers of the Court and have a paramount duty before the Court. They are under the jurisdiction of the Court.<sup>29</sup> The legal profession of advocates is thus not an unregulated business where one does what he wants without consequences. The disciplinary powers of these institutions and persons include admonition, suspension or removal from either the Roll of Advocates or the Roll of Notaries Public and Commissioners for Oaths.<sup>30</sup> The law also

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<sup>22</sup> Ibid, sections 39(1), 35(5). See also sections 2, 3 of the Business Licensing Act, Cap. 208.

<sup>23</sup> Section 3(1)(a) of the Notaries Public and Commissioners for Oaths Act.

<sup>24</sup> Section 22(1), (2)(a) of the Advocates Act. See also Regulation 142(a) of the Advocates (Professional Conduct and Etiquette) Regulations.

<sup>25</sup> Section 22(2)(a).

<sup>26</sup> Section 22(1), (2)(a), (b). See also Regulation 142(b) of the Advocates (Professional Conduct and Etiquette) Regulations.

<sup>27</sup> Sections 4, 10-15; Rule 4(1) of the Advocates (Disciplinary and other Proceedings) Rules; Regulation 142(c) of the Advocates (Professional Conduct and Etiquette) Regulations.

<sup>28</sup> Regulation 142(d) of the Advocates (Professional Conduct and Etiquette) Regulations.

<sup>29</sup> Section 66 of the Advocates Act; Part XI of the Advocates (Professional Conduct and Etiquette) Regulations.

<sup>30</sup> Sections 13(1), (4), 22(2), 24(1) of the Advocates Act; section 5 of the Notaries Public and Commissioners for Oaths Act; Rule 4(1) of the Advocates (Disciplinary and other Proceedings) Rules.

provides avenues for appeal where the disciplinary decisions and measures these authorities take aggrieve advocates.<sup>31</sup>

Concerning state attorneys and law officers,<sup>32</sup> while the Advocates Act entitles them to practise as advocates, it disbars them from being issued with practising certificates.<sup>33</sup> Therefore, the Act prohibits them from practising as advocates during their service as law officers and state attorneys. The Office of Attorney General (Discharge of Duties) Act also reiterates this position.<sup>34</sup> However, both the Advocates Act and the Office of Attorney General (Discharge of Duties) Act allow state attorneys and law officers to practice only following their application for exemption from non-practice according to the Guidelines of the Office of the Attorney General.<sup>35</sup> For them to practice as advocates under the Advocates Act, in addition to meeting the requirements of section 8, they need to make an application to the Attorney General based on the Guidelines the Office of the Attorney General issues.<sup>36</sup> The Office of the Attorney General issued these Guidelines in 2020. These are the Office of the Attorney General (Discharge of Duties) Guidelines for Practising State Attorneys and Law Officers 2020.

According to the Guidelines, a state attorney or law officer can apply to practice as an advocate to the Attorney General only upon there being “special reasons.”<sup>37</sup> These include that the employer of the law officer or state

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<sup>31</sup> Section 5 of the Notaries Public and Commissioners for Oaths Act; section 22(2)(c), 24A(1) of the Advocates Act.

<sup>32</sup> For the meaning of a law officer, see section 4 of the Interpretation of Laws Act, Cap. 1 [R.E. 2019]; and for a state attorney, see sections 3 and 24 of the Office of the Attorney General (Discharge of Duties) Act.

<sup>33</sup> Sections 3(1), 34(2).

<sup>34</sup> Section 17A (1).

<sup>35</sup> Section 34(3), (4) of the Advocates Act; section 17A(2) of the Office of the Attorney General (Discharge of Duties) Act.

<sup>36</sup> Section 17A (3).

<sup>37</sup> Guideline 4(2).

attorney needs the services of an advocate, absence of conflict of interest or presence of any other reason that the Government Legal Team deems fit.<sup>38</sup> A law officer or state attorney wishing to be issued with a practising certificate applies to the Attorney General through a prescribed Form in the First Schedule to the Guidelines with clear reasons.<sup>39</sup> Following recommendation of the Government Legal Team,<sup>40</sup> the Attorney General may or may not authorise the applicant to be issued with a practising certificate.<sup>41</sup> The Guidelines also recognise the competence of state attorneys and law officers to practice as notaries public and commissioners for oaths upon meeting stipulated legal requirements.<sup>42</sup>

Therefore, this article is a legal analysis of how the judiciary of Tanzania, as one of the disciplinary authorities, has implemented and used the powers the Mainland Tanzania legal framework vests in them, especially as section 22 of the Advocates Act generally provides. By the judiciary here, this Article envisages the High Court and the Court of Appeal as courts of records in Tanzania.<sup>43</sup> This Article only considers how the judiciary has dealt with the professional misconduct and criminal offence of unqualified practice. It examines and answers several issues such as whether the Tanzanian judiciary has been willing to punish advocates for unqualified practice and how it has actually done and achieved that. The Article also considers the fate of the documents unqualified persons have drafted and submitted *vis-à-vis* the constitutional rights of litigants to have access to justice in the enforcement

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<sup>38</sup> Guideline 4(3).

<sup>39</sup> Guideline 4(4), (5).

<sup>40</sup> As to what is a Government Legal Team, see section 25 of the Office of the Attorney General (Discharge of Duties) Act.

<sup>41</sup> Guideline 4(6)-(9).

<sup>42</sup> Guideline 5.

<sup>43</sup> *Marco Elias Buberwa v Agnes Kokushekya Elias Buberwa*, Miscellaneous Civil Application No. 253 of 2020, High Court of Tanzania at Dar es Salaam, at p. 16. All decisions cited in this article are reported online at <https://tanzlii.org/> (Accessed 9 Mar. 2022).

of their rights.<sup>44</sup> In achieving these aims, the Article is divided into five parts. Part I is allotted to this introduction. Part II provides an analysis of the legal provisions prohibiting unqualified practice. Part III deals with the practice of the judiciary in dealing with unqualified practice. Part IV discusses the fate of the documents unqualified persons have prepared *vis-à-vis* the constitutional rights of innocent litigants. Finally, Part V provides the overall conclusion of the entire analysis with some recommendations.

## **2. REGULATION OF UNQUALIFIED PRACTICE IN TANZANIA**

The law concerning unqualified practice in Tanzania is contained under parts VI and VII of the Advocates Act and sections 3-7 of the Notaries Public and Commissioners for Oaths Act. Every advocate whose name is in the Roll of Advocates and who has a valid business licence wishing to practice in Tanzania must make an application to the Registrar of the High Court,<sup>45</sup> the custodian of the Roll of Advocates and who issues practising certificates to advocates.<sup>46</sup> The advocate makes the application through a written declaration in the prescribed Form No. I.<sup>47</sup> Where the Registrar is satisfied that the advocate applicant has met all the legal requirement,<sup>48</sup> he shall deliver to the advocate a practising certificate in Form No. II.<sup>49</sup> As a rule, a practising certificate takes effect from the day the Registrar issues it onwards.<sup>50</sup> It expires on the 31<sup>st</sup> of December. of the year the Registrar issued it.<sup>51</sup> Upon

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<sup>44</sup> See Arts. 13-29 of the Constitution of Tanzania, 1977 [R.E. 2002] and the Basic Rights and Duties Enforcement Act, Cap. 3 [R.E. 2019].

<sup>45</sup> Section 35(1) of the Advocates Act.

<sup>46</sup> Sections 6, 34(1), 35(3) of the Advocates Act; sections 2 and 4(1) of the Notaries Public and Commissioners for Oaths Act.

<sup>47</sup> Rule 5 of the Advocates (Admission and Practising Certificate) Regulations.

<sup>48</sup> Section 35(3) of the Advocates Act.

<sup>49</sup> Rule 5 of the Advocates (Admission and Practising Certificate) Regulations.

<sup>50</sup> Section 38(1) of the Advocates Act; *Marco Elias Buberwa v Agnes Kokushekya Elias Buberwa*.

<sup>51</sup> Section 38(2).

expiration, an advocate shall make a fresh application for renewal in order to practise again. The law contemplates situations where the advocate applies for a practising certificate late, but also sets the attendant consequences and requirements.<sup>52</sup> It is clear, therefore, that a practising certificate lacks retrospective application.<sup>53</sup> The law only allows one exception—if the Registrar issues the practising certificate any day between the 1<sup>st</sup> of January and 1<sup>st</sup> of February (the grace period),<sup>54</sup> the certificate takes effect retrospectively from the 1<sup>st</sup> of January.<sup>55</sup> All documents and instruments an advocate drafts and files during the grace period and obtains a practising certificate before its expiration are valid.<sup>56</sup> The judiciary of Tanzania has made it easy to ascertain whether an advocate has in force a practising certificate and thus is allowed to practice through an online system *Mtambue Wakili*.<sup>57</sup> *Mtambue Wakili*, one can fill in the details of any advocate to verify whether an advocate is permitted to practice or not.<sup>58</sup>

Because an advocate can only practice when he has his name in the Roll of Advocates, has a practising certificate and a valid business licence, should he lack any of these requirements, he becomes “unqualified person.”<sup>59</sup> Whatever he practises while an unqualified person becomes unqualified practice.

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<sup>52</sup> Section 36.

<sup>53</sup> *Marco Elias Buberwa v Agnes Kokushekya Elias Buberwa*.

<sup>54</sup> *Wellworth Hotels & Lodges Ltd v East Africa Canvans Co. Ltd & 4 Others*, Commercial Case No. 5 of 2020, High Court of Tanzania Commercial Division at Dar es Salaam, at p. 23.

<sup>55</sup> The proviso to section 38(1).

<sup>56</sup> *Wellworth Hotels & Lodges Ltd v East Africa Canvans Co. Ltd & 4 Others*, at p. 10.

<sup>57</sup> Available at <<https://ewakili.judiciary.go.tz/#/ewakili/home>> (Accessed 20 June 2022).

<sup>58</sup> The Tanganyika Law Society (TLS), the Mainland Tanzania Bar Association, has introduced electronic stamps in the bid to curb the problem of unqualified practice. See <<https://dailynews.co.tz/news/2022-05-276290daa57af4c.aspx>> (Accessed 20 June 2022).

<sup>59</sup> Section 39(1).

Unqualified person lacks the right of audience before all courts, tribunals or institutions he is otherwise entitled to.<sup>60</sup> In other words, he cannot act as an advocate or agent for suitors. He cannot issue summons or other processes. He cannot commence, carry on or defend any action, suit or other proceedings in the name of any other person or even in his own name before any court of civil or criminal jurisdiction. The law disbars him from acting as an advocate in any cause or matter whether civil or criminal.<sup>61</sup>

Should an unqualified person pursue unqualified practice, he commits a criminal offence under the Advocates Act,<sup>62</sup> contempt of court under the Penal Code and the Advocates Act<sup>63</sup> and a gross professional misconduct of unauthorised practice under the Advocates (Professional Conduct and Etiquette) Regulations.<sup>64</sup> When the Court finds the unqualified person guilty of unqualified or unauthorised practice, it can impose on him a fine not exceeding 2,000/=Tshs. The Court can impose other penalties, including forfeiture and subjecting him to any disability such as suspension or removal of name from the Roll of Advocates. Unqualified person found guilty of unqualified practice also cannot maintain any action for any costs for anything he has done while acting unqualified.<sup>65</sup>

The law also prohibits and punishes other aspects of unqualified or unauthorised practice in Mainland Tanzania. The law criminalises the action of an unqualified person who wilfully pretends to be an advocate he is not. Unqualified person wilfully pretends to be an advocate when he uses any name, title, addition or description implying that he is a qualified advocate.

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<sup>60</sup> Section 40.

<sup>61</sup> Section 41(1).

<sup>62</sup> Section 41(2).

<sup>63</sup> Section 114(1) (k), (2), (3) of the Penal Code; section 41(2) of the Advocates Act.

<sup>64</sup> Regulation 121(2).

<sup>65</sup> Section 41(2) read together with sections 13(1), (4), 22(1), (2) of the Advocates Act; section 5 of the Notaries Public and Commissioners for Oaths Act; Rule 4(1) of the Advocates (Disciplinary and other Proceedings) Rules.

The law also prohibits unqualified persons from using the title corresponding to the title of a legal practitioner in any Commonwealth country to imply he is a qualified advocate. Following conviction, an unqualified person wilfully pretending to be an advocate is subject to a fine not exceeding 1,000,000/=Tshs or 12 months imprisonment or both fine and imprisonment.<sup>66</sup> Where the body corporate commits the offence, both the body corporate and its responsible director, officer or servant are equally liable.<sup>67</sup>

The law also disbars an unqualified person from preparing certain legal instruments or documents.<sup>68</sup> It is a criminal offence for an unqualified person to prepare or draw for fee, gain or reward whether directly or indirectly the instruments relating to movable or immovable property or any legal proceeding, formation of any limited liability company whether private or public, and the making of a deed of partnership or its dissolution. His conviction can result in a punishment of a fine not exceeding 1,000,000/=Tshs or 12 months imprisonment or both. The convicted unqualified person also cannot maintain any action for costs for drawing or preparing such instruments or any connected matter.<sup>69</sup> Notwithstanding, the law provides for some exceptions. An unqualified person has no criminal liability where he proves that his preparation or drawing of these documents was not for reward, fee or gain whether directly or indirectly. The law also allows unqualified persons to prepare other documents not falling in the prohibition. These are instruments relating to the power of attorney, transfer of stock or shares containing no trust or limitation thereof, a will or other testamentary instruments, and an agreement under hand only which does not operate as a deed under the Land Act.<sup>70</sup>

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<sup>66</sup> Section 42.

<sup>67</sup> Section 45.

<sup>68</sup> Section 43.

<sup>69</sup> Section 43(1).

<sup>70</sup> Section 43(3). As to the legal issues these exceptions create in Tanzania and which have similarly been considered in other jurisdictions such as Australia, Kenya and the United Kingdom, see Ominde, D., "The Pace of Non-Advocate Lawyers in

Any unqualified person commits an offence when he draws or prepares any instruments in contravention of section 43 by not endorsing or causing his name and address to be endorsed thereon. The law here considers an unqualified person who prepares the prohibited instruments for fee, gain or reward and who does not endorse his name and address for identification.<sup>71</sup> The punishment for this offence is a fine not exceeding 200/=Tshs. The law prohibits the registering authorities, including the courts of law, from accepting or recognising any such instruments unless it has the endorsed name of the person who prepared it.<sup>72</sup> Equally, the law disbars and criminalises touting in Tanzania as well as inducing clients to abandon their advocates in favour of others.<sup>73</sup>

Concerning unqualified persons in the capacities of state attorneys and law officers, the Guidelines prohibit unqualified practice.<sup>74</sup> They consider unqualified practice to be a disciplinary misconduct punishable according to the disciplinary measures the Office of the Attorney General (Discharge of Duties) Act prescribes.<sup>75</sup> According to the Office of the Attorney General (Discharge of Duties) Act, the Deputy Attorney General is the disciplinary authority for state attorneys and law officers employed in the Office of the Attorney General.<sup>76</sup> For state attorneys and law officers employed in other “Ministries of the Government, Government Departments and Agencies”, including the Office of the Solicitor General and the Director of Public Prosecutions, their respective employers become their disciplinary

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Legal Practice in Kenya”, *Social Science Research Network*, 2020, pp. 1-12; Knowler, J. and Spencer, R., “Unqualified Persons and the Practice of Law”, 16 *Flinders Law Journal*, 2014, pp. 203-27.

<sup>71</sup> Section 44.

<sup>72</sup> Section 44(2).

<sup>73</sup> Section 47-48.

<sup>74</sup> Guideline 6.

<sup>75</sup> Guideline 10.

<sup>76</sup> Section 7(1)(e).

authorities.<sup>77</sup> The Attorney General also can refer allegations of professional misconduct of the law officers and state attorneys before the Advocates Committee.<sup>78</sup>

It is important to note here that the Advocates Act recognises that persons other than advocates can conduct, defend or act in proceedings where other laws permit.<sup>79</sup> It also recognises other laws that prohibit a person or class of persons from conducting, defending or acting in proceedings.<sup>80</sup> These provisions play an important role because there are other laws in Tanzania that indeed allow or disbar advocates the right of audience. For example, in addition to advocates, the Labour Institutions Act and the Labour Court Rules allow a party before the Labour Court to have the representation of an official of a registered trade union or employer's association or a personal representative of the party's own choice. The law requires the personal representative acting on behalf of the party in the proceedings to file a written notice to the Registrar and all the parties advising (informing) them of his name, address, place of employment or business and any available fax number, e-mail and telephone number.<sup>81</sup> In certain circumstances, these persons must obtain leave of the Court first for certain actions.

### **3. JUDICIARY'S APPROACH ON UNQUALIFIED PRACTICE**

Part III of this Article discusses the approach of the judiciary in terms of its willingness and manner of acting in the discipline of advocates for

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<sup>77</sup> Sections 9, 27(4), 28(2) of the Act, read together with section 3 of the Advocates Act; section 5(2) of the National Prosecutions Services Act, [Cap. 430 R.E. 2019]; Guideline 4(3); Order 4(1)(j) of the Office of the Solicitor-General (Establishment) Order, G.N. No. 50 of 2018; Regulation 35(2)(b) of the Public Service Regulations, G.N. 168 of 2003.

<sup>78</sup> Section 27(3).

<sup>79</sup> Section 70(a).

<sup>80</sup> Section 70(b).

<sup>81</sup> Section 56 of the Labour Institutions Act; Rule 43 of the Labour Court Rules.

unqualified practice in Mainland Tanzania.<sup>82</sup> The discussion proceeds on the basis of a legal analysis preferred in Part II of this Article. It is necessary to state that the Article does not provide an exhaustive analysis of every form of unqualified practice in Tanzania or every case the courts have decided on unqualified practice. Rather, the Article considers some of the major decisions with a bearing on unqualified practice and the judiciary's approach and willingness to exercise such powers. The Article opines that these major decisions are a reflection of the overall practice of the judiciary.

In dealing with unqualified practice, the judiciary presents a nuanced approach with consistent and sometimes inconsistent outcomes. Such nuances have depended largely on how the judiciary has interpreted and applied the law, including its willingness and the manner to act. Without being exhaustive, unqualified practice has manifested itself in forms such as an advocate without a practising certificate drawing and filing documents for a litigant or appearing in court to represent them, a non-advocate preparing documents only reserved for an advocate, sometimes with the connivance of the advocate, an advocate allowing other persons to use his title or name in drawing and preparing documents, advocates verifying to have known applicants in the jurat of attestation without having met or seen or known such persons, persons not parties to a case hiring careless advocates to pursue further legal remedies reserved for the parties to the case such as appeals, advocates representing in courts persons they have never met, seen or verified their details, advocates from other jurisdictions practising in Mainland Tanzania without approval of the relevant authorities, and corporations preparing instruments which only advocates have the legal authority to prepare.<sup>83</sup>

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<sup>82</sup> Almost all the cases cited here are available online at <<https://tanzlii.org/>> (Accessed 9 March 2022).

<sup>83</sup> For a consideration of these unqualified practices in Tanzania, see some of the decisions and rulings of the High Court in the following cases: *Evansi Bugale v Jimi Modesti*, Miscellaneous Land Application No. 3 of 2021, High Court of Tanzania

The Court of Appeal of Tanzania and the High Court are “courts of records.”<sup>84</sup> Their decisions bind all lower courts, unless they are clearly distinguishable for reasons of time, facts, applicable law or issues.<sup>85</sup> Therefore, in considering how the judiciary has approached unqualified practice, it is important to take the legal position the Court of Appeal of Tanzania has developed. This is because the Court of Appeal’s decisions bind all lower courts, including the High Court, even when the decisions’ correctness is questionable,<sup>86</sup> unlike the High Court whose decisions are only persuasive before the Court of Appeal and only bind lower courts.<sup>87</sup>

In setting the tone of, and pace for, dealing with unqualified practice, the Court of Appeal of Tanzania delivered its landmark decision in *Edson Oswald Mbogoro v Dr. Emmanuel John Nchimbi & the Attorney General*.<sup>88</sup> The Court decided that section 41 of the Advocates Act prohibits and criminalises unqualified practice in Mainland Tanzania. It held that the documents the unqualified person prepares are illegal and should be expunged from records and treated as if they never were drafted and presented in court.<sup>89</sup> Notwithstanding this decision, the Court of Appeal did not punish the

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at Kigoma; *Fatuma M. Ramadhani v Ally M. Juma*, Civil Revision No. 4 of 2019, High Court of Tanzania at Dodoma; *Nyamunini Ntarambigwa v Simon Kokoti*, Miscellaneous Land Application No. 19 of 2021, High Court of Tanzania at Kigoma; *Madushi Nzuki v Dunia John*, Criminal Appeal No. 7 of 2020, High Court of Tanzania at Kigoma; *Daudi Bujenjedeli & Two Others v Village Council of Mnanila Village*, Miscellaneous Land Application No. 53 of 2020, High Court of Tanzania at Kigoma; *Simon Asajile Mbogela v Juma Njate*, Miscellaneous Land Application No. 56 of 2020, High Court of Tanzania at Mbeya.

<sup>84</sup> *Marco Elias Buberna v Agnes Kokusbekya Elias Buberna*, at p. 16.

<sup>85</sup> *Fatuma Mohamed v Chausiku Selema*, Civil Appeal No. 225 of 2017, Court of Appeal of Tanzania at Mwanza, at p. 3.

<sup>86</sup> *Jumuiya ya Wafanyakazi Tanzania v Kivanda cha Uchapaji cha Taifa* [1988] TLR 146.

<sup>87</sup> *Beatrice Mbilinyi v Ahmed Mabkhut Shabiby*, Civil Application No. 475 of 2020, Court of Appeal of Tanzania at Dar es Salaam, at pp. 5, 15.

<sup>88</sup> Civil Appeal No. 140 of 2006, Court of Appeal of Tanzania at Dar es Salaam.

<sup>89</sup> At pp. 12-13.

unqualified person. It only dealt with the documents the unqualified advocate had drafted and the illegal and criminal nature of unqualified practice itself.<sup>90</sup> Thus, in dealing with unqualified practice, the Court had left open “the first door” for lower courts to either impose punishments, deal only with the prepared documents, simply punish the unqualified advocate or even take any “wise” approach. In the ensuing practice of the High Court, its decisions expressly or implicitly reflect this open door approach of the Court of Appeal.

The High Court has consistently decided or ruled that only natural persons can practise as advocates in Tanzania. This is because only natural persons can have their names entered in the Roll of Advocates. Thus, the Court has considered that law firms and partnerships or other legal persons cannot be advocates or legal practitioners the Advocates Act contemplates.<sup>91</sup> Consequently, it is an unqualified practice the Advocates Act prohibits for legal persons to draw and prepare documents reserved for advocates, even when the legal person itself is composed or constituted of advocates. Instead, it should be the advocates constituting it who draw and prepare such documents on its behalf. Legal documents prepared otherwise fall under the

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<sup>90</sup> For some of the decisions of the High Court taking a similar approach which this part will not discuss them, see *Islam Ally Saleh v Akbar Hameer & Another*, Civil Case No. 156 of 2016, High Court of Tanzania at Dar es Salaam; *Dr. Salim Ahmed Salim v The Editor, The East African Newspaper & Another*, Civil Case No. 332 of 2002, High Court of Tanzania at Dar es Salaam; *Ahmed Jamal v Yeslam Said Bin Kulaib*, Civil Appeal No. 312 of 2004, High Court of Tanzania at Dar es Salaam; *Ryoba Msogore@Marwa v R*, Miscellaneous Criminal Application No. 17 of 2020, High Court of Tanzania at Musoma; *Nokia Solutions & Network (T) LTD v Moteswa Lusinde*, Miscellaneous Application No. 500 of 2019.

<sup>91</sup> See for example: *Ramadhani Sood Balenga v Hans Aingaya Macha*, Land Case No. 66 of 2013; *Lucas Nzengula (Son and Heir of Zubura John) v Isack Athumani and Royal Insurance (T) Limited*, Civil Appeal No. 66 of 2008; *Omari v Registrar of Titles*, Miscellaneous Land Application No. 90 of 2014. For a consideration of these decisions, see *Kasimu Ahmed Bingwe v Mtepa Bakari*, Miscellaneous Land Application No. 14 of 2016, High Court of Tanzania at Mtwara, at p. 4.

prohibition of section 41 of the Advocates Act and courts will expunge such documents from any application or proceeding.<sup>92</sup>

While there has been a possible consideration that a preliminary objection that one is an unqualified person is not a pure point of law as it demands an ascertainment of facts,<sup>93</sup> a legally persuasive and consistent approach has been that this preliminary objection is a pure point of law because the Court can take judicial notice through *Mtambue Wakili* and if it finds the advocate unqualified, the consequence is to strike out the application.<sup>94</sup> As a preliminary objection on a pure point of law, the Court has decided that it should be raised in the submission in chief or in the reply submission. It should not be raised in the rejoinder as it will take the other party by surprise without according him the right to be heard.<sup>95</sup> Otherwise, the objection should be dismissed.

The High Court's decision in *Marco Elias Buberwa v Agnes Kokusbekya Elias Buberwa*,<sup>96</sup> dealt with the issue of an unqualified advocate who had filed for the applicant the chamber summons with an affidavit in an application for extension of time to apply for leave to appeal to the Court of Appeal. While he applied and renewed his practising certificate on 16 September 2020, he argued that the late renewal after one had paid the fines had the retrospective effect applying all the way from January 2020. Therefore, the entire

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<sup>92</sup> *Simon Asajile Mbogela v Juma Njate*, Miscellaneous Land Application No. 56 of 2020, High Court of Tanzania at Mbeya, at p. 5.

<sup>93</sup> *Alliance Insurance Corporation Limited v Arusha ART Limited*, Civil Appeal No. 297 of 2017, Court of Appeal of Tanzania at Arusha, at p. 8.

<sup>94</sup> *Pangea Minerals Ltd v Petrofule (T) Ltd and 2 Others*, Miscellaneous Commercial Application No. 51 of 2020, High Court Commercial Division at Dar es Salaam, at p. 10.

<sup>95</sup> *Harrison Sila Mariki v Fredrick Makisa Temu*, Land Appeal No. 41 of 2020, High Court of Tanzania at Moshi, at p. 13.

<sup>96</sup> Miscellaneous Civil Application No. 253 of 2020, High Court of Tanzania at Dar es Salaam.

contention centred on a proper interpretation of the Advocates Act's provisions relating to a valid practising certificate. In dealing with this matter, the Court dealt with the "doctrine of *sanatio in radice*" or "*utakaso wa makosa yote ya nyuma*" or the "*utakaso doctrine*."<sup>97</sup> This could be translated into English as "sanctification of all the past mistakes" or "sanctification doctrine."

First, the Court held that the proviso to section 35(1) cannot be a hiding bush of an Advocate who fails to comply with the requirement of Section 41(1) of the Advocates Act. It affirmed that section 35 does not purify or give legal life to pleadings unqualified persons had drawn. It is only a procedural section concerning the time expiry of licence. Even the penalties or compensation paid for late renewal do not extend to cover or cure unqualified practice in contravention of the law. Thus, it is neither "a purification "*utakaso*" (sanctification) of his acts wrongly done in the Court of law nor a compensation for such wrongful acts."<sup>98</sup> The judge noted that according to section 38(1), (2), the certificate does not have a retrospective effect. Rather, its effect commences from the day in which it has been taken. Only for the grace period of 1 January – 1 February will the certificate take effect from the 1<sup>st</sup> of January.

Second, the Court considered the rationale or the principles behind the prohibition of unqualified practice in Mainland Tanzania. It observed that the purpose of section 41 has been to protect the legal profession and the general public from advocates whose licences are not valid. It emphasised that advocates as officers of the Court and the law requires them to refrain themselves from carrying out their duties until renewal of the certificate so as not to tarnish the image of the noble profession. It observed that "a just system, peace and tranquillity of our society are built on the ethical legal profession. Therefore, the image of the legal profession must be safeguarded

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<sup>97</sup> Ibid, at p. 1.

<sup>98</sup> Ibid, at pp. 7, 9, 11.

by all of us who are entrusted in this vocation.”<sup>99</sup> It noted further that to allow professionals to act unprofessionally creates chaos by ruining the noble profession, and encourages hooliganism in the profession, an attempt that Courts of law should prohibit. Citing the case of *Edson Oswald Mbogoro* and *Baraka Owama*, the Court struck out the chamber summons and affidavit for being prepared by an unqualified person. The Court observed that the application should be struck out because allowing it amounts to perpetuation or condoning of illegality and negligence on the part of the advocates and that any action done by an advocate in violation of the Advocates Act is in furtherance of the offence.<sup>100</sup> These rationales and purposes have been the bedrock of regulating unqualified practice in other jurisdictions such as Kenya, Australia and the United Kingdom.<sup>101</sup> Notwithstanding these lofty ideals, the court did not punish the unqualified person for the misconduct of unqualified practice.

In other cases, the judiciary has dealt with the unqualified practice under sections 43 and 44 of the Advocates Act. It has considered these provisions to mean that section 44 cannot be read or stand in isolation from section 43. This is because the offence section 44 criminalises is already based on the unqualified person preparing certain documents under section 43. It has interpreted section 44 to mean that the requirement of endorsement of the name and address relates only to unqualified persons who prepare reserved documents for fee, gain or reward in contravention of section 43. Therefore, an advocate with a practising certificate does not fall within this prohibition, as he is not an unqualified person. Where a qualified advocate draws documents without endorsement, courts will not strike out, expunge or reject them. Rather, Courts should exercise their inherent power to order

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<sup>99</sup> Ibid, at p. 14.

<sup>100</sup> Ibid, at pp. 18-19.

<sup>101</sup> Ominde and Nyariki, 2020, pp. 3-8; Knowler and Spencer, 2014, pp. 218-26.

amendment or rectification.<sup>102</sup> But in situations where the Court has found clear violations of section 44 in the context of section 43, it has ended up striking documents prepared by unqualified persons, in most cases without punishing the misconduct and offence of the unqualified person who drafted them.<sup>103</sup>

The High Court has also considered unqualified practice in the Advocates Act in the context of the labour laws in several of its decisions. In *Kilimani Dotto Richard v Geita Gold Mine Ltd*,<sup>104</sup> it has decided that a personal representative under section 56 of the Labour Institutions Act must issue a written notice (advise) informing all parties, including the Registrar, of his representation under Rule 43(1) of the Labour Court Rules. This obligation is mandatory. Failure to do so renders the personal representative's representation and presence in court unlawful. Where the law has been complied with, the work of a personal representative goes beyond physical appearance in court. It includes several aspects of achieving effective legal representation of a party.<sup>105</sup> However, the Court has cautioned that the law should set down regulations controlling the conduct of personal representatives not to amount to unqualified persons working as advocates

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<sup>102</sup> The Court of Appeal took this approach in *George Humba v James M. Kasuka* TBR, Civil Application No. 1 of 2005. Since then, this position has been followed in several decisions both of the High Court and Court of Appeal. See *Beatrice Mbilinyi v Ahmed Mabkhub Shabiby*, Civil Application No. 475 of 2020, Court of Appeal of Tanzania at Dar es Salaam, at p. 14; *Daudi Yaredi Nyunya & Kanyanga Msombwe v R*, Miscellaneous Economic Cause No. 11 of 2018, High Court of Tanzania Corruption and Economic Crimes Division at Iringa, at p. 3; *Kasimu Ahmed Bingwe v Mtepa Bakari*, Miscellaneous Land Application No. 14 of 2016, High Court of Tanzania at Mtwara, at pp. 6-7.

<sup>103</sup> *Robert Antony@Bonge & 3 Others v R*, Miscellaneous Criminal Application No. 18 of 2021, High Court of Tanzania at Musoma. See further *Mohamed Shaban & 6 Others v Tanzania Electric Supply Co. Ltd*, Revision No. 269 of 2017, High Court of Tanzania Labour Division at Dar es Salaam.

<sup>104</sup> Labour Revision No. 99 of 2018, High Court of Tanzania at Mwanza.

<sup>105</sup> *Ibid*, at pp. 5-6.

contrary to the Advocates Act. Without the leave of the Court, a personal representative cannot draft pleadings or prepare written submissions, taking into account section 70 of the Advocates Act.<sup>106</sup> Any contravention of these rules is unqualified practice the Advocates Act prohibits.

In *Wellworth Hotels & Lodges Ltd v East African Caravans Co. Ltd & 4 Others*,<sup>107</sup> the High Court was confronted with the preliminary objection concerning the unqualified person who had filed the plaintiff's case without having renewed his practising certificate. Ultimately, the Court struck out the plaint for having been filed by an unqualified person. However, the Court did not punish the unqualified person for misconduct.<sup>108</sup> The same judge in his earlier decision in *Afriq Engineering & Construction Co. Ltd v The Registered Trustees of the Diocese of Central Tanganyika*,<sup>109</sup> had taken a different approach on unqualified practice in Tanzania. Rather than striking the documents the unqualified person has prepared, the Court reasoned that innocent litigants should not be punished for the mistakes of unqualified advocates.

In taking this approach, the Court reviewed the recent practice in several commonwealth jurisdictions of Ghana, Kenya and Uganda where courts have upheld the documents that unqualified persons had prepared. Instead, the Court punished the unqualified advocate for professional misconduct contrary to section 41 of the Advocates Act. The Court invoked section 22(2)(b) of the Advocates Act and ordered the Registrar to refer the matter to the Advocates Committee for appropriate punishment for the

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<sup>106</sup> *District Executive Director, Misungwi v Japhet Ngussa*, Labour Revision Application No. 30 of 2020, High Court of Tanzania at Mwanza. The decision heavily relied on the earlier precedent in *Theodory Michael v Sigory Investment Tanzania Limited*, Revision No. 25 of 2017, High Court of Tanzania at Mwanza.

<sup>107</sup> Commercial Case No. 5 of 2020, High Court Commercial Division at Dar es Salaam.

<sup>108</sup> *Ibid*, at p. 25.

<sup>109</sup> Commercial Cause No. 4 of 2020, High Court of Tanzania Commercial Division at Dar es Salaam.

misconduct.<sup>110</sup> In citing with approval the decision in *Afriq Engineering & Construction Co. Ltd*, the High Court in *Standard Chartered Bank (T) Limited v Best Travel Solution Limited and 3 Others* also referred the unqualified advocate who had appeared for some of the defendants to the Advocates Committee for the professional misconduct of unqualified practice in violation of section 41 of the Advocates Act.<sup>111</sup> Unlike *Afriq Engineering & Construction Co. Ltd*, the Court in *Standard Chartered Bank (T) Limited* expunged the written statements the unqualified advocate had prepared, citing for its authority section 41(1) of the Advocates Act and the decision of the Court of Appeal of Tanzania in *Edson Osward Mbogoro*.<sup>112</sup>

In other decisions of the High Court, the cases had some peculiar aspects of unqualified practice and still the Court took different paths to disciplining advocates. In *Fatuma M. Ramadhani v Ally M. Juma*,<sup>113</sup> the High Court was confronted with the question of an advocate from Zanzibar practising as an advocate in the High Court of Tanzania. This is a clear case of unqualified practice because for a person from Zanzibar to practise in Mainland Tanzania for a particular case only, he must have been in continuous practice as an advocate in Zanzibar for 5 years and must have applied to the Chief Justice to be allowed to practice in Tanzania as such.<sup>114</sup> Once the Chief Justice grants his approval, the advocate becomes subject to the provisions of the Advocates Act as if he were an advocate in Mainland Tanzania.<sup>115</sup> In this case, the Court found this to be the legal position.<sup>116</sup> The Court found the action of this unqualified advocate amounting to unqualified practice that section 41 of the Advocates Act criminalises. Having found that section 41

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<sup>110</sup> Ibid, at pp. 31-32.

<sup>111</sup> Commercial Cause No. 16 of 2020, High Court Commercial Division at Dar es Salaam, at pp. 5-6.

<sup>112</sup> Ibid, at pp. 7-8.

<sup>113</sup> Civil Revision No. 4 of 2019, High Court of Tanzania at Dodoma.

<sup>114</sup> Sections 8(1)(b)(ii), 39(2) of the Advocates Act.

<sup>115</sup> Ibid, section 39(4).

<sup>116</sup> Civil Revision No. 4 of 2019, High Court of Tanzania at Dodoma, at pp. 2-3.

of the Advocates Act is silent regarding the fate of the documents unqualified person prepares, the Court decided to proceed with the case, having advised the respondent to seek the services of a qualified advocate.<sup>117</sup> Thus, the Court neither dealt with the unqualified advocate nor expunged the documents he had prepared.

The case of *Baraka Owawa v Tanzania Teachers' Union*<sup>118</sup> dealt with a unique case of unqualified practice. The Court acted *suo mottu* in raising the issue of an advocate who had prepared and attested the signature of the applicant to support his application while he was unqualified.<sup>119</sup> In the course of the proceedings, counsel for the respondent alleged that Mr. Lukandiza, the advocate for the applicant, is also a state attorney or law officer employed by Musoma Town Council. While the Court disputed this fact for lack of evidence from the respondent's counsel, the Court found that a proper reading of the Office of the Attorney General (Discharge of Duties) Act requires a state attorney to practice as an advocate only following the Guidelines his Office had issued. When the Court determined this case, the Attorney General had not yet issued the Guidelines. Nonetheless, because counsel for the respondent had not brought any tangible evidence showcasing that Mr. Lukandiza is a state attorney when he acted as advocate, the Court dismissed the allegation and struck out the affidavit and chamber summons.<sup>120</sup> The Court did not punish Mr. Lukandiza nor consider what would have been the approach should Mr. Lukandiza indeed turned out to be a state attorney or law officer.

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<sup>117</sup> Ibid, at pp. 3-4.

<sup>118</sup> Miscellaneous Labour Application No. 6 of 2020, High Court Labour Division at Musoma.

<sup>119</sup> Ibid, at p. 2.

<sup>120</sup> Ibid, at pp. 11-12.

In *Evans Bugale v Jimi Modesti*,<sup>121</sup> the High Court dealt with another aspect of unqualified practice. The Court *suo mottu* did find that the applicant's affidavit had raised several allegations of professional misconduct against his previous advocate who consistently failed to act according to his instructions, including failing to appeal within time. The Court found that while it appeared the applicant had verified and deposed his affidavit, it was actually not him who signed and deposed the affidavit. The Court found the applicant unaware of who actually had verified and deposed the affidavit. On questioning the advocate who had prepared and filed the affidavit and who also had entered appearance at the hearing of the application, the advocate confessed that she neither prepared nor signed the affidavit.

Rather, it was the legal officer under his instruction who prepared and signed the affidavit. While withholding the names of all these persons for unqualified practice in order to protect "their reputation", the Court never punished them for the misconduct of unqualified practice despite holding that this conduct was "both a crime and illegal conduct, tried to deceive and influence the court to give decision on a false evidence by affidavit and dishonestly presented in court."<sup>122</sup> Having obtained their confession of wrongdoing, the Court resorted to warning and forgiving them not to repeat similar mistakes in the future.<sup>123</sup> However, the Court struck out the chamber summons and affidavit as defective for being prepared by unqualified persons.

In the case of *Nyamunini Ntarambigwa v Simon Kikoti*,<sup>124</sup> the same judge dealt with another issue of unqualified practice. In this case, the son of the

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<sup>121</sup> Miscellaneous Land Application No. 3 of 2021, High Court of Tanzania at Kigoma.

<sup>122</sup> *Ibid*, at p. 8.

<sup>123</sup> *Ibid*, at p. 6.

<sup>124</sup> Miscellaneous Land Application No. 19 of 2021, High Court of Tanzania at Kigoma.

applicant prosecuted the case while pretending to be the applicant. It was the respondent who raised this issue and stated that the father of this son, the actual applicant, had already given up on this case in favour of the respondent. This then brought the question of who signed and verified the affidavit for the applicant's application. The Court found it was this fake applicant (the son) who drew and filed the application, and verified and deposed the affidavit in support of the application. Thus, the jurat of attestation was made by a fake person under impersonation with full participation of negligent and complicit advocates who never verified the real names and identifications of the parties.

The Court found this to be "very dangerous, in the administration of justice in case an adverse order is issued against the party who appears in the matter but was not aware of the matter altogether."<sup>125</sup> And what has happened the Court termed a professional misconduct on the part of advocates who attested the affidavit and his fellow advocate who identified the fake applicant in the jurat of attestation. Instead of punishing the advocate for misconduct, the judge remarked: "I am tired of this habit and cannot tolerate more. This would be my last sympathy. I will start taking legal measures in accordance with the powers vested in me by law as judge section 22(1)(2)(a) and (b) of the Advocates Act."<sup>126</sup> When such time comes, one should blame nobody, but his or her own misconduct."<sup>127</sup> The Court ended up striking the application and advised the respondent that should he wish, could pursue a separate legal action for redress against responsible advocates.

Finally, the ruling of the High Court in *Kirigiti Chacha Wambura & 3 Others v Delvina Baltazar Swai* when dealing with unqualified practice is worthy of

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<sup>125</sup> Ibid, at p. 7.

<sup>126</sup> Cap. 341 [R.E. 2019].

<sup>127</sup> Ibid, at p. 10.

attention.<sup>128</sup> The ruling was a response to a preliminary objection that the counsel for the applicant had prepared and filed pleadings while unqualified under section 41 of the Advocates Act for having no valid practising certificate under section 39. The Court found this to be unqualified practice. However, it ruled that it has no power to expunge the pleadings from record. The Court decided that only the Court of Appeal has the power to expunge pleadings prepared by unqualified persons.

Therefore, the Court reasoned that the matter should be referred to the Court of Appeal for direction or it should “take steps which will ensure justice to the parties without offending the law.”<sup>129</sup> Finding that a reference to the Court of Appeal is inconvenient and time wastage, the Court resorted to applying the Oxygen principle. In the end, the Court decided “to ignore the proceedings” and proceeded “as if there have been no such proceedings.” On taking the disciplinary action against the unqualified advocate, the Court decided to issue only a “slight warning” advising the advocate to be careful that he does not appear in court again without a valid practising certificate. Its basis for this approach was that the Court respects the unqualified advocate, who was an elderly person.<sup>130</sup>

#### **4. STRIKING OUT DOCUMENTS *VIS-À-VIS* THE RIGHTS OF LITIGANTS**

This Part discusses the thorny question dealing with the rights of innocent litigants whose documents the courts have expunged in the determination of unqualified practice. The majority of the decisions have followed the binding approach of the Court of Appeal in *Edson Oswald Mbogoro v Dr. Emmanuel John Nchimbi & the Attorney General* and several other decisions of the High Court

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<sup>128</sup> Miscellaneous Civil Application No. 397 of 2020, High Court of Tanzania at Dar es Salaam.

<sup>129</sup> *Ibid*, at p. 5.

<sup>130</sup> *Ibid*, at p. 6.

as Part III has analysed. In *Edson Oswald Mbogoro*, the Court of Appeal observed that section 41 of the Advocates Act was silent regarding the fate of the documents unqualified persons had prepared. The High Court has made similar observations.<sup>131</sup> This silence necessitated the Court of Appeal to resort to common law based on section 2(3) of the Judicature and Application of Laws Act.<sup>132</sup> Examining the common law position at 1920 in the case of *Sparling v Brereton*,<sup>133</sup> it found that the case ruled that an innocent client should not be punished for his documents for *trifling* irregularities of the advocate. However, the Court reasoned that practising while unqualified is not trivial. It is a criminal offence under section 41 of the Advocates Act.<sup>134</sup> Thus, the Court of Appeal distinguished the position in the case of *Sparling v Brereton* from that of Tanzania on the legal basis of section 41. Having considered the legal position in Kenya and Uganda, the Court established it as a law in Tanzania that unqualified practice is not only a criminal offence and a gross professional misconduct, but also that all the documents unqualified person had prepared have taints and stains of illegality and cannot be admitted in courts of law. They should be treated as if they were never drafted and presented in court.<sup>135</sup>

Thus, the Court of Appeal made section 41 of the Advocates Act to provide that the fate of documents of unqualified practice is striking them out for illegality. However, there is a need to appreciate that Mr. Edson Oswald Mbogoro, the applicant in this case, was also an advocate. The Court reasoned that he should have known better that the advocate he had engaged

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<sup>131</sup> *Fatuma M. Ramadhani v Ally M. Juma*, Civil Revision No. 4 of 2019, High Court of Tanzania at Dodoma, at p. 3; *Wellworth Hotels & Lodges Ltd v East Africa Cannans Co. Ltd & 4 Others*, Commercial Case No. 5 of 2020, High Court of Tanzania Commercial Division at Dar es Salaam, at p. 15.

<sup>132</sup> Now Cap. 358 [R.E. 2019].

<sup>133</sup> [1866] 31 LTR 64.

<sup>134</sup> At p. 8.

<sup>135</sup> At pp. 12-13.

to pursue his case was unqualified to practice in Tanzania.<sup>136</sup> Thus, in addition to distinguishing the case of *Sparling v Brereton*, the next compelling determination was the status of the applicant Mr. Edson Mbogoro that largely influenced the Court of Appeal's position regarding the fate of the documents emanating from unqualified practice in Tanzania. Further, a closer reading of this decision indicates that had Mr. Mbogoro been a layperson, its decision would have been different. This is because when examining the position in the common law jurisdictions of Uganda and ultimately Kenya, it was unable, at that time, to obtain evidence whether the decision in *Kajwang v Law Society of Kenya*,<sup>137</sup> which upheld that the law punishes unqualified practice of the unqualified person and not the innocent litigant, had been overturned or sustained by a higher court in Kenya.<sup>138</sup> Accordingly, I find that the Court of Appeal of Tanzania had left open "the second door" on dealing with the documents of unqualified persons in Tanzania—the open door that it is possible, in very clear and restricted cases, for the Courts in Tanzania, especially the High Court, to only punish unqualified persons while upholding the documents they have prepared.

It is not surprising that some decisions of the High Court have taken this approach. Some of these decisions are *Fatuma M. Ramadhani v Ally M. Juma* and *Afriq Engineering & Construction Co. Ltd v The Registered Trustees of the Diocese of Central Tanganyika*.<sup>139</sup> While the decision in *Fatuma M. Ramadhani* simply relied on the silence of section 41 of the Advocates Act to uphold the documents of the unqualified person,<sup>140</sup> it is the decision in *Afriq Engineering* that presents a legally compelling case. In deciding to uphold the documents of an unqualified person, Judge Nangela reasoned that the sins of an

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<sup>136</sup> At pp. 9, 11, 12.

<sup>137</sup> [2002] 1 KLR 846.

<sup>138</sup> At pp. 10-12.

<sup>139</sup> Civil Revision No. 4 of 2019, High Court of Tanzania at Dodoma and Commercial Cause No. 4 of 2020, High Court of Tanzania Commercial Division at Dar es Salaam respectively.

<sup>140</sup> At p. 3.

unqualified advocate should not punish the innocent litigant, unless the litigant was complicit in the unqualified practice. He asserted that “in the interest of justice, the right of an innocent client needs to be secured.”<sup>141</sup> The High Court further fortified its position by resorting to a consideration of the decisions in Kenya, Uganda and Ghana on the subject, including the decision of the Supreme Court of Kenya, which partly answers the legal concern the Court of Appeal of Tanzania had in *Edson Oswald Mbogoro*.<sup>142</sup> The Court even upheld the submissions presented by unqualified persons in court on the basis of these decisions and the Oxygen principle.<sup>143</sup>

The most important question is, why should one consider it relevant to uphold the documents of unqualified practice? The reason for their consideration is twofold. First, there is a clear understanding that “a claim in law and a course of action belongs to the client and not the advocate.”<sup>144</sup> Therefore, while it is the advocate who drafts and files the pleadings in court, it is the litigant’s pleadings for the remedies he is pursuing in a case. In that sense, there is no reason to punish an innocent litigant in his case for the mistake of his advocate. Of course this reasoning cannot be overstretched to open a Pandora’s Box for litigants to claim that every mistake is advocates’ mistake and thus defeat the legal safeguards. The second reason is that innocent litigants have protected constitutional rights. These include the right to effective legal representation and right to justice, which both encompass the right to effective access to courts of law, right to a fair hearing, right of redress and pursuing other rights available in a democratic society.<sup>145</sup>

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<sup>141</sup> At p. 25.

<sup>142</sup> At pp. 25-29.

<sup>143</sup> At p. 29.

<sup>144</sup> *Afriq Engineering Decision*, at p. 26 citing the Kenyan decision in the *Republic v Resident Magistrate’s Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna and 9 Others*, [2016] eKLR at para. 35.

<sup>145</sup> Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 [R.E. 2002].

The better response to this question was considered by the High Court in *Marco Elias Buberwa v Agnes Kokushekeya Elias Buberwa*.<sup>146</sup>

Considering reasons for not expunging the litigants' pleadings, the Court advanced five reasons. First, the law strictly punishes an offending advocate and does not declare the documents he has prepared illegal. Second, innocent litigants should not suffer the consequence of irresponsible advocates who practice while unqualified. Third, the interest of justice demands that it will become a denial of justice for the innocent litigant to have his documents declared illegal simply for engaging the services of such advocates. Fourth, there is no justifiable reason to improperly affect the interests of innocent litigants. Fifth, expunging the documents of innocent litigants causes delay in the dispensation of justice, resulting in a huge backlog of cases filed invariably after striking out. This becomes a wastage of courts' and parties' resources and time.<sup>147</sup> The Court even noted that "putting the pros and cons of striking out the application drawn and filed by an unqualified person at the "*instus*" "*mizani*", I find the pros to be overwhelming."<sup>148</sup> Thus, while the Court struck out the documents following the authority in *Edson Oswald Mbogoro* and *Baraka Owawa*, it found the reasons to uphold the pleadings in favour of innocent litigants compelling. The decision leaves the question open whether the same pleadings or documents could be filed by a qualified practitioner.

## 5. CONCLUDING REMARKS

In considering how the judiciary has dealt with unqualified practice in Tanzania, this Article based its analysis on the Mainland Tanzania legal framework governing the legal profession of advocates and the approaches the High Court and the Court of Appeal have taken. The Article finds that

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<sup>146</sup> Miscellaneous Civil Application No. 253 of 2020, High Court of Tanzania at Dar es Salaam.

<sup>147</sup> At pp. 19-20.

<sup>148</sup> At p. 20.

the Tanzanian framework is robust and mostly clear on the professional misconduct and criminal offences it criminalises or prohibits advocates from engaging. It has established that the conflicting and non-uniformity decisions, mostly of the High Court, are the result of the open door legal precedent the Court of Appeal set in the case of *Edson Oswald Mbogoro* and the silence of section 41 of the Advocates Act.

The Article submits that on the balance of probability, and with few exceptions, the judiciary seems willing to punish innocent litigants for the mistakes of the advocates in the bid to preserve the integrity of the legal profession in asserting its role as referee and supervisor of the profession. The work has found that this approach has largely ignored the constitutional rights of litigants the Tanzanian constitution enshrines and guarantees. Finally, this Article has found that the judiciary has been unwilling and uneven in punishing advocates. It observes that the judiciary has failed to exercise its power correctly as section 22(1), (2) of the Advocates Act mandates. The Article maintains that upholding documents unqualified persons have prepared is a good practice in upholding the rights of innocent litigants. Exceptions should only be recognised in all cases of clients' complicity in unqualified practice.