

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., WAMBALI, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 340/18 OF 2019

RAYAH SALUM MOHAMED

(by virtue of special power of attorney from)

SHERDEL GHULAM RENDAPPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

MASJID SHEIKH ALBANI RESPONDENT

**[Application for an order for Stay of Execution of the ruling
and drawn order of the High Court of Tanzania
(Land Division) at Dar es Salaam]**

(Maghimbi, J.)

Dated the 25th day of July, 2019

in

Land Revision No. 15 of 2019

RULING OF THE COURT

5th & 22nd November, 2019

WAMBALI, J.A.:

This application for stay of execution of the ruling and drawn order of the High Court of Tanzania, Land Division in respect of Land Revision No. 15 of 2019 was lodged by Rayah Salum Mohamed by virtue of special power of attorney from Sherdell Ghulam Rend. The application has been preferred through the notice of motion supported by the affidavit of Rayah Salum Mohamed.

When the respondent, the Registered Trustees of Masjid Sheikh Albani was served with the application, through the services of an advocate, she lodged an affidavit in reply deposed by Hamoud M. Al Asbahi to contest the same. It is further noted that in paragraph 3 of the said affidavit in reply, the respondent contends that, the power of attorney which purports to grant Rayah Salum Mohamed the mandate to lodge the present application on behalf of Sherdell Ghulam Rend is defective. In his view, the defect is based on the fact that the said power of attorney was registered on 23rd May, 2018 before it was executed on 30th May, 2018. A copy of the said the power of attorney is attached as annexure "A" to the affidavit in reply.

At the hearing of the application, the applicant was represented by Mr. Samson Mbamba and Mr. Themistocles Rwegasira both learned advocates, whereas the respondent was represented by Mr. Deogratias John Lyimo Kiritta also learned advocate.

In this regard, based on the raised point on the defective power of attorney, before we heard arguments of the counsel for the parties on the merits of the application, we requested them to address us on whether in view of the alleged defect, the application is properly before the Court.

On his part, Mr. Mbamba readily conceded that the power of attorney is defective. However, he quickly pointed out that the said defect is not fatal as the power of attorney can be rectified by the Registrar of Titles who registered it. He explained that, the defect concerns the form and not the contents or substance of the power of attorney itself. Mr. Mbamba added that there is no dispute that, Sherdell Ghulam Rend granted special power of attorney to Rayah Salum Mohamed to sue on his behalf.

The learned advocate therefore, concluded his submission by urging the Court to grant the applicant leave to go and approach the Registrar of Titles for purpose of rectifying the power of attorney with regard to the defect that it was registered on 23rd May, 2018 before it was executed by the donor and donee on 30th May, 2018. In his submission, he said, the Court should grant that prayer by invoking the overriding objective principle enshrined under the provisions of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 R.E.2002 (the AJA) which enjoins it to aim to do justice by determining the dispute between the parties substantively.

On the adversary, elaborating on the nature of the defect in the said power of attorney, the learned counsel for the respondent

adopted his explanation contained in a written submission which was lodged in Court on 31st October, 2019 and contended that, the applicant has no *locus standi* to institute the application as the purported power of attorney is incurably defective and bad in law. He submitted further that the defect emanates from the fact that the power of attorney was registered by the Registrar of Titles on 25th May, 2018, while it was executed by Sherdell Ghulam Rend (donor) and Rayah Salum Mohamed (donee) on 30th May, 2018.

In the circumstances, Mr. Kiritta, urged us to strike out the application because the defect in the power of attorney is fundamental and renders the applicant to have no *locus standi* to lodge the present application on behalf of Sherdell Ghulam Rend. He emphasized that the power of attorney could not be registered on 25th May, 2018 before it was executed by the donor and donee on 30th May, 2018.

The learned advocate for the respondent submitted further that, the prayer of the applicant's counsel to be granted leave to go and rectify the defective power of attorney is untenable. In his view, the defect in the power of attorney is substantial and therefore, it cannot be cured by invoking the overriding objective principle as submitted

by Mr. Mbamba. Mr. Kiritta concluded his submission by urging the Court to strike out the application with costs.

On our part, having heard the rival arguments of the counsel for the parties, and upon going through a copy of the power of attorney which the applicant relies as a source of legitimacy to lodge the present application before the Court, we have no hesitation to state that the same is wanting. In our considered opinion, the power of attorney is not only wanting because it seems to have been registered on 25th May, 2018 before it was executed by the donor and donee on 30th May, 2018, but it also does not grant special powers of attorney to Rayah Salum Mohamed to lodge the present application as claimed by her. We shall demonstrate our observation and findings herein below. Our careful perusal of the said power of attorney reveals the following matters.

Firstly, the title of the power of attorney itself is wanting as it does not give the purported special power of attorney to Rayah Salum Mohamed to lodge the present application on behalf of Sherdell Ghulam Rend as the applicant would like the Court to conclude. For purpose of clarity, we deem it appropriate to reproduce the relevant part of the power of attorney hereunder:

"THE LAND REGISTRATION ACT (CAP. 334)
APPLICATION FOR FILING OF A POWER OF
ATTORNEY
(SECTION 96)

CT NO. 97148
PLOT. 28 BLOCK C
TEMEKE
DAR ES SALAAM CITY.

I SHERDELL GHULAM REND OF P.O. BOX 7258, DAR ES SALAAM, and RAYAH SALUM MOHAMED OF P.O. BOX 7258 DAR ES SALAAM, being respectively the Donor and Donee of a Power of Attorney dated 30 day of 05, 2018, HEREBY APPLY that such power of attorney be filed in accordance with the provision of section 96 of the Land Registration Act, (Cap. 334)".

After the statement reproduced above the said power of attorney which has only one page is signed by both the donor and donee in the presence of Abdulshaquil Potter Mataka, advocate. However, the date and month as to when they duly signed the same are not indicated therein serve for the year which is shown to be 2018.

On the other hand, a close reading of the reproduced part of the said power of attorney reveals that, it was purposely made to be filled under section 96 of the Land Registration Act, Cap. 334 (the Act). It is

therefore, without doubt that the said power of attorney was filled jointly by the donor and donee under section 96 of the Act with the aim of granting power to the donee (Rayah Salum Mohamed), to make applications under the Act to effect dispositions of or otherwise to act in relation to registered land, in this case, CT No. 97148, Plot No. 28 Block C Temeke, Dar es Salaam city. For the purpose of clarity, the provisions of section 96 (1) provides as follows: -

"The Registrar shall on the joint application of the donor and the donee of a power of attorney to make applications under this Act to effect dispositions or otherwise to act in relation to registered land, file such power of attorney. Every such application shall be in writing in the prescribed form and shall be executed and attested in the manner required for deeds by sections 92 and 93."

It thus evident from the reproduced provision that, the said power of attorney was executed by the donor and donee on 30th May, 2018 for the purpose of filing the same to comply with the provisions of section 96 (1) of the Act. Therefore, the said power of attorney did not grant the donee special power to sue or lodge the present

application on behalf of the donor as indicated by the applicant in the notice of motion and her affidavit.

Secondly, it is further noted that, apart from that copy of power of attorney stated above, there is another power of attorney which is attached to it with no page numbers bearing the title;

"GENERAL POWER OF ATTORNEY".

Made under the registration of documents Act, [CAP 117 R.E. 2002]".

The said general power of attorney contains four papers with no page numbers. Nevertheless, the relevant part of the same, for purpose of our deliberation states as follows:

"TO ALL TO WHOM THESE PRESENTS SHALL COME, I, SHERDELL GHULAM REND OF P.O. box 7258 Dar es Salaam, Tanzania, whereas I own various movable and immovable assets and properties in various parts of Tanzania and whereas I am personally unable to attend to my day to day affairs and for reasons of convenience it is necessary that I should confer upon him the power hereinafter stated.

Now know by these presents that I SHERDELL GHULAM REND do hereby nominate and constitute

and appoint RAYAH SALUM MOHAMED present residing at KARIAKOO, LIVINGSTONE STREET of P.O. Box 7258 Dar es Salaam as my true and lawful Attorney for me in the name and on behalf of myself and/or my said Attorney in any capacities and in the name and on behalf of my partnerships, firm, association of persons, trustee, beneficiary or business in which I am now or may in future in any manner become interested to exercises, execute and perform all or any of the following acts, deed and things, namely:-

- 1. To consider, settle, approve, sign, execute, deliver and or issue all agreements documents, certificates, and instruments (all whether As a deed or not) which the Attorney is in its absolute discretion considers desirable in connection with the following: -*

(a) Plot number; 28, with Title deed number 97148; Block C, Plot Area 12790, located TEMEKE Area, TEMEKE District, Dar es Salaam in the United Republic of Tanzania ...”

The said general power of attorney is similarly signed by the same donor and donee and witnessed by Abdulshaqil Potter Mataka, advocate on 30th May, 2018. Then what follows is a one-page document attached to the general power of attorney which indicates

that, it was registered at the Land Registry by the Registrar of Titles and stamp duty paid on 23rd May, 2018.

In this regard, we are of the considered opinion that, if the two powers of attorney are taken as they are, there is doubt as to whether they were jointly registered on 23/5/2018 before the donor and donee executed the same on 30/5/2018. It is also doubtful as to whether the said registration concerned both powers of attorney that is, one registered under section 96 (1) of the Act and the other which had to be registered under the Registration of Documents Act, Cap.117 R.E.2002. We harbour those doubts because having closely examined the two powers of attorney, we have no hesitation to state that the same are distinct. One of the major difference concerns the mode of registration. While the former is required to be registered under section 96 of the Act by the Registrar of Titles, the latter is properly registered under the Registration of Documents Act by the Registrar of Documents. The other difference is on their respective purpose as indicated in the reproduced paragraphs above.

Thirdly, we note that from the reproduced paragraphs of the two powers of attorney, there is nowhere in which it is indicated that the applicant was given '*special power of attorney*' by Sherdell Ghulam

Rend to lodge the current application as indicated in the notice of motion and the supporting affidavit of the applicant.

It follows that, apart from the difference on the dates when the two powers of attorney were registered and executed, it is also doubtful if both of them could have been jointly filled and registered at the Land Registry by the Registrar of Titles as indicated in a one-page document. Therefore, the purported special power of attorney from Sherdell Ghulam Rend to Rayah Salum Mohamed is not supported by the contents of any of the two powers of attorney. In this regard, we are of the opinion that the two reproduced powers of attorney are wanting not only in their form but in substance.

Be that as it may, apart from what we have stated above with regard to the form and substance of the two powers of attorney, we must emphasize that appearance in the Court of Appeal by persons holding powers of attorney is subject to the provisions of Rule 30 (2) of the Rules which provides as follows: -

"A person not resident of the United Republic may appear by lawfully authorised attorney."

It is apparent from the reproduced rule that, in the present application, even if the alleged special power of attorney could have been properly granted to the applicant, still there is no evidence that, Sherdell Ghulam Rend whose address is in Temeke District is not a resident of Tanzania. To the contrary, there is evidence that the donor of the powers of attorney is resident in Tanzania. In the circumstances, Rayah Salum Mohamed cannot have the benefit of relying on the provisions of Rule 30 (2) of the Rules to lodge the present application and appear before the Court on behalf of Sherdell Ghulam Rend since he is a resident of Tanzania.

It is important, at this juncture to refer to the decision of the Court in **Georgia Celestine Mtikila v. 1. The Registered Trustees of Dar es Salaam Nursery School and 2. International School of Tanganyika Ltd** [1998] TLR 512. In that appeal, the appellant had sought leave of the Court to be represented by her husband under the power of attorney. In response, the Court made reference to Rule 28 (2) of the Tanzania Court of Appeal Rules, 1979 which is currently Rule 30 (2) of the Rules and stated as follows;

"Appearance before the Court of Appeal by persons holding powers of Attorney is regulated

by the provisions of Rule 28 (2) of the Court of Appeal Rules 1979 and the appellant is not covered by the provisions because she is resident in Tanzania”.

In the present application, Sherdell Ghulam Rend is resident in Tanzania and therefore, the applicant, Rayah Salum Mohamed cannot purport to represent him in this Court under the purported ‘special power of attorney’. This is contrary to the provisions of Rule 30 (2) of the Rules.

In the event, we agree with the learned counsel for the respondent that, the applicant has no *locus standi* to lodge and prosecute the present application on the purported ‘special power of attorney’. Thus, the application is incompetent. We therefore, do not, with respect, agree with the learned counsel for the applicant that the pointed out defects with regard to the two powers of attorney before the Court, and the applicant’s failure to comply with the provisions of Rule 30 (2) of the Rules, can be remedied by invoking the overriding objective principle. The defects go to the very root of the status of the applicant which renders the application incompetent.

In the result, we strike out the application with costs for being incompetent.

DATED at **DAR ES SALAAM** this 20th day of November, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of November, 2019 in the presence of the Mr. Themistocles Rwegasira assisted by Leonard Masatu counsel for the applicant and Mhina Michael counsel for the Respondent is hereby certified as a true copy of the original.


H.P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL