

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL APPEAL NO 33 OF 2000

YUSUFU MUSA.....APPELLANT

VERSUS

RAMADHANI ALLY.....RESPONDENT

J U D G E M E N T

MUSHI, J

In the course of writing this judgement in this appeal, I discovered an irregularity which needs special attention before writing the actual judgement on appeal. In this case which was heard in the Court of Resident Magistrate at Arusha, the plaintiff, Yusufu Musa who is also the appellant was represented by a firm of lawyers by the name of Merinyo & Co advocates while the defendant, now the respondent Ramadhani Ally - was represented by lawyers from Tanzania Legal Corporation. Hearing of the evidence of the case for the plaintiff started on 18/6/97. The Plaintiff was represented by Mr. Merinyo - learned advocate while the defendant was represented by Mr. Mwaluko - learned counsel from the Tanzania Legal Corporation. Case for the plaintiff continued to 17/10/99 when learned Counsel, Mr. Merinyo, closed the case. All along both counsels were present and conducted the case by examining and cross-examining the witnesses.

The case ^{was} adjourned to enable the defendant to present his evidence by calling witnesses. On 18/8/98 by consent of both counsels, ie. Mr. Merinyo for the plaintiff and Mr. Mwaluko for the defendant, the hearing was adjourned to 1/9/98. On 1/9/98, the court record reads as follows:-

....2/-

11/9/98

Coram: F.J. Mushi - RM

Plaintiff: Present in person.

Defendant: Present

Inter: Frida

Court: The matter was scheduled for hearing today, the date was suggested by consels of both parties:

No reason has been shown as to why they have not entered appearance. The case to proceed as scheduled.

DEFENCE CASE OPENS

DW.1: Ramdadhani Ally 30yrs Male, adult, Islam affirms and states:-

The dispute between as is about a parcel of 1 and left to us by our father. After his death, he left 11 children. After six months I started building a house on part of my late father's land. When the house was on furnishing, the plaintiff started complaining that my building was not proper. He was our administrator.

After completing the building my sister passed away. Before the burial my mother told me that the 10x10 leader came saying that the plaintiff was claiming from our deceased father Tshs. 2000/=. I told her I will make a followup after the burial. Before 3 days another complaint followed. I went to the plaintiff and asked him why he sued as to 10x10 while he was my (msimamizi). The plaintiff told me to meet with him at Kilombero, mzee Mbegu's place to discuss the problem.

We met and discussed. The plaintiff said that the deceased did not owe him anything except that he received complaints from my brother and mother as to why I was building on a land which is not mine. I told him that I was building for the benefit of the family.

After that he beat up my mother and sued as to conciliation board in Arusha custom. The plaintiff claimed for a path (kichochoro). The wazee visited the farm as the plaintiff had claimed that he had built a house for the deceased father.

It was decided in my favour. The plaintiff went to primary court. He won. I appealed to Kaloleni District Court.

Thats all..

Xd by

Plaintiff: The 2000/- was for plot according to you
The plot is the one, one which we were born. I do not
knew if the value of the plot was 2000/= Tshs.

Defendant: I will have witnesses.

Order: Hearing 1/10/98

Parties to notify their councils.

Sgd. F.J. Mushi- RM

1/9/98"

The defendant gave evidence, and the plaintiff asked only two
questions in cross-examination. The proceedings were adjourned to
1/10/98 for the defendant to present his witnesses. In adjourning
the proceedings the presiding magistrate made the following order:

"Order: Hearing on 1/10/98

Parties to notify

their consels.

F.J. Mushi, RM

1/9/98"

The question now is whether the presiding magistrate was right in
calling upon the defendant to present his evidence in the absence
of both counsels who had been conducting the case for the actual
parties. If the answer is in the affirmative, what is the role
and powers of an advocate in a brief which he/she has taken. If
the answer is in the negative, is there any injustice caused to the
plaintiff and the defendant who had entrusted their case to the
advocates.

There is no doubt at all that every Tanzanian Citizen and
for that matter every foreigner in our Country has the right to
engage a Practicing advocate to represent him/her in a legal
problem in our Courts of law except in the Primary Courts where
advocates are not allowed to appear.

Once an advocate has taken a brief or instructions from
a client, it is that advocate who has the conduct of the case in
the court untill the client withdraws instructions from such
advocate or the advocate himself/herself withdraws from the
conduct of the case with the permission of the court.

A client of an advocate need not appear in court in the course of proceedings in the matter which he had briefed an advocate unless so directed by the court. This is evident under Order 111 Rule 1 of Civil Procedure Code which for ease of reference reads:-

"Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or , his recognized agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorized by him in that behalf: Provided that any such appearance shall if the court so directs, be made by the party in person"

Also relevant is rule 5 which says:-

"Any process served on the advocate of any party or left at the office or ordinary residence of such advocate, and whether the same is for the personal appearance of the party whom the advocate represents, and unless the court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person"

This appearance by an advocate does not only apply to the plaintiff but it also applies to the defendant who is represented by an advocate. Order V rule 5 states:-

"Save where the court requires the personal appearance of the defendant, a defendant in respect of whom a summons to appear is issued may appear:

- (a) in person; or
- (b) by an advocate duly instructed and able to answer all material questions relating to the sure, or
- (c) by an advocate accompanied by some person able to answer all such questions"

In this matter both parties were represented by advocates. It is the responsibility of an advocate once briefed to study the brief and determine the applicable law or laws to be relied on in the conduct of the case in court. It is also the duty of the advocate to determine what evidence is required and the witnesses who will be required to testify. It is also the duty of the advocate to know what questions to ask a witness in examination in chief or in Cross-examination. A client may very well be ignorant of what to do in respect with the case unless briefed by the advocate.

In the present case, the presence of the plaintiff and the defendant in court on 1/9/98 was merely coincidental. But the ^{parties} ~~were~~ not in court for the purposes of conducting the case. The conduct of the case was in the hands of their respective advocates who were not in court. The parties had ^{not} that withdrawn instructions from their advocates. In law, therefore, on 1/9/98, the parties in the case were not present and proceedings could not be conducted because the advocates who were conducting the case were not present. The learned trial magistrate acted in error in calling the defendant to testify by giving evidence. The learned trial magistrate assumed the role of defendant's advocate. The defendant would not know what to say because he was not the one who had prepared the defence but his advocate. Similarly, the plaintiff would not know what questions to ask in cross-examination.

.....6/-

6 -

It is my considered view that the court was not properly constituted to conduct proceedings. The proceedings which were conducted by calling upon the defendant to adduce evidence was a nullify and that grave injustice was caused to both defendant and plaintiff. It is therefore ordered that the proceedings of 1/9/98 in respect with the evidence of the defendant is hereby declared a nullify and accordingly quashed. It is directed that the record be remitted to the trial magistrate with a direction to record the evidence of the defendant in the presence of advocates and consequently write another judgement.

The judgement which was partly written based on the evidence recorded on 1/9/98 is hereby set aside. To the extent stated above, the appeal is allowed with costs to the appellant.

N. M. MUSHI

JUDGE

30/7/2002

Date: 2/8/2002

Coram: N. M. Mushi, J.

Mr. Merinyo-advocate for the appellant.

Respondent: Ramadhani Ally.

Judgement read in chambers.

N. M. MUSHI

JUDGE

2/8/2002

/Ms.