

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

PC Civil Appeal No. 109 of 2007

(Appeal from the Kinondoni District Court at Kinondoni - Civil Appeal Number
173 of 2006)

JAMILA ALLY.....

APPELLANT

VS

YAHYA SHOMARY.....

RESPONDENT

JUDGMENT

Date of last Order: 05-04-2011

Date of Judgment: 12-04-2011

JUMA, J.:

The background facts leading up to this appeal trace back to 5th January 2007 when the Kimara Primary Court appointed respondent Yahya Shomary to administer the estate of the late Daudi A. Kizanda in Probate Administration Cause No. 173 of 2006. The appellant was not satisfied. She filed an appeal to the District Court of Kinondoni at Kinondoni (Civil Appeal No. 13 of 2007). When her appeal came up for hearing on 12-03-2007 she sent one Joseph Kaswira with a purported Power of Attorney to represent her. Respondent's Advocate opposed this kind of representation, contending that Mr. Kaswira had no *locus standi*. The District Court adjourned the hearing to 19-03-2007 to allow the appellant to either appear in person or appear by a duly instructed Advocate. Armed with a Power of Attorney, Mr. Kaswira

once again appeared on 19-03-2007 to represent the appellant. Again, respondent's Advocate opposed this type of representation. The learned Advocate cited Order III Rule 2 of **Civil Procedure Code, Cap 33** and sections 41 (1) and 70 of the **Advocates Act** in his opposition to the representation by a holder of Power of Attorney. In its ruling dismissing the appeal, the District Court noted that by sending Mr. Kaswira despite the specific directions of the district court, was a manifestation of appellant losing further interest to prosecute her appeal before the district court. Later on 08-05-2007, appellant went back to the District Court this time to pray for re-admission of his appeal. Respondent once again raised a preliminary point of objection contending that the request for re-admission was time barred. Relying on Item No. 9 in the **Law of Limitation Act, 1971** the District Court noted that limitation period for re-admission of an appeal that was earlier dismissed for want of prosecution is thirty days. On 09-07-2007 the District Court (J. Mawalla-RM) ruled that the application for re-admission was filed outside the prescribed thirty days.

This is an appeal by Jamila Ally against the Ruling of the District Court of Kinondoni at Kinondoni (**I.J. Mawalla-RM**) dated 19-03-2007 which had dismissed appellant's appeal on the ground that she had lost interest to prosecute her appeal. The appellant is in addition aggrieved by the Ruling of the District Court dated 09-07-2007 which rejected her request to re-admit an appeal on the ground that it was time barred. It is against the two Rulings that this appeal has been preferred on the following three grounds:-

- 1) That the District Court erred in law and facts for dismissing the appeal for want of prosecution despite the presence of her attorney.
- 2) That the District Court erred in law and fact for applying Order III of the **Civil Procedure Code** and section 41-(1) and 70 of the **Advocates Act** to govern appeals originating from primary courts.
- 3) The District Court failed to perform its duties fairly by denying the appellant right to be represented.

When this appeal came up for hearing on 21 February 2011, Mr. Mkilya Daudi the learned counsel for the appellant submitted on why he thought the district court erred for dismissing the appeal despite the presence of her attorney why appellant could not appear before the district court. Mr. Mkilya Daudi submitted that because the appellant's daughter going by the name Mwanaidi was ill, the appellant appointed Mr. Joseph Kaswira Power of Attorney. The learned counsel contended that this power of attorney was earlier on 15 January 2007 registered in the Ministry of Land. Mr. Mkilya Daudi expressed his surprise why the district court failed to issue summon her to appear in person to argue her first appeal at the district court.

In his replying submission; Mr. Mbilinyi the learned counsel for the respondent, in effect supported the decision of the district court to dismiss appellant's appeal. According to Mr. Mbilinyi, there was nothing in the record of the district court to support the appellant's

claim that she could not attend because her daughter was ill. In the absence of such information, Mr. Joseph Kaswira had no right to appear on behalf of the appellant. Mr. Mbilinyi observed that at the district court, appellant had filed her appeal under a certificate of urgency implying that she wanted her appeal to be heard urgently.

Having perused the record of proceedings of the subordinate court and also after hearing the submissions made on behalf of both the appellant and respondent on the first and second grounds of appeal; two main questions stand out for my determination. First question is whether Joseph Kaswira had a lawful power of attorney entitling him to represent the appellant at the district court. The second is whether the **Civil Procedure Code** and the **Advocates Act** govern representation of parties appearing in the district court hearing appeals from primary courts. The two questions, and indeed the 1st and 2nd grounds of appeal are closely intertwined and I will for purposes of this appeal wrap up them together.

In my opinion, the law governing appearances in primary and in district courts when hearing appeals from primary courts is well settled. Mwalusanya J. (as he then was) restated the settled position of law in the case of **Julius Petro vs. Cosmas Raphael (1983) TLR 346** when he stated that section 33 of the **Magistrates' Courts Act, Cap 11** governs appearances on behalf of the parties at the primary courts and in district courts (when hearing Appeals)

only. Appearances on behalf of parties in the High Court have to be made either by the parties themselves or their advocates only and not by "agents". The **Civil Procedure Code, Cap 33** does not apply to the High Court when hearing appeals originating from Primary Courts. The **Civil Procedure Code, Cap 33** applies to the High Court, Resident Magistrates' Court and District Courts when these courts exercise their respective original civil jurisdiction. Cap 33 also applies when the High Court hears appeals originating from the District Court or Resident Magistrates' Court.

Records of the district court indicate that on 12 March 2007 Joseph Kaswira appeared before the district court under a purported power of attorney. The district court observed that Mr. Kaswira presented a copy of his power of attorney which did not indicate whether the appellant was sick or was unable to attend or whether she was outside the city of Dar es Salaam. The district court adjourned the hearing to 19th March 2007 after concluding that Mr. Kaswira lacked the locus standi to argue the appeal and directed the appellant to be notified. Come on 19th March 2007 Mr. Kaswira once again appeared under the same power of attorney.

It is clear from the record of proceedings of the district court that the learned appellate magistrate did not clearly indicate that representation in an appeal from primary court before him was exclusively governed by section 33 of the **Magistrates Courts Act, Cap. 11**. That is, although the law is settled that the **Civil Procedure**

Code does not apply to district courts when hearing appeals originating from primary courts, the appellate magistrate still had in mind the recognized agents of parties who are envisaged under Order III Rule 2 of the **Civil Procedure Code**. In his first of the two Rulings dated 19/03/2007 the appellate district magistrate based his decision on both the **Civil Procedure Code** and the **Magistrates Courts Act** to determine whether Joseph Kaswira could properly represent the appellant when he stated,

"My understanding representation on behalf of parties is not prohibited altogether, but permitted in certain circumstances only s. 33 of the MCA. Order 3 rule 2 of the Civil Procedure Code 1966 as amended, where a 'genuine' recognized agent represents a party in a suit. The question to ask is whether Joseph Kaswira is a genuine recognized agent...? According to my observation he is not. It is for these reasons his representation on behalf of the appellant was denied...."

Similarly on page 1 of his ruling dated 9th July 2007 the appellate magistrate stated,

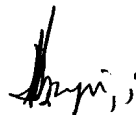
"In spite of that, when the matter came again for hearing on 19/3/2007 Mr. Kaswira had a courage to appear purporting once again to hold, the power of attorney for the applicant/appellant. Thereupon the Advocate for respondent prayed to the court to give ruling on the question of the status of Mr. Kaswira who persistently appear to represent the applicant/appellant before this court.

According to rule 2 of order III of the Civil Procedure Code 1966... and also s. 41-(1) and 70 of the Advocates Ordinance this court found that the continued action sending Mr. Kaswira to appear after being warned by this Court, the applicant/appellant

had lost an interest to prosecute this matter. And as such, the court granted the prayer of the respondent..." [3rd and 4th paragraphs]

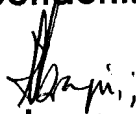
From the foregoing, it is evident and I hereby make a finding that the learned Resident Magistrate did not properly direct himself as to the **Magistrates Courts Act** which is the exclusive law governing appearance on behalf of parties in district courts on appeals from primary courts. Section 33 of the **Magistrates Courts Act** allows primary court magistrates or district court magistrates (hearing appeals from primary courts) to permit any relative or any member of the household of any party to any proceedings of a civil nature, upon the request of such party, to appear and act for that party.

Accordingly, and for reasons outlined, this appeal is allowed. The Ruling delivered by the subordinate court on 19th March 2007 and the one delivered on 9th July 2007 are both quashed and set aside. Appellant's appeal which had been dismissed by the subordinate court for want of prosecution is hereby restored. Each party shall bear its own costs.



**I.H. Juma,
JUDGE
12-04-2011**

Delivered in presence of: Jamilla Ally (Appellant) and Baltazar Mbilinyi (Advocate) for the Respondent.



**I.H. Juma
JUDGE
12-04-2011**