IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. CIVIL APPEAL NO. 28 OF 2019

(Appeal from the Judgment of the District Court of Nyamagana at Mwanza (Lema, RM Dated 23rd of April, 2019 in Civil Appeal No. 60 of 2018)

SOSPETER BWILIMA ..... APPELLANT

VERSUS

ERENO (STEPHEN J. NGAWA) ..... RESPONDENT

JUDGMENT

22nd April, & 23rd June, 2020

ISMAIL, J.

The Mwanza Urban Primary Court before which the respondent instituted his claim for refund of funds ordered the appellant to make good the sum of TZS. 7,500,000/- which the appellant allegedly owed the respondent. The sum was advanced to the appellant in two tranches on 30th June, 2009 and 2nd November, 2009. The trial court ordered that the said sum be fully paid to the respondent within three months from the date of the judgment. Aggrieved, he appealed to the District Court, but his

appeal hit a dead wood as the 1st appellate court upheld the decision of the trial court. Still discontented, he has taken his battle to this Court, seeking to assail the decision of the 1st appellate court. He has coined four grounds of appeal which are reproduced as hereunder:

1. *That the lower appellate court erred in law and fact for failure to appreciate the appellant's counsel's submissions that the trial court had erred in entertaining the case that was instituted by a person who had no locus standi as such the said judgment was a nullity.*
2. *That having concluded that it was wrong for both the donor and donee of the Power of Attorney to give evidence in court at the same time and if so done the evidence by a donor was not maintainable, the court erred in law in concluding that the respondent's evidence was valid.*
3. *That the lower appellate court erred in law and fact in concluding that the trial court properly incorporated the assessors' opinion in composing the judgment without care that the same were not recorded not even reflected in the proceedings.*

4. *That the lower court erred in law in confirming the trial court's judgment which in fact was based on documentary evidence Exhibits "A" and "B" that was tendered by an incompetent person and therefore improperly admitted.*

The facts which bred the instant appeal are quite straight forward. They roll back to 30th May, 2009, when the appellant allegedly called to ask for a short term loan of the sum of TZS. 5,000,000/- with a promise that the same would be refunded as soon as he would finish his business. This sum was paid through a bank transfer channeled from the respondent's bank account. On 2nd November, 2009, the appellant sought the respondent's accommodation. This time, the sum of TZS. 2,500,000/-, changed hands through the same channel. After this, the appellant became elusive, never to return the money and became incommunicado. After a protracted pursuit that bore no fruits, the respondent resorted to a court action. She enlisted the services of Stephen J. Ngawa to whom he donated powers through a special power of attorney. Proceedings were commenced in the Primary Court of Mwanza Urban, vide Civil Case No. 371 of 2018. The appellant's contention is that the sum which was credited into his account was meant to be delivered to his wife, PW3, who is the

respondent's daughter, and that this liability was imposed on her after his marriage with PW3 turned sour. At the end of the proceedings, the trial court was convinced that the appellant had reneged on his promise and, liable to make good the payment. He was ordered to pay the entirety of the sum due in three months. Aggrieved by the decision of the trial court, the appellant filed an appeal to the District Court of Nyamagana which found nothing faulty with the decision of the trial court. It dismissed the appeal and upheld the trial court's decision with costs. Undaunted, the appellant found his way to this Court through the instant appeal.

Hearing of the matter was conducted by way of written of submissions which were preferred by the parties' counsel, consistent with a schedule which was duly conformed to. Featuring for the appellant was Mr. James Njelwa, learned counsel, while the respondent enlisted the services of Mr. Mwita Emmanuel, learned advocate.

Throwing the first jab was Mr. Njelwa who chose to argue both of the first two grounds in a combined fashion. While the first ground questions the lower courts' wisdom to allow a person who did not have a *locus standi* to feature in the proceedings, the second punches holes on the lower courts' decision to hold that testimony by the donor and donee of the

power of attorney was valid. He held the view that the person who instituted the matter, being a stranger, had no *locus standi,* and it was wrong for the trial court to base its decision on the testimony of PW1 while the same was not valid. He was of the view that the first appellate court was wrong not to have held the judgment of the trial court a nullity. Making reference to pages 5 and 6 of the trial proceedings, Mr. Njelwa contended that, when PW1 testified on behalf of PW2, he acted as PW2's principal. It was wrong for the latter to appear in court while he had ceded powers of prosecution to PW1. He contended that by allowing both to testify, the trial court had indulged in a serious error which had the potential of nullifying the proceedings. On this he referred the Court to the decisions of ***Paaring A.A. Jaffer v. Abdallah Ahmed Jaffer & 2 Others*** [1996] TLR 110; and ***Naiman Moiro v. Nailejlet K. J. Zablon*** [1980] TLR 274. Mr. Njelwa wondered how the testimony which was adjudged invalid was considered as valid in arriving at the conclusion that the appellant was liable. To buttress his argument he cited the case of ***Kajubi v. Kayanja*** [1967] 1 EA 301.

With respect to ground three of the appeal, the learned counsel's contention is that the trial magistrate failed to properly incorporate the

assessors' opinions in the judgment that was pronounced to the parties. He argued that not even the trial court's proceedings suggest that such opinions were sought and recorded. To fortify his contention, Mr. Njelwa cited section 7 (1) of the Magistrates' Court's Act, Cap. 11 R.E. 2002 (now R.E. 2019), and Rule 3 (1) of the Magistrates' Court's (Primary Courts) (Judgment of the Court) Rules, 1987, GN. No. 2 of 1988. Terming the omission fatal, the learned counsel cited the decision in ***Abdallah Bazamiye and Others v. Republic*** [1990] TLR 42 in which it was held that omission to involve assessors in the trial is fatal, rendering the trail a nullity.

Submitting on ground four, the learned counsel decried the trial court's decision to base its finding on exhibits A and B which were tendered by an incompetent person. On this, the appellant was unhappy with the way testimony of PW1 and PW2 was treated by the trial court, knowing that PW1's involvement was only as an agent of PW2, meaning that PW1 was not competent to tender exhibits A and B. He holds the view that the same ought not to have been admitted in evidence and make a finding thereon. Mr. Njelwa concluded that since the trial court's decision was

founded on an illegal testimony tendered by an incompetent witness, the said judgment is irregular and liable to being quashed and set aside.

The respondent's reply was as vociferous as it was strenuous. Leaping to the defence of the lower courts decisions, Mr. Emmanuel submitted in respect of the first two grounds that, since Stephen J. Ngawa had a valid power of attorney, his representation was never challenged. He submitted that the claimant's decision to appoint him was on account of the respondent's ill health, and this is reflected at page 5 of the judgment of the 1st appellate court. The counsel further contended that she went to testify in court when she felt better. He argued that, noting the anomaly, the 1st appellate court did not consider the testimony, meaning that the same was technically expunged. Nevertheless, the counsel contended, the 1st appellate court was convinced that the remaining witnesses had made a case deserving to let the appellate court uphold the trial court's decision. Mr. Emmanuel urged the Court to apply the overriding objective to save the rest of the testimony adduced. He implored the Court to be inspired by the decision of the superior Court in ***Magoiga Gichere v. Peninah Yusuph***, CAT-Civil Appeal No. 55 of 2017 (Mwanza-unreported). Mr. Emmanuel contended that the decision in ***Kajubi v. Kayanja*** (supra) is

distinguishable since the issue in that case stemmed from the fact that the donee of the power of attorney instituted the case in his own name, while in the instant case the donee instituted the proceedings in the claimant's name. He urged the Court to disregard it.

Submitting on the third ground, the learned counsel held that it is trite law that a magistrate has to consult the assessors before a decision is reached. He contended that the law does not, however, require that their opinions be reflected in the judgment. On this, he cited GN. 2 of 1988 which imposes no condition that assessors' opinions be reflected in the judgment. He referred to the decision of ***Neli Manase Foya v. Damian Mlinga***, CAT-Civil Appeal No. 25 of 2002 (unreported) to fortify his contention. He urged the Court to dismiss this ground of appeal.

On ground four of the appeal, Mr. Emmanuel argued that exhibits A and B are deposit slips which were issued by Exim Bank and were tendered by the donee of the power of attorney to prove that the claimant parted with TZS. 7,500,000/- and that the same was deposited in the appellant's account. He further asserted that the said evidence was adduced by the donee of the power of attorney who was clothed with powers to tender the said documents. The learned counsel contended that this documentary

evidence was a complimentary testimony to the oral evidence which was adduced by PW1 and PW2. He held the view that the appellant's defence did not have any dislodging effect on the respondent's testimony. The respondent's counsel prayed that the appeal be dismissed with costs.

In rejoinder, the learned counsel for the appellant reiterated what he stated in his submission in chief. He maintained that the respondent's attorney had no locus standi and would not act as such where the claimant herself was present and appeared and testified. With respect to application of the overriding objective, Mr. Njelwa relied on the decision of ***Puma Energy Tanzania Limited v. Rubby Roadways Tanzania Limited***, CAT-Civil Appeal No. 3 of 2018 (DSM-unreported) in which it was held that overriding objective is not a panacea of all ills. He contended that circumstances of this case are such that the omission was fundamental and going to the roots of the matter. He maintained his rallying call that the Court should allow the appeal and set aside the trial court's decision.

I have dispassionately gone through the parties' splendid and contending submissions, the record of proceedings in the lower courts and legal position as it currently obtains. Two main issues are distilled. ***One*** is as to whether PW1 had a *locus standi* to institute the proceedings that

bred the instant appeal; and ***two***, whether opinion of the assessors were sought and incorporated in the impugned judgment and, if so, whether the trial magistrate was under obligation to record assessors opinions. I will tackle the appeal following the sequence in which the grounds were argued.

The gravamen of the appellant's complaint in grounds one and two is that PW1 did not have a *locus standi* to institute the proceedings on behalf of PW2, and that it was wrong for PW1 and PW2 to testify on the same set of facts.

It is trite law that a person who moves a court in respect of a matter has to demonstrate sufficient interest in the matter that he pursues through the court action. This is what is called *locus standi*, meaning a legal standing or interest in the subject matter. For a person to derive interest or to have a *locus standi* he must either be a victim or a legal representative of a victim. A fitting definition of this term was given in ***Lujuna Shubi Ballonzi Senior v. Registered Trustees of Chama Cha Mapinduzi*** [1996] TLR 203 (HC). It was held:

> *"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show*

that his right or interest has been breached or interfered with."

In this case, PW2's interests were championed by PW1 in whose favour PW2's powers were donated for purposes of instituting the matter. This is the donation that is contested by the appellant, contending that such donation infracted the principle as restated in ***Parin Jaffer*** (supra) and ***Naiman Moiro*** (supra). The reason given by the respondent is that she donated such powers when she was ailing. She subsequently got better and came to testify when the matter had been instituted. As I fully subscribe to the reasoning advanced by the counsel for the appellant, that where the power of attorney is donated the donor ceases to have residual powers to subsequently appear in court, I hasten to state that the position in the cited decisions was predicated on the provisions of Order 3 Rule 2 (a) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019) (CPC). What needs to be understood is that the CPC is a statute which is not applicable in primary courts where disposal of matters emphasize the need for upholding orality, simplicity and informality, taking into consideration the fact that this is a court for the lay people. It is in that spirit that the provisions of section 33 (2) of the Magistrates' Courts Act, Cap. 11 R.E.

2002 (MCA), read together with Rule 21 of the Magistrates' Courts (Civil Procedure in Primary Courts Rules Part II Civil Proceedings, allow representation. Section 33 stated as hereunder:

> *"(1) N/A*
>
> *(2) Subject to the provisions of subsection (1) and (3) of this section and to any rules of the court relating to representation of parties, a primary court may 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."* [Emphasis supplied].

Rule 21 specifically states that the court may, in a fitting circumstance, adjourn the matter and require personal attendance of the claimant. While the record is silent on whether PW2's presence was requested, what is clear is that her appearance has been explained and her role was specifically limited to testifying on what she knew about the case. From the foregoing, the clear message is that representation in the primary court is not only permissible but it is a lot more simplified, requiring no elitist procedure as that which is enshrined in Order 3 Rule 2 of the CPC. I would hold, as I hereby do, that PW1's appointment by PW2 was, for all intents and purposes, an appointment for representation consistent with

the requirements under section 33 of the MCA. I find nothing offensive and that its compliance with the law should not be pegged to the two decisions of this Court cited above.

With respect to tendering of testimony by both PW1 and PW2, it is my humble conviction that this was an anomalous conduct presided over by the trial court. Once PW2 settled for PW1 as her proxy then the choice was to let him testify without calling upon PW2 to also testify, or let PW2 testify without letting PW1 testify. By allowing both to testify or at least PW1, then such testimony was irregularly recorded and it shouldn't have counted. In this case testimony of PW1, the claimant, which appears at page 5 of the trial court's proceedings should have been left to stand at the expense of the testimony of PW1 which was, in all respects, hearsay. A glance at page 4 of the 1st appellate court's judgment reveals that the learned magistrate spotted this anomaly and chose to choke off the testimony of PW1 and, having done so, the anomaly caused was sufficiently addressed and I am not convinced that this is the only testimony on which the trial court's verdict was founded. Consequently, I find nothing blemished in this respect and I am content that testimony of PW2 had what it takes to prove claims against the appellant, and I don't

see how the appellant would be prejudiced when the 1st appellate court saw that the anomaly and rectified it. I dismiss these grounds of appeal.

The counsel for the appellant has come up with an issue relating to the names of respondent *i.e.* Erone Shija and Stephen J. Ngawa the latter of which appears in brackets. The contention by the counsel is that from the look of it these are one and same person, while the trial court's judgment brings an impression that the two are different persons. He links this to what appears at pages 4 and 5 of the proceedings in which Stephen J. Ngawa testified as PW1 while Ereno Shija, the donor of the power of attorney testified as PW2. It is common ground that an appeal is against what the lower court decided and not on something new which was not decided in the trial or 1st appellate court. The only exception to this is where the point raised is one of law and not of fact. This position was accentuated in ***Elisa Mosses Msaki v. Yesaya Ngateu Matee*** [1990] TLR 90 (CA) wherein it was held:

> *"This Court will only look into matters which came up in the lower court and decided; not on which were not raised nor decided by neither the trial court nor the High Court on appeal."*

This position was emphasized in ***George Mwanyingili v. Republic***, Criminal Appeal No. 335 of 2016 (unreported) which was recited in ***Dickson Anyosisye v. Republic***, CAT-Criminal Appeal No. 155 of 2017 (Mbeya-unreported). It was held:

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

Since the issue of names did not feature in the lower Court, the same cannot be a subject of discussion at this stage. I choose to give this contention a wide berth.

The appellant's third ground of appeal attacks what he contends to be the trial court's failure to properly incorporate opinions of the assessors in the composition of the judgment. This is a view that is hotly contested by the counsel for the respondent. The latter's view is that the law does

not require that a trial magistrate should go to all that length. On this, the respondent's counsel is spot on. Involvement of assessors in the decisions borne out of the primary court proceedings is, as correctly contended by the counsel for respondent, governed by the provisions of the Magistrates Court's (Primary Courts) (Judgment of Court) Rules, GN. 2 of 1988. These Rules (Rule 3) are to the effect that opinions of the assessors are reflected in the signatures that they append on the decisions and not otherwise. This position has been underscored in several decisions. In ***Neii Manase Foya v. Damian Mlinga,*** CAT-Civil Appeal No. 25 of 2002 (unreported), it was held thus:

> *"With due respect to learned High Court judge, this is not what Rule 3 (2) provides. The assessors are members of the court and sign the judgment as such, and not for the purpose of authenticating it or confirming it. In answer to the second point of law, assessors are neither required to give their opinions, nor to have their opinions recorded by the magistrate."*

The strength of appellant's contention is further dampened by what is gathered from page 4 of the judgment of the trial court in which the trial magistrate is quoted as saying as follows:

> ***"Washauri kwa pamoja waliosikiliza shauri pamoja na mimi, baada ya kuutafakari ushahidi wa wadaawa wananiambia kuwa,*** *haibishaniwi kwamba mdai ilimwingizia mdaiwa mwenyewe anakubali ila anadai mke wake SM 3 ndiye aliyeziomba kwa mdai amsaidie zikapitia kwenye akaunti yake kwa sababu SM 3 hakua na akaunti naye mdaiwa alizitoa zote akampa SM 3 ...."* [Emphasis is mine].

From the foregoing, it is clear that involvement of the assessors in giving opinion and concurrence with the trial magistrate was manifested not only on the signatures they appended, but also through the counsel they gave to the trial magistrate as acknowledged in the quoted passage. It is my considered view that the appellant's contention on this ground of appeal is nothing short of a misconception and dismiss it.

The next battleground in this appeal relates to the appellant's contention that it was an error on the part of the 1st appellate court to confirm a judgment which was based on exhibits which were adduced by an incompetent witness. It is true, in my considered view, that the irregularity which marred the testimony of PW1 had a bearing on exhibits A and B, thereby rendering their admissibility irregular. Expunging of the testimony of PW1 would not leave exhibits A and B unscathed. They died

with the death of the testimony of PW1. But the question is whether, in the absence of this testimony, the respondent failed to prove his case at the required standard. My unflustered answer to this question is NO! Through the residual testimony of PW2 and PW3, the respondent was able to prove that money changed hands from PW2 to the appellant and that the same is still due and unsatisfied. This is a fact that is acknowledged by the appellant though his contention is that the same was meant to be paid to PW3. This casual contention has been refuted by the PW2 and PW3 both of whom were consistent and eloquent on how the appellant planned to borrow money to inject life to his fledging business, and the promises he made to repay it. No evidence was adduced to prove that after the said sum had been credited into the appellant's account the same was handed to PW3 or that the latter was informed that the said transaction had been effected to the appellant's account. I join hands with the 1st appellate court and hold that the trial court was right in concluding that a case had been made out to warrant a decision in the respondent's favour. This is consistent with the canon of justice underscored in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 to the effect that ***"the person whose***

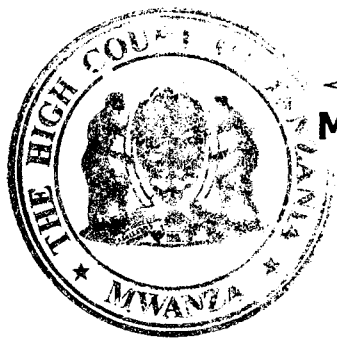
evidence is heavier than that of the other is the one who must win."

Overall, I am convinced that the appellant has not presented a case that can be said to be cogent enough to persuade me that the lower courts strayed into any errors which would result in the annulment of the decision that held the appellant responsible for the sum due to the claimant.

Consequently, I dismiss the appeal and uphold the trial and 1st appellate courts' decisions. The respondent is to have the costs of this appeal.

It is ordered accordingly.

DATED at **MWANZA** this 23rd day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 23/06/2020

Coram: Hon. M. K., Ismail, J

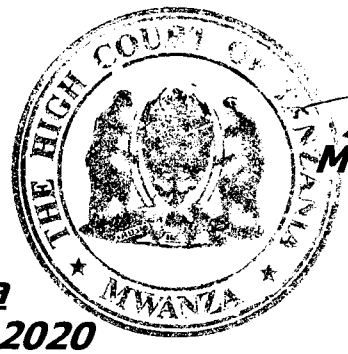
Appellant: Mr. Njelwa, Advocate for

Respondent: Mr. Mwita Emmanuel, Advocate for

B/C: B. France

Court:

Ruling delivered in chambers, in the presence of Mr. Njelwa, Advocate for the Appellant and Mr. Mwita Emmanuel, Advocate for the respondent, and Ms. Beatrice B/C this 23rd day of June, 2020.



M. K. Ismail
JUDGE

At Mwanza
23rd June, 2020