

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 21 OF 2019

(Originating from Misc. Civil Application No. 07 of 2018)

ALLY IDDY HAPI.....APPELLANT

VERSUS

KILONZO GODFREY KALAGE.....RESPONDENT

JUDGMENT

04/02/2020 & 23/03/2020

GWAE J,

The appellant herein above being dissatisfied by the decision of the of the District Court of Simanjiro in Misc. Civil application No. 07 of 2018 has appealed to this court with the following grounds of appeal;

- i. That the Hon. Magistrate manifestly erred in law and fact for not considering the fact that the respondent on his oral testimony while under oaths consented to the said application for the transfer of the said case;
- ii. That the Hon. Magistrate erred in law and fact by rejecting the application on the ground of pecuniary jurisdiction while it is openly clear that the transfer of case from Primary Court to District court can't be offended by the pecuniary jurisdiction factor;

- iii. That the Hon. Magistrate erred in law and fact by rejecting the applicant/appellant herein with the Constitutional right of Legal Representation;
- iv. That the Hon. Magistrate erred in law and fact by rejecting the applicant's application and on its contrary appointing the primary court Magistrate namely Hon. Lucia E. Mushi of Engasmet Primary Court which is different court from where the case was filled, to hear and determine the case basing on unreasonable grounds;
- v. That the Hon. Magistrate erred in law and fact by misdirecting herself into the issue of consolidating two cases in different courts basing on the grounds that the two courts are situated in a nearby neighborhood and the parties have a criminal case in a district court (which is not true) without considering the fact that the said two courts use different diaries to schedule their cases of which no relief is gained to the parties.

A brief background of the matter is hereby reproduced;

Before the Primary Court of Shambarai in Shauri la Madai Namba 37 ya 2018 the appellant herein above was the defendant and the respondent KILONZO GODSON KALAGE was the plaintiff. The plaintiff was seeking an order of the court to allow him to sell the defendant's properties namely a house situated at "mtaa wa sekondari" and a car "Corolla T 195 CLC" following the failure by the defendant to pay his debt to the plaintiff which is to the tune of Tshs. 17, 274,569/=.

Before hearing of the matter commenced, the appellant through his advocate **Mr. Hassan Ally Kigulugulu** made an application for transfer of case from Shambarai Primary Court to the District Court of Simanjiro at Orkesumet. The matter was heard and consequently a ruling was delivered to the effect that the application was not granted for the following reasons; that the subject matter of the claim falls within the pecuniary jurisdiction of the Shambarai Primary court and not the District Court, secondly, avoidance of unnecessary costs and lastly both parties to defend themselves as the court works justly. Together with the reasons mentioned the appellate Magistrate also ordered the case to be transferred to another Primary Court namely Engasmet Primary Court to be heard by another Magistrate Hon. Lucia E. Mushi. The reason for this order is that the parties have another case (Criminal Case) at the District Court which is near to Engasmet Primary Court.

On hearing of this matter before this court the applicant is still represented by the learned advocate **Mr. Hasssan Ally Kigulugulu** who also represented him in the District Court whereas the respondent was unrepresented. Mr. Kigulugulu urged this court to adopt his grounds of appeal as contained his memorandum of appeal. On the other hand the respondent stated that he does not object representation of the appellant and that what he actual needs is the matter to be heard on merit.

Answering the **first ground** of appeal, the appellant contended that the District Court Magistrate did not consider the fact that the respondent on his oral testimony while under oath consented to the said application for the transfer of the said case.

From the records of the court dated on 25/03/2019 when the matter was called for hearing the respondent submitted that;

“Your Honor what I’m saying is that, I don’t object their prayer to transfer the cases, (sic) this court can grant their prayer. I believe all the courts do work in justice basis”

From the quotation above of the wordings of the respondent himself it is evident that the respondent did not object the appellant’s prayer of the sought transfer of the case from the Shambarai Primary Court to the District Court of Simanjoro and that it is his belief that all courts work justly.

However I think it is worth to note that despite the fact that a party to a suit has consented to a prayer advanced by another party that itself does not in law oblige the court to grant such a prayer unless the court is satisfied that there is a valid reason of doing so. The court must look for other factors surrounding the circumstances of the case in arriving at its decision or judgment. The same applies to the case at hand, the fact that the respondent did not object on the transfer of the case by the sought applicant, that itself did not suffice a grant of the prayer, other factors also ought to be put into consideration in arriving to the decision.

On the **second ground** of appeal the appellant stated that the Resident Magistrate stationed at District Court rejected the appellant’s application on the ground of pecuniary jurisdiction while it is openly clear that the transfer of case from Primary court to district court can’t be offended by the pecuniary jurisdiction.

I think I should start by addressing the issue of jurisdiction of both Primary Courts and District Courts in matters of civil nature in relation to transfer of cases from Primary Courts to District Courts.

Generally Primary Courts, District Courts or Court of the Resident Magistrates or land tribunals when determining matters of civil nature are limited to Pecuniary and Territorial Jurisdiction. The Pecuniary Jurisdiction of the District Courts or Resident Magistrate's Courts in Civil matters is provided under Section 40 (2) (a) &(b) of the Magistrates' Courts Act Cap 11 as amended by Section 22 of the Written Laws Miscellaneous Amendment Act No. 3 of 2016 where the jurisdiction for Immovable properties is Tshs. 300,000,000/= and Tshs. 200,000,000/= for movable properties.

Pecuniary Jurisdiction of the Primary Courts on the other hand is provided under section 18 (1) of the Magistrates' Courts Act Cap 11 as amended by Section 20 of the Written Laws Miscellaneous Amendment Act No. 3 of 2016 where the jurisdiction for Immovable properties is Tshs. 50,000,000/= and Tshs. 30,000,000/= for movable properties.

It is elementary principle of the law that parties cannot by consent give a court jurisdiction which it does not possess. See: **Shyan Thanki and others v. Palace Hotel** (1971) EA at 202. From the records of the courts below, it is evident that the present matter originates from a claim of Tshs. 17,274,569/= by the respondent, and from the wording of the statute provided above the competent court to try this matter is the Shambarai Primary Court as the nature of the claim falls within its

Pecuniary Jurisdiction but in the present case there is an issue of legal representation pertaining to a right to be heard.

That being said let me turn to the issue of Legal Representation which forms the basis of this appeal in relation to the Jurisdiction of the Court. The applicant herein above is seeking the transfer of his case from Shambarai Primary Court to Simanjiro District Court for him to enjoy the legal Representation from Mr. Hassan Kigulugulu advocate an application which he was denied by the District Court.

This issue has been dealt with in a number of cases by my learned brothers where by generally it is said that legal representation does not confer jurisdiction of a court, before the court transfers the case it must satisfy itself that it has jurisdiction to entertain the matter.

In the case of **Ashura M. Masoud v. Salma Ahmad**, PC. Civil Appeal No.213 of 2004 **Mlay J**, (as he then was), gave a very good elaboration on this issue which I wish to quote;

“The District Court does not acquire jurisdiction in probate and administration matters by reason that a party wishes to be represented by an advocate. Jurisdiction is conferred by the law and not by the wishes of a party.....The powers to transfer of cases under Section 47 (1) of the Magistrates’ Courts act Cap 11 can only be used to transfer a case from Primary court to district Court or a Court of the Resident Magistrate having Jurisdiction. The reason that the applicant wishes to engage an advocate, as I have stated, does not in itself confer jurisdiction upon the court.”

Another holding from my brother **Mugeta J**, in the case of **Denja John Botto & 2 others vs. Umoja wa Wafanyabiashara Ndogo ndogo Mailimoja**, Civil Appeal No. 157 of 2018 H. C DSM (**Unreported**)

is to the effect that Jurisdiction of courts is conferred by statutes, therefore engagement of an advocate on itself cannot confer jurisdiction to a District Court or a court of the Resident Magistrate jurisdiction which it does not have.

While I am alive of the above enunciated principles, I think the principles above are distinguishable to this case in the sense that in the former cases the trials of the same had commenced unlike in our present case where the trial had not commenced till on 3/12/2018 when the appellant presented a letter to the primary court requesting a transfer of the case so that he could be represented. More so the right to representation is a constitutional right and above fair hearing goes together with a right to representation.

I am also aware of the decision of the Court of Appeal in the case of **Agness Simbambili Gabba vs. David Samson Gabba**, Civil Appeal No. 26 of 2008 CAT at DSM, **Kileo J.A.** stated the following;

“It was highly irregular for her to order a return of the probate matter to the primary court for it to proceed with the appointment of an administrator while knowing that the applicant had engaged the services of an advocate who was barred from appearing in the primary court. In effect she denied the appellant her right to Legal Representation”.

Since the Court of Appeal is the Superior Court and its decision is binding to all lower courts, I am also obliged by the decision of the Court of Appeal stated above and therefore hold that it was improper for the District Magistrate to deny the appellant his constitutional right to a legal

Representation taking into account that advocates are strictly barred from entering their appearance in Primary Court by virtue of Section 33 (1) of the Magistrates Act, Cap 11 Revised Edition, 2002.

That being said I shall not deal with ground No. 3 as it has already been discussed above together with ground number 2 and therefore I will proceed to deal with ground number 4 and 5 all together.

In ground No. 4 and 5 of the appeal the appellant argued that the Appellate Magistrate erred in law and fact by appointing another Primary Court Magistrate namely; Lucia E. Mushi of Engasmet Primary Court which is a different court from where the case was filled. The appellant also is of the view that the District Court Magistrate misdirected herself by consolidating the two cases in different courts basing on the grounds that the two courts are situated in a nearby neighborhood and that the parties have a criminal case in a district court without considering the fact that the said two courts use different diaries to schedule their case of which no relief is gained to the parties.

From the records of the court particularly the Ruling delivered by the District Court Magistrate, the learned Magistrate rejected the application and ordered the transfer of a case to another Primary Court to be tried with a different Magistrate and I wish to quote part of the ruling herein under;

“Though the case will not be transferred to District Court but will be heard at Engasmet Primary Court by Hon. Lucia E. Mushi of Engasmet Primary Court, will be heard here because parties have another case (Criminal Case) at District Court which is near to Engasmet Primary

Court. Not only the above but also the Respondent in his submission when discussing the P.O said is known to Hon. Haule the trial Magistrate from Shambarai Primary Court so to overcome the problem of justice seen not to have been done, that's why will be presided by another Magistrate here at Engasmet Primary Court."

I find this part of the decision unfounded, I am of the considered view that the District Court Magistrate has not given satisfactorily reasons as to why the said case should be transferred to another Primary Court to be tried by another Magistrate taking into account that the parties have not prayed for such order and also the respondent consented to such transfer with a belief that all courts work justly. The fact that the parties have another case in the District Court does not justify the transfer of the case to a nearby court as these are two different courts with two different schedules and I have further observed that, the parties have not complained of the inconveniences or undesirable situation caused by the presence of such cases in the primary court of Shambarai and district court, if at all there is any. I would further make a reference to a book "**A Quick Reference for Magistrates in the District Courts and Courts of Resident Magistrates in Tanzania**" Published by **The Judiciary of Tanzania (2019)** where at Page 18-19 of the said book it has provided circumstances where powers to transfer cases will be exercised as follows;

- a) where it appears that the circumstances or gravity of the proceedings make it desirable that the proceeding should be transferred; or
- b) where there is reasonable cause to believe that there would be failure of justice were the proceedings to be heard in the primary court; or

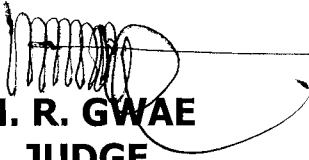
- c) where the subject matter of the proceedings arose outside the local limits of the primary court's jurisdiction or is not within its jurisdiction, or in any case in which the law applicable is a Customary law which is not a Customary law prevailing within such primary court; or
- d) where the proceedings seek to establish or enforce a right or remedy under Customary law or Islamic law, or are an application for the appointment of an administrator of the estate of the deceased person, and the court is satisfied that the law applicable is neither Customary law nor Islamic law, or that the question whether or not Customary law or Islamic law is applicable cannot be determined without hearing or determining the proceedings.

In our instant matter, the parties did not complaint that the matter was filed outside their local limits nor did the parties question impartiality of the trial magistrate.

That being said this appeal is allowed, the order by the District Court Magistrate to transfer the case to Engasmet Primary Court to be determined by Hon. Lucia E. Mushi of Engasmet Primary Court is hereby quashed and set aside. It is now ordered that this matter be transferred to the District Court to be expeditiously heard on merit.

It is so ordered.




M. R. GWAE
JUDGE
23/03/2020