

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MBEYA)**  
**AT MBEYA**  
**CIVIL APPEAL NO. 25 OF 2019**

*(From the District Court of Kyela at Kyela in Civil Appeal No. 08 of 2019.  
Originating from Kyela Urban Primary Court in Civil Case No. 19 of 2019.)*

**KYELA POLYTECHNIC COLLEGE.....APPELLANT**  
**VERSUS**  
**KYELA FM RADIO.....RESPONDENT**

**JUDGEMENT**

Date of Last Order : 28/08/2020  
Date of Judgement: 06/11/2020

**MONGELLA, J.**

This matter emanates from Kyela Urban primary court whereby the respondent sued the appellant for breach of contract. It was alleged that the parties entered into a contract for airing the appellant's commercials for consideration of T.shs. 900,000/-. The respondent claimed that the appellant breached the contract for non-payment of the agreed price. The trial primary court dismissed the suit on ground that the respondent failed to prove his claim on balance of probabilities. Aggrieved by that decision, the respondent appealed to the District court of Kyela where he obtained the judgment in his favour.



The decision disgruntled the appellant herein hence this appeal which was argued by written submissions. The appellant's petition of appeal contained five grounds, but for reasons to be soon unfolded I shall deal with only one ground. This is ground three under which the appellant claims that the appellate district court misdirected itself in law and fact when it failed to realize that the parties who litigated at the primary court were distinct from those that appeared on the district court record.

Arguing on this ground, Ms. Martha Gwalema, learned advocate who represented the appellant, submitted that the law requires proper parties to be named in a suit. She argued that the naming of parties in their proper names goes to the centre of the matter. Referring to the case record, she contended that in the trial primary court the parties were "*Kyela FM Radio (Abas A. Mwakalinga) v. Mkuu wa Chuo cha Biashara KPC (Salatiel Moyo Mwakyambiki)*." However, surprisingly, when the respondent instituted the appeal in the District court the parties were "*Kyela FM Radio v. Kyela Polytechnic College*." Given this change of names of the parties, she was of the position that non-existent parties were involved in the appeal in the District court. She argued so saying that the parties in the appeal in the District court never litigated in the primary court. She was of the stance that this is a fatal irregularity going to the root of the matter and cannot even be saved by the oxygen principle.

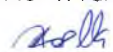
On his part, Mr. Ezekiel Mwampaka, learned advocate who represented the respondent, vehemently opposed this ground and the arguments advanced by Ms. Gwalema. He contended that if one looks at the names in the two lower courts as cited also by Ms. Gwalema, he will note



that the names are still useful up to this Court (sic). He argued that Kyela Polytechnic College is a registered company managed and controlled by an individual director. He argued that by suing the director in the primary court, it did not mean that the respondent sued the said director under his capacity as "*Salatiel Moyo Mwakyambiki*" but a director of KPC which is an abbreviation of Kyela Polytechnic College.

He further contended that his line of argument is even evidenced in the evidence adduced in the trial court whereby the said evidence directly pointed to Kyela Polytechnic College (KPC). He said that *Salatiel Moyo Mwakyambiki* was brought there as the director of KPC. He added that considering the evidence at the trial court, the appellant was not materially prejudiced by being sued in the name of its director. He invited the court to be guided by the principle settled in the case of ***Mwaitenda Ahobokile Michael v. Interchick Company Ltd.***, Civil Application No. 218 of 2016 (CAT at DSM, unreported) to the effect that the courts should not be obsessed with strict compliance with procedural rules than the merits of the dispute before them.

I have considered the arguments of both counsels on this ground of appeal. First of all I do not subscribe to Mr. Mwampaka's argument that the proper naming of parties to the suit is a mere procedural requirement having no effect to the rights of the parties. In my settled view, the same is very important as it has an impact on the liability of the party to the suit in honouring the decree of the court issued in the particular case. Suing the company in its name has different consequences than suing the directors of the company. When the company is sued in its name it means that



when held liable, its assets can be used to satisfy the decree of the court. However, when the directors are sued in their own capacity, it may connote that the cause of action is attributed to the acts of the directors having no connection to the liability of the company. When held liable the directors may become responsible in satisfying the decree. In the matter at hand the respondent in the primary court specifically sued the "Mkuu wa Chuo cha Biashara KPC (Salatiel Moyo Mwakyambiki). By going further to mention his names means that he sued him in his personal capacity.

It is a settled legal principle that parties who litigated at the trial court cannot change on appeal. See: **Christian Mrimi v. Coco Cola Kwanza Bottlers Limited**, Civil Application No. 113 of 2011 (unreported); **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Fatna Mohamed**, Civil Revision No. 6 of 2017 (CAT, unreported) and **Christina John Mwita v. Paschal Maganga**, Misc. Land Appeal No. 28 of 2019 (HC at Musoma, unreported). What I discern from Mr. Mwampaka's argument is that the court is supposed to presume that the parties that changed on appeal are the same as those appearing in the trial court record and by looking at the evidence adduced in the trial court. With all due respect, I find this argument erroneous. The principal of the college and the college itself are two distinct persons in law thus cannot be used interchangeably. If at all, as argued by Mr. Mwampaka, that the evidence led in the trial court established the liability of the company, that is, Kyela Polytechnic College and not of the Principal of the College, one Salatiel Moyo Mwakyambiki, then the trial court was right in finding that the case was not proved on balance of probability against him. However, the error could not be cured



by changing the parties on appeal. The appellate District court ought to have taken this fact into consideration and determine the competence of the appeal before it.

Under the circumstances as observed above, I agree with the appellant that the appeal was incompetent before the District court for change of parties to the suit. Consequently, the judgment and proceedings of the District appellate court are hereby quashed. To this point I find no relevance in proceeding with the rest of the grounds of appeal. Costs awarded to the appellant.

Appeal allowed.

Dated at Mbeya on this 06<sup>th</sup> day of November 2020.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered in Mbeya in Chambers on this 06<sup>th</sup> day of November 2020 in the presence of both parties' counsels.



  
**L. M. MONGELLA**

**JUDGE**