

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL No. 26 OF 2020

CHARLES LUFURANO DOMICIAN.....APPELLANT

VERSUS

RANDA HOLDINGS LIMITEDRESPONDENT

(Appeal from the decision of the Court of Resident Magistrates Court of Dar-Es salaam
at Kinondoni)

(Lyimo- Esq, RM.)

dated 13th January, 2020

in

Civil Application No. 217 of 2019

JUDGEMENT

30th September & 17th December 2020

AK. Rwizile, J

Before the Court of Resident Magistrates' of Kinondoni, the respondent filed an application for transfer of Civil case No. 13 of 2018. It was from Magomeni Primary where parties had litigated before on the claim of 10,250,000/= . Before the same was heard to its finality, the respondent filed an application.

It was for transfer from the Primary Court to the District Court under section 47(1)(b) of the Magistrates Court Act, [Cap. 11 R.E 2019]. After a full hearing, the application was

granted, and so transfer order made. The appellant was not happy with the decision of the court and hence this appeal. Before this court three grounds of appeal were preferred; **One**, That the court erred in law and fact by allowing transfer of Civil case No. 13 of 2018 from Magomeni Primary Court to Kinondoni District Court while it had no pecuniary Jurisdiction to determine the matter with a claim of 10,250,000/=. **Second**, that the court erred in law and fact by allowing transfer of Civil Case No. 13 of 2018 from Magomeni Primary Court to Kinondoni District Court in absence of any justifiable reasons for doing so. **Third**, that the court erred in law and fact by basing its finding on two decisions of **Agness Simbambili vs David Samson Gabba**, Civil Appeal No. 26 of 2008 (CAT) and **Dorcas Luzuga vs Omary Ramadhan**, Matrimonial Appeal No. 6 of 2008 (HC) without taking into account that the two cases evolved around matrimonial matters and probate which can be dealt with by District Court or Court of Resident Magistrates or High Court concurrently. The appeal was heard by way of written submissions.

The appellant though not represented by Mr. Ditrick Mwesigwa learned advocate, he at least had service of the same only on drafting these submissions. The appellant preferred this appeal because transfer of the case from the Primary Court was done because of the respondent's aim of engaging an advocate.

His submission therefore was clear that at the primary court, parties are allowed to enter appearance by relatives. The appellant said, he has been appearing by his wife before the same court, when he was abroad for further studies. According to his submission, his accounts are attached and it is difficult for him to engage a lawyer. He submitted that in accordance to section 33(2) and (3) of the Magistrates court Act, even corporation are allowed representation by its employees before the primary court. The appellant opined that engaging an advocate alone cannot be taken as sufficient reason for transfer of the cases to a higher court. He relied in the case of **Abubakhari Mohamed Mlenda vs Juma Mfaume** [1989] TLR 147.

On whether or not the District Court has pecuniary jurisdiction to hear the case, this court was referred to the case of **Denja John Botto and 2 others v Umoja wa**

Wanyabiashara Ndogondogo Mailimoja, Civil Appeal No. 157 of 1018, where this court (Mugeta, J) held that jurisdiction of the court cannot be vested by transfer, but by specific wording of the statute. This position was also followed by the same court (Kulita J) in **Lulu Richard Msofe vs John Christopher** Mnzava, PC Civil Appeal, 11 of 2019. He went on submitting that because the amount involved is below jurisdiction of the District Court, the court was therefore not vested with jurisdiction to entertain the same even by way of transfer. It was the appellant's view that the court had no reason even to invoke its inherent powers under section 95 of CPC because that had to apply in consideration of the dictates of section 47(1) (c) (i-iii) and (iv) of the Magistrates Court Act.

The appellant who abandoned the first ground appeal, argued the 3rd ground of appeal that the case of **Agness Simbambili vs David Samson Gabba**, Civil Appeal No. 26 of 2008 (CAT) was misapplied because it was a probate matter where other courts have concurrent jurisdiction with the Primary Court. However, in the case of **Dorcas Luzuga vs Omary Ramadhan**, Matrimonial Appeal No. 6 of 2008 (HC), he submitted, was a matter from the matrimonial proceeding where section 76 of Law of Marriage Act, provides for shared jurisdiction among courts subordinate to this court and the Primary Court. The learned counsel asked this court to allow this appeal and quash the proceedings of the District court.

MS Alice Frank Kilawe learned counsel appeared for the respondent. she was of the submission that this appeal is baseless and should be dismissed for the follow grounds; the court had justifiable reasons to allow transfer of Civil case No. 13 of 2018. She submitted, that engaging a lawyer is a justifiable reason since right to representation is constitutional, guaranteed under article 13(6)(a) of the Constitution of the United Republic of Tanzania. The learned counsel went on submitting that the representation of the company cannot be compelled by forcing the company to employ advocates. As to individuals, it was her view that representation in court is done by persons with powers of attorney. She said, it was not therefore true that the appellant's wife represented him

in court. It was clear, from her submission that section 33 of MCA is a clear guidance to that effect.

She attacked the appellant's counsel that representing him in court at the minimum payment is against the law.

She cited rule 72(1) (a) of The Advocates (Professional conduct and Etiquette) Regulations 2018. The learned counsel was categorical that the case of **Denja John Botto** (supra) held that jurisdiction of the court is vested by the statute. She said that section 40(3)(b) of the MCA vests such jurisdiction to the court to hear a case of commercial nature where the amount does not exceed 30,000,000/=. It was her opinion that the amount involved here is below 30,000,000/=: because the law states the maximum amount therefore the court has jurisdiction. According to the learned advocate, the case of **Agness Simbambil Gabba** (supra) was decided by the Court Appeal and therefore it cannot be overruled by the cases decided by this court.

According to her, powers of transfer are vested in the court under section 47 of the MCA. She went on submitting that under section 6 of Probate and Administration of Estates Act, the District Court has powers on administration of small estates defined under section 2 of the Act to include the amount of 10,000,000/= as held in the case of **Ashura Masoud vs Salma Ahmed**, Civil Appeal No. 213 of 2004. By this point, the respondent was responding to the clear fact that transfer powers of the District Court are not limited by jurisdiction of the court. From her finding, she asked this court to dismiss this appeal with costs.

Before I ventured into the merits of the appeal, I had to first deal with the question whether or not this appeal is properly before this court. This point was neither addressed by the appellant nor respondent and it is not covered in the grounds of appeal.

On the day assigned for judgement, I prompted MS Kilawe for the respondent on whether transfer order made under section 47 of MCA is appealable. The learned advocate was of the firm answer that it is appeal. Not until prompted to go through the provisions of section 49 (4) of the same Act, when she was of the view that indeed this appeal was not a proper cause of action to be taken by the appellant. Since the applicant was absent

and his advocate Ditrick Mwesigwa, who have consistently been absent for the judgement in two occasions, I decided to fix this case for the judgement.

As I said, the question before me for determination is whether the decision of the District Court made under section 47 is appealable. I have to note here that the District Court made its order of transfer under section 47(1) (b) because the application to it so applied, which states as follows;

47.-(1) Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for-

(a) the primary court, with the consent of the district court or a court of a resident magistrate having jurisdiction, to transfer the proceeding to such district court or court of a resident magistrate or to some other primary court;

(b) the district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court.

It is from the law that transfer of cases is governed by part v of the MCA. This deals with provisions of section 47 to 50.

Therefore, courts have, before granting or refusing transfer of cases to have in mind, that these powers discretionary but guided by the law. Powers to transfer cases are therefore under section 47 and 48. Whenever that is done, it is important to note that the court so making that decision has absolute powers in my view to agree or disagree with transfer. Having made such an order, then, the aggrieved party has no right of appeal. This is clearly stated under section 49(3). Which states as follows;

(3) No appeal shall lie against the making of, or any refusal to make, an order under the provisions of section 47 or 48.

The law is clear and does not need interpretation. Whenever the decision is made, whether granting or refusing to grant an order for transfer of the case under section 47 or 48, then an aggrieved party has no right of appeal. Since this appeal emanates from the decision granting transfer under section 47, therefore this appeal was not a proper

forum to challenge it. Having said so, I have to hold with certainty that this appeal is misplaced. It is therefore to be dismissed as I hereby do. The appellant has to pay costs of this appeal.

AK Rwizile
JUDGE
17.12.2020

Delivered in the presence of Mebo Mgaya holding briefs of Mr. Mwesigwa for the appellant. The respondent is absent and her advocate.

AK Rwizile
JUDGE
17.12.2020



Recoverable Signature

X

Signed by: A.K.RWIZILE

