

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

HC CIVIL APPEAL NO.13 OF 2020

(Arising from an Order of Bukombe District Court in Misc. Civil
Application No.16 of 2020 dated 21 February, 2020)

NYAMISANGO JONATHAN APPELLANT

VERSUS

MAULID ABAS RESPONDENT

JUDGMENT

Date of last order: 12.04.2021

Date of Judgment: 15.04.2021

A.Z.MGEYEKWA, J

The appellant is appealing against the order of Bukombe District Court in Misc. Civil Application No. 16 of 2020 delivered on 21st February, 2020. Briefly the facts which bred the instant appeal are quite straightforward. They roll back to Ushirombo Primary Court matter in Civil Case No. 238 of 2019 whereby the respondent claimed for contract for the recovery of civil debt to a tune of Tshs. 306,000/=. The Primary Court of Ushirombo is vested with the

power to determine the matter however, the appellant preferred to engage an Advocate thus she preferred to transfer the case from the Primary Court to the District Court where she can be represented. Therefore, the appellant lodged an application before the District Court requesting the District Court to transfer the file from Ushirombo Primary Court to the District Court for the reason that she wanted to be represented by an Advocate. The District Court determined the matter and dismissed the application after finding that there was no genuine reasons for transferring the case from the trial court.

Being aggrieved the appellant has taken his battle to this Court, seeking to assail the decision of Bukombe District Court. She has coined three grounds of appeal as follows:-

- 1. That, the learned Magistrate erred in law and fact by refusing to order the transfer of case and hence denied the appellant her right to legal representation.*
- 2. That, the learned Magistrate erred in law by wrongly interpreting the right to legal representation as a mere wish to engage an Advocate.*
- 3. That, the learned Magistrate erred in law and fact in interpretation of section 47 of the Magistrates Courts Act, Cap.11 in connection with the*

contents of the affidavit sworn by the appellant in support of Misc. Civil Application No. 16 of 2020.

In prosecuting this appeal, the hearing was conducted through audio teleconference and the appellant was remotely present while the respondent did not show appearance.

Following the prayer by the appellant to proceed *ex parte* succeeding the absence of the respondent regardless of being served and as such it was revealed that the respondent denied signing the summons, this court granted the prayer for the applicant to proceed *ex parte*.

The appellant had not much to say, she opted to submit the three grounds generally. She urged this court to consider her grounds of appeal. The appellant stated that the case was before the Primary Court then she preferred to engage an Advocate to represent her since everyone has a right to be represented in court. The appellant went on to state that she filed an application at the District Court requesting for the court to transfer the case to the District Court. She added that the District Court determined the case and referred the case back to the trial court. She claimed that the District Court did not do justice for allowing her to be represented.

After having gone through the records and the submission made by the appellant, I now turn to the grounds of appeal which relates to the right of representation. The appellant is complaining that the District Court erred in law by refusing to order the transfer of the case and hence she was denied her rights to legal representation. The appellant also faulted the Magistrate for wrongly interpreting section 47 of the Magistrates Courts Act Cap.11 in connection with what the appellant stated in her affidavit.

I have gone through the District Court of Bukombe proceedings and found that the appellant main purpose to transfer her case from the Primary Court to the District Court is stated in her affidavit in particular paragraph 6 and 7 that she has engaged the service of Siiraji Mussa Kwikima, an Advocate to defend her, but he cannot appear and defend her at the Primary Court. For the interest of justice, she urged the District Court to transfer Civil Case No. 238 of 2019 which is pending at the Primary Court to the District Court where the appellant can have legal representation.

It is worth noting that the transfer of cases from the Primary Court to the District Court is not automatic or guaranteed. In accordance with section 47 (1) of the Magistrates Courts Act, Cap.11 [R.E 2019] the cases which are required by law to commence at Primary Court can be transferred to the

District Court. 47 (1) of the Magistrates Courts Act, Cap.11 [R.E 2019] provides that:-

“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 proceedings to such district court or court of a resident magistrate or the to some other primary court;

(b) The district 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 magistrate's court.

Applying the above provision of law and after traversing through the applicant affidavit, I am in accord with the District Court that there is no pressing issue that attracts the court to transfer the case from the Primary Court to the District Court. The appellant claimed that it is her constitutional right to have a legal representation. In my view, regardless of the right of legal representation being a constitutional right for every person, however, the issue of the ability to engage an Advocate without being supported by any other reasons is not a sufficient reason to grant transfer of the case. In the case of **Aboubakar Mohamed Mlenda v Juma Mfaume** (1989) TLR 145 it was held that:-

"Wish and ability to engage an advocate alone does not amount to good and sufficient cause to grant an application to transfer a case from primary Court to any other court."

It is also a cardinal principle of the law that the need for legal representation cannot give the court jurisdiction which it does not legally have. The court is duty-bound to entertain matters in accordance with the law. If the case can be entertained by the Primary Court and the same had actually been instituted and hearing started, it cannot be transferred to the District Court on a mere reason that the appellant has decided to engage an advocate. The records reveal that Ushirombo Primary Court started to determine the case therefore, in my view transferring the same amounts to abuse of court process contrary to section 47 of the Magistrates Court Act, Cap. 11 [R.E 2019] that aim to rescue the miscarriage of justice if the case will be tried at the wrong court, or for any other reasonable grounds justice will not be attained.

As rightly cited by the first appellate court in Misc. Civil Application No. 16 of 2020, the law requires a suit to be filed in the courts of the lowest grade with competent jurisdiction to try them as stipulated under section 13 of the Civil Procedure Code Cap. 16 [R.E 2019]. In the case of **M/S Tanzania - China Friendship Textile Co. Ltd v Our Lady of Usambara Sisters** (2006) TLR 70, the Court of Appeal of Tanzania held that:-

"According to the principle contained in section 13 of the Civil Procedure Code, every suit must be instituted in the court of the lowest grade competent to try it".

Applying the above authority and the fact that the appellant had no any substantive claim which could cloth the District Court with jurisdiction to the exclusion of the Primary Court, I am satisfied that the appellant claim has no merit.

In consequence, I find that there is no merit in these grounds of grievance. That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the Bukombe District Court findings. Therefore, I proceed to dismiss the appeal without costs. The matter to proceed at Ushirombo Primary Court where it ended.

Order accordingly.

Dated at Mwanza this date 15th April, 2021.


A.Z.MGEYEKWA
JUDGE
15.04.2021

Judgment delivered on 15th April, 2021 via audio teleconference whereby the appellant was remotely present.




A.Z.MGEMEKWA

JUDGE

15.04.2021