IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 32 OF 2020

BURUNO SOSPETER.....1st APPELLANT
MAPINDUZI SOSPETER.....2nd APPELLANT

VERSUS

SALVATORY BEYANGA.....RESPONDENT
(Appeal from the decision of Karagwe District Court in Civil Appeal No. 1 of 2019)

JUDGMENT

13 & 16 July, 2021
MGETTA, J:

Earlier on one Salvatory Beyanga (henceforth the respondent) successfully sued Buruno Sospeter and Mapinduzi Sospeter (henceforth the 1st and 2nd appellants respectively) for recovery of a debt in the sum of Tzs. 4,300,000/= in *Shauri la Madai Na.* 64 of 2018 at Kayanga Primary Court, Karagwe District (henceforth the trial court). Dissatisfied with the trial court decision, the two appellants unsuccessfully appealed to Karagwe District Court (henceforth the appellate Court). Once again, aggrieved by decision handed down on 31/10/2019 by the appellate court, they through a legal service of Mr. Aaron Kabunga, the learned advocate filed a two ground petition of appeal complaining that:

1. The appellate Court grossly erred in law for failure to quash and set aside proceedings and judgment of the trial court which presided over the case without having territorial jurisdiction as the parties hail from Bushangaro – Bweranyange, the local limits of Nyabiyonza Primary Court; and
2. The appellate Court grossly erred in law for failure to quash and nullify the proceedings and judgment of the trial court which was presided over the case and delivered judgment without having opinions of court assessors.

When the appeal was called on for hearing, Mr. Kabunga, the learned advocate appeared for the appellants; while, the respondent appeared in person, unrepresented.

As regard to the 1st ground of appeal, Mr. Kabunga submitted that the proceedings of both trial court and the appellate court be quashed and set aside because the trial court presided over the case without having jurisdiction, and the appellate court upheld it. The case was supposed to be instituted at the jurisdiction where the parties reside or come from. He submitted further the parties come from Bweranyange village where there is a Primary Court called Nyabiyonza Primary Court. He was surprised to learn that the respondent in this case decided to institute a suit against the

appellants at Kayanga Primary Court (trial court) where there is also District Court.

He asserted further that according to the law, the suit was supposed to be instituted at Nyabiyonza Primary Court instead of the trial court. To support his argument, Mr. Kabunga referred me to the provision of **Section 3 (1) & (2) of the Magistrates Courts Act** (Cap. 11) which establishes and gives jurisdictions to the Primary Courts. He also cited to me the case of **Robart Maitland versus John Peter Pantelaks**; Land Case Appeal No. 26 of 2011 (High Court) (Bukoba) (unreported) whereby the high court met a similar situation and ruled that the suit must be instituted at local limits where the parties come from. If the case is instituted outside its local limits, the decision and proceedings thereof become a nullity. He insisted that the local limit of this matter is Nyabiyonza Primary Court. Hence, the trial Court which heard and determined this case had no territorial jurisdiction.

Responding to Mr. Kabunga's submission, the respondent said that to his understanding when the matter involves moveable properties like in this case where he claims for recovery of money from the appellants, any primary court within a district should have jurisdiction. He added, except where the matter involves immoveable properties like land. He queried

himself that he did not think that he made any mistake by instituting the suit before the trial court.

Let me respond to 1st ground of appeal. First and foremost, it should be understood that the case of **Robert Maitland** (supra) cited to me is distinguishable from the case in hand. I will therefore not waste much of my time on it because the issue was whether the court at Kinondoni or Bukoba had jurisdiction over a matter before it. In our case, the trial court is established within Karagwe District and Nyabiyonza Primary Court as well. The issue therefore is which between the two Primary Courts established within Karagwe District had territorial jurisdiction to entertain the matter at hand.

From the 1st ground of appeal, there are two things which feature therein: territorial jurisdiction and local limits. **Section 3 (1) of Cap 11** provides for territorial or geographical jurisdiction of a Primary Court. For ease of reference, I quote it as hereunder:

> *"3. (1) There is hereby established in every district a Primary Court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the district in which it is established".*

From the above statutory position, it is crystal clear that territorial or geographical jurisdiction of Primary Court is the district in which it is established. Principally, within a district there is only one Primary Court as provided under **Section 3 (2) of Cap. 11** which reads and I quote that:

> *"3. (2) The designation of a primary court shall be the Primary Court of the District in which it is established".*

That means the Primary Court in Karagwe District is one, though there can be several centers of primary courts such as Kayanga, Nyabiyonza, etc. This means further that the Primary Court of Nyabiyonza is a Primary Court of Karagwe, and a Primary Court of Kayanga is also a Primary Court of Karagwe. Those two have territorial or geographical jurisdiction within Karagwe District in which they were established. In the case of **Mrisho Pazi versus Tatu Juma** (1968) HCD 119, it was held *inter alia*, that each Primary Court within a district has territorial or geographical jurisdiction over the whole district.

As regards to local limit or jurisdiction, I agree that each primary court within a locality where it situates has to exercise its powers within that local limit where the parties reside. But this is a matter of prudence. A person may file an action in a Primary Court of his own choice within any

place within a district, in disregard to local limit. As said earlier, in order to avoid causing inconvenience, expense incurred and time spent by his opponent, it is prudent to file an action within such a local limit where the defendant resides. Any party wishing to avoid such inconvenience, the law allows to apply for transfer of the case to where he resides.

Frankly speaking, to my understanding there is no law that restricts a person of a certain locality within a district from instituting a case in a primary court situated at another locality. I am therefore of the considered opinion that the first ground of appeal should fail and I do accordingly dismiss it.

As regards to the second ground of appeal, Mr. Kabunga stated that the trial court sat without court assessors. If they were there, they did not give their opinions. He therefore submitted that it is a statutory requirement that in each Primary Court there shall be not less than two court assessors who will sit together with a magistrate. The two assessors will give opinions which should be reflected in the judgment.

He submitted further that the proceedings of the trial court show that on 21/9/2018, there were two assessors namely Joachim and Buruhani present. On 26/11/2018 at page 17 of the trial court proceedings, after the

case was closed, the magistrate gave the order that *"hukumu tarehe 03/12/2018, wadaawa wameonywa kufika"*. But there is no indication that assessors were consulted. In the proceedings, there is no indication that the assessors were invited to give their opinions. Mr. Kabunga was therefore of the view that in the eyes of the law, in absence of assessors' opinions therefore there was no judgment; or rather it is a judgment of the magistrate

To fortify his submission, he referred me to the case of **Bi. Ephrazia Angeno Versus Bruchard Rwabutondogoro**; (PC) Civil Appeal No. 11 of 2007 (HC) (Bukoba) (unreported). He insisted that in the present case, court assessors were not involved. He also cited the cases of **Mohamed Bishage versus Mwatatu Bishage**; (PC) Civil Appeal No. 1 of 199 (HC) (Bukoba) (unreported) and **Theobard Kaganda versus Fr. Fortunats S. Bijura**; Land Appeal No. 21 of 2016 (HC) (Bukoba) (Unreported). The cases cited show that the role of assessors is of great importance. Failure to show that they were involved at the Primary Court, that nullifies the entire proceedings and judgment of the Primary Court. He submitted that since the court assessors did not participate or were not involved, the proceedings and judgment of the trial court and that of the appellate court be nullified, quashed and set aside. Then, the appeal be allowed with cost.

In his reply to Mr. Kabunga's submission, the respondent started that if court assessors were not involved or did not participate that was not his mistake. What he knew was that they were present in all the time the case was being conducted at the trial court. He therefore prayed the appeal be dismissed with cost. The concurrent decisions of the courts below be upheld.

From the outset, I entirely agree with Mr. Kabunga that on the issue of involvement and participation of court assessors in a primary court are of great importance and a requirement of the law. It is provided under **Section 7 (1) of Cap 11** and I quote that:

> *"7 - (1) In every proceeding in the Primary Court, including a finding, the court shall sit with not less than two assessors.*

In terms of rule 2 of the **Magistrates Courts (Primary Courts) (Judgment of Court) Rules GN No 2 of 1988** (henceforth GN No 2 of 1988), the magistrate and assessors are both members of the primary court. All of them are members of the court. No one is superior than the other. When it comes to issue of making a decision, that decision is of majority. It is also provided under **Section 7 (2) of Cap 11** that:

7. (2) All matters in the Primary Court including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrate and assessors present and in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote"

That statutory requirement is amplified more in **GN No. 2 of 1988** that before a decision is made, it is mandatory for the primary court magistrate to consult with other members (the assessors) requiring each of them to subscribe his opinion which would determine the decision of the court. Vide: **Mohamed Bishoge** (supra).

In the same vein, it is mandatory that after the members of the court have made a joint consultation, and if they unanimously consent or agree to a unison decision, they leave to the magistrate to write or compose the decision, but which decision should be signed by all the three members,

the magistrate and the two assessors. As the decision of the primary court is of the majority, if during joint consultation, one member disagree with the two and proceed to give a dissenting opinion, that opinion must be recorded and he is required to sign thereof. Then the consented opinion of the rest two members shall form a decision of the court and they have also required to sign.

Unlike in the District Land and Housing Tribunals where opinions of assessors must be in writing and signed by assessor giving such opinion, in the primary court when it comes to the issue of consultation in order to reach at a certain finding or decision the magistrate consult with the assessors present over the finding or decision to be reached. Thus, the case of **Theobard Kaganda** (supra) is distinguishable from the case in hand. Likewise, if find that the decision in the case of **Bi. Ephrazia Angeno** (supra) to be decided *per incuriam* because it was decided in ignorance of the existence of the law and other decided case(s) of this court.

To my understanding, there is no law requiring the opinions of members of the primary court be recorded in the case file by a magistrate. After all the magistrate is also member of the court. Should his opinion be also recorded? I don't think this would be a proper procedure intended by

the law. Likewise, it is my conviction that the law governing the involvement of assessors is intended to require assessors to sign when a magistrate gives an order for adjournment of the case, as Mr. Kabunga tried to convince this court. It is my firm view therefore that is not an intention of the legislature as provided under the provision of **section 7 (1) and (2) of Cap 11.** The wordings of this provision requires in case of any difference in decisive issue among members of the court their signatures are mandatory and not otherwise.

Reverting to the case at hand, on 21/9/2018 as shown at page 1 of the typed trial court proceedings, it is true that one Joachim and Buruhani were present as court assessors. The trial court proceedings show further they kept attending during the examination of witnesses up to 26/11/2018 when the magistrate adjourned the case and set a date for judgment. Mr. Kabunga asserted that there is no indication that on 26/11/2018 the magistrate consulted with assessors. If they were consulted, their opinions were not recorded.

Let me make it clear. One could not detect that there was consultation of the trial court members, magistrate and assessors, because there is no law requiring the outcome of their consultation to be recorded. Their consultation is reflected by their signatures put at the bottom of the

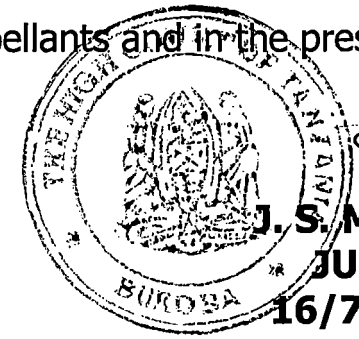
judgment that was delivered on 3/13/2018. I therefore find that the trial court judgment was signed by all the three members of the court, namely the magistrate and the two assessors who sat with him. Thus, the second ground of appeal has no merit. I accordingly dismiss it.

As a result, I find the two grounds of appeal unmeritorious. I accordingly dismiss the appeal in its entirety. The appellants are condemned to pay costs to the respondent.

Accordingly ordered.

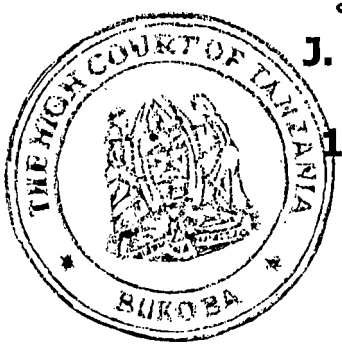
J. S. MGETTA
JUDGE
16/7/2021

COURT: This judgment is delivered today this 16th July, 2021 in the presence of Mr. Aaron Kabunga, the learned advocate for the appellants and in the presence of the respondent in person.



J. S. MGETTA
JUDGE
16/7/2021

COURT: Right of appeal to the Court of Appeal is fully explained.



J. S. MGETTA
JUDGE
16/7/2021