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**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**PC. CIVIL APPEAL NO. 05 OF 2021**

***(Arising from Civil Appeal No. 07 of 2020 in the District Court of Mbinga  
which originated from Civil Case No. 13 of 2020 from Mbinga Urban  
Primary Court)***

**KIKUNDI CHA UTULIVU ILELA MBINGA ..... APPELLANT**

**VERSUS**

**THE ASSOCIATION OF MBINGA COFFEE GROWERS ..... RESPONDENT**

**JUDGMENT**

Date of Last Order: 05/08/2021

Date of Judgment: 19/08/2021

**BEFORE: Hon. S. C. Moshi, J**

This is a second appeal. The respondent successfully instituted a civil suit, Civil case No. 13 of 2020 at Mbinga urban primary court against the appellant for a claim of Tshs. 19,677, 374/= being unpaid sum for a coffee processing machine which was advanced to the appellant. The appellant's appeal to the district court of Mbinga was not successful; hence the present appeal. The appeal contains four points which are reproduced hereunder, with minor typographical corrections: -

*1. That the appellate court erred in law to uphold the decision without ascertaining the locus standi of the respondent.*

*2. That the trial court erred in law to hold that it was*

*the duty to make decision to ascertain that the respondent is a company.*

*3. That the appellate court erred in law and fact to make decision on basing assumption*

*4. That the appellate court upheld the trial court decision contrary to the law.*

At the hearing of the appeal Mr. Frank Kapinga, advocate appeared for the appellant whereas the respondent was represented by Mr. Alex Nyoni, advocate.

Mr. Frank Mapunda submitted on the first ground of appeal and the second ground of appeal together *inter alia* thus, the District Court erred for upholding the decision of Primary Court without satisfying itself of the *locus standi* of the plaintiff, now respondent. The respondent introduced itself as a company, the respondent raised objection to the effect that the respondent wasn't a company but a Kikundi (group) which the appellant was also a member. However, the trial court held that it was a company without satisfying itself if the respondent was a company. It was not established that the respondent was a legal person who could sue and be sued. However, the District Court decided that the appellant had a duty to prove that the respondent was a company. He contended that, all documents show that Mbinga Coffee Growers is only an Association not a Company.



On third ground, he submitted that, the appellate court based its decision on assumption. The appellate magistrate commented that he knew that the advocate knew the facts, this is seen at page 5 (five) of the judgment of the District Court at paragraph 3. He contended that, this was wrong, the court should not have used this phrase.

Lastly, on the fourth ground; he said that the respondent instituted a case at Primary Court. It directed Innocent Mbunda to file the case as its representative from the company. Mr. Innocent Mbunda introduced himself as a principal officer of the company. The appellant raised objection that the person who introduced himself as principal officer was an advocate. The appellant prayed that he should not be allowed to proceed. Mr. Innocent Mbunda did not show his position in the company; however, the court allowed him to proceed with the case; again, at appellate stage, Mr. Innocent Mbunda represented the respondent not as a principal officer but as an advocate of the respondent.

He pointed out that the primary court's record shows that the respondent filed some exhibits which include a demand note which was filed by Innocent Mbunda as an advocate for respondent. He argued that, allowing Innocent Mbunda to proceed in that case is contrary to section 33(1) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 which prohibits advocates to represent clients/parties in the Primary Courts. He

said that, the same law under section 33 (3) allows companies/body corporate to allow its principal officers other than advocates to appear in court.

He in the end contended that, basing on the above, the proceedings and decisions of the Primary Court was void and illegal; hence it follows that even the proceedings and decision of the District Court are also illegal. He therefore prayed that the appeal be allowed with costs.

In response to Mr. Frank's submission Mr. Alex Nyoni submitted on first and second grounds among other things that, the district court's decision was correct because at the time when the case was opened the respondent was not a company. If the respondent was a member of the association, then he should have provided the court with a constitution. It was his argument that the respondent had *locus standi*, and that the appellant was duty bound to prove that the respondent had no locus standi as he raised a preliminary objection that respondent was not a company.

On third ground, in grounds of appeal, before District Court, there was no dispute that there was a debt, the issue was whether the respondent was a company or not. In this case the advocate knew that there was a debt. The issue was whether it would be payable to a right



person. Therefore, it was not magistrate's personal view.

Lastly, on the fourth ground, Mr. Alex Nyoni agreed that the act of Innocent Mapunda preparing a demand notice while he was a principal officer was wrong. He equally conceded that, Innocent Mbunda again erred by standing at an appeal as an advocate. He said that, Mr. Mbunda was supposed to appear as a principal officer. He also conceded that this ground has merits; he proposed that the actions renders the Primary Courts proceedings illegal, he however, differed with Mr. Frank Kapinga as far as the interpretation of section 33 (1) of the Magistrates' courts Act (supra) is concerned. He said that Innocent Mbunda appeared in the Primary Court as a Principal Officer. Even advocates may appear if they are principal officers. However, the court erred for not requiring him to explain his position in the company.

To a great extent the appeal revolves around the issue of locus standi of the respondent in her capacity as a legal entity and advocate's right to act and appear before a primary court. Both points are basically issues of law. Therefore, before tackling the grounds of appeal it is imperative to state, though briefly, the position of the law relating to legal personality of companies. In principle companies are legal entities, a company may sue or be sued in its name. However, it is worth noting that the suit has to be through an authorized representative of the

company. Under Tanzanian company law, a company means a company formed and registered under the Companies Act, Cap. 212 R.E 2019, see section 2(1) of the Act.

Now reverting back to the grounds of appeal, I have scrutinized the record as a whole. Burden of proof in civil cases lies on whomsoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, see section 110 (1) and section 110 (2) of Tanzania Evidence Act, Cap. 6 R.E 2019 which provides that, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person; further, section 111 provides that, the proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. In civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability, see Section 2 (b) of the Evidence Act (supra). Therefore, the burden shifts from one party to the other depending on who alleges the truth of a particular fact. In the present case there is no scintilla of evidence which establishes the legal personality of the respondent, that it has been formed and registered under the Companies Act, see section 2 (1) of the Companies Act (supra). As opposed to Mr. Nyoni's argument, the duty of proving that the respondent had a legal personality by virtue



of being a company was upon the respondent and not on the appellant. The respondent had a duty from the beginning to produce her certificate of incorporation to prove that she is a company. Always where the legal personality of a company is in dispute the duty to prove its juristic status is on the party who claims that she is a company.

Basing on the foregoing, I find that, the respondent had no locus to sue. This discussion suffices to dispose of the first and second ground.

On fourth ground, likewise, there is clear violation of section 33 (1) of the Magistrate' courts Act (Supra). Mr. Innocent Mbunda testified under oath before the trial court that he was a principal officer representing the respondent. However, it is common ground that Innocent Mbunda had also acted for the respondent as an advocate, it is evidenced by the demand Notice which was drawn by Innocent Mbunda, advocate. Again, strangely, the same advocate who introduced himself as respondent's principal officer appeared before the district court as respondent's advocate, indeed, this is perplexing and unprofessional. It is the duty of an advocate to transact his business with skills and diligence, both to his client and the court, See **Akena Adoko vs. Advocates Committee** (1982) TLR 290.

It is apparent on the record that, Mr. Innocent Mbunda advocate drew a demand notice on behalf of the respondent whilst the matter

was being filed in the primary court. He also testified before the trial court as a principal officer of the respondent while he, in the notice he identified himself as an advocate acting on behalf of the respondent. To top it all, he appeared in the district court as an advocate. This is apparent violation of the law, section 33 (1) and 33 (3) of the Magistrates' Court Act, cap. 11 R.E 2019.


The third ground too is meritorious, the appellate district court magistrate at page five second paragraph from bottom based his finding on assumptions, here I quote, "Mr. Frank in his argument seems like he agrees the debt....". It is evident that the magistrate reasoning based on assumptions that the applicant's advocate agreed that there was a debt. Assumptions does not state definitely what was stated, in fact it depicts magistrate's own thinking.

That said and done, I find that the appeal has merits. The appeal is allowed. Both court's proceedings and judgements are quashed, and any orders made therefrom are set aside. Costs to be paid by the respondent.



Right of appeal is explained.



  
**S. C. MOSHI**  
**JUDGE**  
**19/08/2021**