

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOB A DISTRICT REGISTRY
AT BUKOBA

LAND CASE APPEAL NO. 57 OF 2021

(Arising from App. No. 146 of 2016 of DLHT for Kagera at Bukoba)

1. AJIRATH SAID.....1ST APPELLANT

2. TUMAINI MTAZAMBA..... 2ND APPELLANT

VRS

SEPHENE ANTONY..... RESPONDENT

RULING

23/08/2021 & 31/08/2021

NGIGWANA J.

In the due course of filling a reply to the petition of appeal in Land Case Appeal No.57 of 2021, the respondent raised a preliminary objection on the point of law that the appeal is not signed by the purported 1st appellant. Having raised that P.O, it was incumbent for this court to determine it before proceeding to the merit of this case as it has been the best practice of courts.

Advocate Elieth Barnabas, who represented the respondent submitting on the raised P.O, substantiated that the Memorandum of appeal was not drawn and signed by the purported 1st Appellant one Ajirath Said. He argued that it is a legal position under section 41(1) of the Advocates Act, Cap 341, R.E 2019 that no unqualified person shall act as an advocate. That the act of the 2nd Appellant involving the first appellant in the current appeal and signing on her behalf without herself signing that he so acted without such power. It is trite law that memorandum of

appeal must be signed by parties or their advocates on their behalf. The respondent's counsel prayed the appeal be struck out with costs.

Invited for the reply, Advocate Assey for the 2nd Appellant submitted that the memorandum of appeal was prepared by the 2nd Appellant and signed. But he neither acted as agent nor advocate rather he prepared the memorandum of appeal basing on the names of parties to the case as they were appearing at the trial DLHT. He therefore relied on the judgment and proceedings of the DLHT upon which the name of Ajirat Said was involved.

When it was a turn for respondent's counsel to make a rejoinder, she reiterated her stance and contended that since the 2nd appellant's counsel has conceded that the 2nd appellant prepared and signed the memorandum of appeal which involves the first appellant, the second appellant so acted as an agent of the first appellant. She further submitted that ignorance of law is not a defence and that the second appellant would have consulted a lawyer. He reiterated his prayer that the appeal be struck out.

Having heard both rival arguments from parties' advocates, I have now learnt that parties are in agreement on the following:

1. That the memorandum of appeal involves the name of Ajirath Said as the first appellant.
2. That Ajirath Said who is the first appellant herein was the first respondent at the trial court but did neither appeal by preparing the memorandum of appeal nor signing it.

3. The law requires memorandum of appeal to be signed by parties or their advocates.

4. That the second appellant prepared a memorandum of appeal and inserted the names of Ajirath Said as first appellant and he himself signed.

What seems to be bone of contention confronting parties is that:

By involving the name of Ajirath Said as the first appellant in the memorandum of appeal which was prepared and signed by the second appellant only, whether that act amounts to acting as an agent without qualification in terms of section 41(1) of Advocates Act?

Before I start determining the merit of the P.O, it is worth to note at the outset the purpose/need for courts to deal with preliminary points of objections which invariably raise pure points of law. The Court of Appeal in case of **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers, & Organisation of Tanzania Workers Union, Civil Appeal No. 79 of 2001** cited its earlier decision in **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji** - Civil Application No. 42 of 1999 (unreported), expressed the aim of preliminary objections as,

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily. "

Similarly, in **Mukisa Biscuit Manufacturing Co. LTD Vs Westy End Distributors Ltd** (1969) EA 696 propounded the meaning of Preliminary objection:

"that the objections should be raised on a pure point of law and cannot be raised if any fact has to be ascertained. Further, that a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit"

From the guidance of the Court of Appeal in **Hezron Nyachiya** (Supra) one would inevitably grasp the aim of raising a preliminary objection, among being to save time of parties and courts without going on merit as there is a point of law as this court has done now. While in **Mukisa Biscuit case** (Supra) guides courts to filter out frivolous objections which do not qualify as pure point of law so to be called.

In view of what parties had argued for and against and in order to know whether the raised objection do qualify to be called an objection on point of law, the court has found proper to start by looking into the provision of the law on the issue of signing the memorandum of appeal. The said provision which is Order XXXIX Rule 1(1) of the Civil Procedure Code Cap 33 (R.E 2019) states as follows: -

*"Every appeal shall be preferred in the form o f a memorandum **signed by the appellant or his advocate** and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded."(Emphasize is mine).*

From the provision of Order XXXIX Rule 1(1) of CPC above it is clear that the dictate of law requires the memorandum of appeal that, first must be signed and second must be signed by the appellant himself or His advocate short of that the memorandum of appeal is defective.

The above provision compliments section 41(1) of Advocates Act which was argued for by the respondent's counsel which reads

"No unqualified person shall act as an advocate, or agent for suitors or, as such, issue out any summons or other process, or commence, carry on or defend any action, suit or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or act as an advocate in any cause or matter, civil or criminal."

As ascertained earlier, there is no dispute that the first appellant (Ajirath Said) appearing in the memorandum did not sign the same. The second appellant's reply was that he signed for his part but not on behalf of the first appellant. I paused to ask if he did not sign on behalf of the first appellant, why did he prepare the document by involving the first appellant who did not wish to appeal? The counsel for the second appellant, Mr Assey further tried to offer an answer, that the name was so placed as the proceedings at the trial had the names of the first appellant. I refuse to accept such a defence because being parties at the trial in a certain case, the law does not provide that they must be necessarily the same parties at the appellate court. This is due to the simple logic that appeal is a right for one who thinks is aggrieved with the decision at the trial to appeal and not every party who was at the

trial court. The second appellant could have himself appealed separately.

I am thus inclined to agree with respondent's advocate, Ms Elieth Barnabas that the act of the second appellant preparing a memorandum of appeal and involving the names of the first appellant and signed himself was acting on behalf of her. The act was contrary to law as the second appellant is not an advocate in terms of Order XXXIX Rule (1) of CPC qualified to sign the memorandum of appeal on behalf of the first respondent.

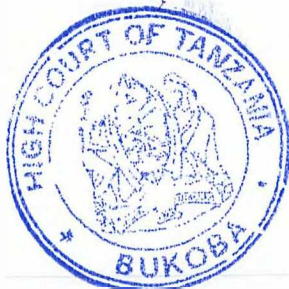
It is a view of this court that this defect is fatal and incurable which cannot be saved by the principle of overriding objective due to the reason that if a memorandum of appeal which is a fundamental document initiating an appeal is left to stand may eventually occasion failure of justice to the first appellant lest the appellants (both as they appear) fail the case and in the event costs are ordered to be paid by them, the respondent is likely to execute such order against the first appellant and attach her properties, the act which this court is not ready to condone.

In the premises, I hold that, the second appellant involving the name of Ajirath Said as the first appellant in the memorandum of appeal which was prepared and signed by the second appellant only without a signature of the first appellant, that *ipso facto* amounts to, acting as an agent or advocate without qualification in terms of section 41(1) of Advocates Act and consistently offends the provision of Order XXXIX Rule1(1) of CPC.

Therefore, the raised objection has merit and suffices to be termed as a preliminary objection on point of law which disposes this matter summarily. The appeal is therefore incompetent and it is hereby struck out with costs.

Order accordingly.

Dated at Bukoba this 31st day of August, 2021.





E. L. NGIGWANA

JUDGE

31/08/2021

Ruling delivered this 31st day of August 2021 in the presence of Ms. Erieth Barnabas, learned advocate for the respondent but in the absence of the 2nd appellant and his advocate Mr. Assey and in the presence of Mr. E.M. Kamaleki, judges' law Assistant.




E. L. NGIGWANA

JUDGE

31/08/2021