

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 7 OF 2021

**(C/F Civil Application No. 24 of 2020 in the District Court of Arusha at Arusha, Originating
from Civil Case No. 156 of 2019 at Arusha Urban Primary Court)**

MKUU WA JIMBO ARUSHA MASHARIKI.....1ST APPELLANT

PENDAEL MALAKI NNKO.....2ND APPELLANT

VERSUS

JULIUS MWANGALABA.....RESPONDENT

JUDGMENT

13/05/2022 & 12/07/2022

GWAE, J

The appellants have filed this appeal after being dissatisfied by the decision of the Arusha District Court which denied them transfer of the case to the District Court on reason of engagement of an advocate. In this appeal the appellants have filed two grounds of appeal namely;

- i. That the Honourable District Magistrate erred in law and in fact in holding that legal representation is not a ground to transfer a case.

- ii. That the Honourable District Magistrate ruling is bad in law and in fact for failure to assign reasons in her ruling.

Primarily, the respondent had rented two rooms from ELCT North Central Diocese, Arusha East District, on consideration of a rent of Tshs. 20,000/= per month. It appears that sometimes in the year 2009 the respondent defaulted payment of the rent and consequently his properties were confiscated. Being aggrieved, he filed a suit against the appellants at Arusha Urban Primary claiming Tshs. 16,168,450/= being the value of properties confiscated which were in excess of the total amount owed by the respondent.

Hearing at the trial court had proceeded when the appellants filed their application at the District Court seeking for transfer of the said case on reason that they were after engaging an advocate. Unfortunately, the application was considered as abortive, thus the present appeal.

At the hearing of this appeal, the appellants were represented by advocate Stephen Magambo on the other hand the respondent appeared in person unrepresented. The appeal was argued orally.

Amplifying the grounds of appeal Mr. Magambo submitted that the appellants wanted to secure an advocate who would represent them and that as by then advocates were not allowed to enter appearance in primary courts, the appellants decided to seek a transfer of the case to the District Court. Mr. Magambo went on submitting that, the respondent's claim is also based on tenancy which bars the jurisdiction of Primary courts and above all the respondent has also sued the wrong parties as the appellants have no locus standi save for the body of trustees of Central-Evangelical Lutheran Church of Tanzania. It was therefore his prayer that the appeal be allowed and the respondent be advised accordingly.

The respondent on his part insisted that the decision of the District Court was properly founded and that the primary court has jurisdiction to determine the matter.

Having heard the rival submissions, the petition filed by the appellant calls upon this court to determine whether the trial court was justified to hold that legal representation is not a ground to transfer a case. The issue of transfer of cases on the reason of engagement of an advocate has been dealt upon by this court in many cases. Much as section 47 (1) of the Magistrates' Courts Act provides for transfer of cases from Primary Courts to

District Court nevertheless the court has been discouraging transfer of cases from Primary Courts to District Courts on reasons of Engagement of an advocate especially where proceedings at the Primary Courts have already commenced unlike cases where proceedings have not yet commenced. Such cases include; **Ashura M. Masoud v. Salma Ahmad**, PC. Civil Appeal No.213 of 2004 and **Denja John Botto & 2 others vs. Umoja wa Wafanya biashara Ndogo ndogo Mailimoja**, Civil Appeal No. 157 of 2018 H. C at DSM (Unreported). In the former case, it was stated that;

"The District Court does not acquire jurisdiction in probate and administration matters by reason that a party wishes to be represented by an advocate. Jurisdiction is conferred by the law and not by the wishes of a party..... The powers to transfer of cases under Section 47 (1) of the Magistrates' Courts act Cap 11 can only be used to transfer a case from Primary court to district Court or a Court of the Resident Magistrate having Jurisdiction. The reason that the applicant wishes to engage an advocate, as I have stated, does not in itself confer jurisdiction upon the court."

I have also considered the fact that the proceedings in this case had already commenced at the trial court and the respondent had already

testified. Therefore, the District court could not assume jurisdiction by the reason of engagement of an advocate.

Having the above explanation in mind I have also considered the fact that this application was filed on 12/04/2019 before the amendment of section 33 of the Magistrates' Courts Act Cap 11 Revised Edition, 2019 through Written Laws (Misc. Amendments) No. 3 of 2021 where advocates and public prosecutors may appear or act for any party in a primary court, and it is for obvious reasons the appellants cannot be salvaged by the said amendment as the matter was filed before the said amendment.

The above being said, this court also wishes to address on two issues although they were not raised as grounds of appeal but the same were raised by the appellants' counsel in his oral submission since they touch the issue of jurisdiction of the primary court, it is for that reason this court finds it pertinent to have them considered.

On the first issue, the appellants alleged that the primary court had no jurisdiction to determine the matter as the matter is purely a land matter and the primary court has no jurisdiction to entertain land matters. On the other hand, the respondent insisted that the trial court had jurisdiction to

entertain the matter as his claims based on his properties which were taken by the appellants.

In order to be in a better position to answer this issue, it is important to revisit the claim of the respondent against the appellant, the same which is found at the trial court's records. According to the complaint form, the respondent's claim against the appellants is Tshs. 16, 168, 450/= arising from confiscation of his properties following his failure to pay rent to the appellants, thus it was his allegation that the properties confiscated were in excess than the rent claimed. For easy of reference, I wish to quote that part of the claim;

"Mdai alikuwa anadaiwa na mdaiwa kodi ya pango kiasi cha shilingi laki sita. Mdaiwa akakamata vitu vya mdai vyenye thamani iliyozidi pesa aliyokuwa anadaiwa."

From the claim above, it is evident that the respondent claim is on his properties which he alleges to be taken by the appellants in excess of the rent he is required to pay. The appellants are alleging that this claim is founded on land, however this court is of a different view from that of the appellants as the claim in its self is not based on rent but the properties which were taken or confiscated by the appellants to cover the rent claimed.

Had the respondent's claim based on the claim of rent, the primary court would not have jurisdiction but since it is on the claim of the properties, regardless of the source of the claim this court is of the firm view that the claim is a normal civil suit and not a land matter.

The first issue being answered in affirmative, this court proceeds to determine the second issue where the appellants alleged that the respondent sued the persons who had no locus standi. According to him the respondent ought to have sued the Board of Trustee of Central-Evangelical Lutheran Church of Tanzania. The respondent on his part stated that he sued the right person.

This issue need not to detain me much, from the proceedings of the trial court the respondent sued Mkuu wa Jimbo Arusha Mashariki as the first respondent and Pendaël Malaki Nnko as the second respondent. The appellants in this case are officials from the Evangelical Lutheran Church of Tanzania, which is a religious institution. Religious institutions are required by law to be registered as societies under the Societies Act [Cap.337 Revised Edition, 2002]. The requirement is provided under section 12 (1) of the said Act. Upon being issued with a certificate of registration, the Institution is required under section 2 of the Trustees Incorporation Act [Cap, 318,

Revised Edition, 2002] to be incorporated and be issued with a certificate of incorporation. Once the certificate is issued; the religious organization or association is deemed to have been incorporated, therefore, can sue or be sued in its incorporation name only. See the decision in the case of **Kanisa la Anglikana Ujiji vs Abel s/o Samson Heguye**, Labour Revision No. 5 of 2019 (unreported).

In the matter at hand, it is evident that the respondent entered into a lease agreement with "K.K.K.T-DMA-JIMBO LA ARUSHA MASHARIKI" therefore it is obvious that the respondent did not enter into agreement with the appellants and therefore the proper party to be sued would be the registered Trustees of the Evangelical Lutheran Church of Tanzania North-Central Diocese, which is legal entity capable of suing and being sued.

From the above, it is apparent that the parties herein have no locus standi, and even if the trial of the case proceeds with hearing it is with no doubt that a subsequent order issued will not be executable. For this matter, this court finds that the respondent has sued the wrong parties, consequently, I invoke my revisional powers under section 25 of the Magistrates' Courts Act, Cap 11 Revised Edition, 2019 and nullify the proceedings of the trial court and that of the District Court. The respondent

is at liberty to institute the matter afresh against the proper party (ies). Each party shall bear its own costs of this appeal and those at the courts below.

It is so ordered.

Dated and Delivered at Arusha this **12th July 2022**




M. R. GWAE
JUDGE
12/07/2022