

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

CIVIL APPEAL NO. 8 OF 2020

(Appeal from the District Court of Arumeru, Misc. Civil Application No. 31 of 2019, Originating from Enaboishu Primary Court, Civil Case No. 179 of 2019)

LUCY KILEO 1ST APPELLANT

EMMANUEL FANUEL 2ND APPELLANT

Versus

VICTORIA HANGALI RESPONDENT

JUDGMENT

6th April & 6th May, 2022

Masara, J.

Victoria Hangali, the Respondent herein instituted a civil claim of TZS 30,000,000/= against the Appellants at Enaboishu Primary Court ("the trial court"). The claim resulted from the costs she incurred in re-transporting building materials to her building site. According to the evidence adduced by the Respondent and her witnesses at the trial court, on 16/8/2019, the Appellants blocked lorries that carried her building materials to her building site. The drivers of the lorries were forced to offload the materials at a place that is 1 kilometre away from the Respondent's building site. The Respondent hired guards to safeguard the materials. She also engaged casual labourers to transport the materials to the building site by using wheelbarrows. The Respondent also complained that she had



previously referred the dispute over the path to the Ward and District Land and Housing Tribunals where she was declared the winner and given the right to transport materials through that path

After hearing the evidence of both sides, the trial court resolved to make a visit to the *locus in quo*.

The trial court scheduled to visit the *locus in quo* on 21/10/2019, but on that date the Appellants defaulted appearance. It was adjourned to 25/10/2019 for the same purpose; but, on 23/10/2019 the Appellants filed an application in the district court seeking to transfer the case to it on the ground that they intended to engage an advocate. After hearing the parties, the district court in its ruling delivered on 28/1/2020 dismissed the application. The district court was of the view that the Appellants failed to adduce sufficient reasons for transferring the case from the trial court. The record shows that the Appellants were aggrieved by the decision of the district court, they filed the present appeal on 28/2/2020.

Before the appeal was determined, it is on record that on 2/3/2020 the Respondent approached the trial court and prayed that the case proceeds from where it had ended after dismissal of the application by the district

court. Summons were issued to the Appellants, but they refused summons as it is shown in the proceedings of 6/3/2020. The case proceeded on 10/3/2020 in the absence of the Appellants. The case was fixed for judgment which was delivered on 23/3/2020 declaring the Respondent the winner. The Appellants were ordered to pay the whole amount claimed to Respondent. It is not clear whether the trial court was aware of the appeal preferred by the Appellant at the time it entered judgment in favour of the Respondent.

This appeal is preferred on four grounds of appeal as reproduced verbatim hereunder:

- a) That, the trial Magistrate erred in law and fact for holding that the right for legal representation is not sufficient ground for transfer of suit from Enaboishu Primary Court to District Court of Arumeru;*
- b) That the trial Magistrate erred in law and fact in ordering return of the record to the Primary Court of Enaboishu in utter disregard of an application to transfer the matter in the District Court of Arumeru and held that Appellants herein had to wait until the matter is determined by the Primary Court to its finality then they will have an opportunity to appeal to the District Court;*
- c) That the Trial Magistrate also acted with material irregularity by its failure to consider the Appellants have not adduced testimonies and other evidences on record before Enaboishu Primary Court; and*
- d) That the Trial Magistrate erred in law and fact in failing to exercise jurisdiction vested in it by the law in the matter.*

Basing on the above grounds, the Appellants prayed that the appeal be allowed by quashing and setting aside the decision of the district court with costs.

At the hearing of the appeal, the Appellants were represented by Mr Joseph Hillary, learned advocate, while the Respondent appeared in Court in person. The appeal was disposed of through filing of written submissions.

In the written submissions, Mr Hillary combined the four grounds of appeal and argued them jointly. The learned advocate contended that transfer of a case from one court to another may be granted only upon a party showing sufficient reasons. He fortified that the Appellants had sufficient reason as they wished to manifest their right to legal representation as provided under Article 13(6) of the Constitution. He also made reference to section 33(1) of the Magistrate Courts Act, Cap. 11 [R.E 2002] (the MCA) which bars advocates from appearing in primary courts. He was of the view that a proper construction of section 47(1)(b) of the MCA which allows transfer of cases from the trial court to the district court, would not exclude the right to legal representation as one of the reasons for transferring a case from the trial court. To cement his argument that legal representation is a constitutional right, which

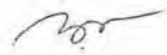
constitutes sufficient reason for transfer of a case, Mr. Hillary relied on the decisions in **National Bank of Commerce vs Vitalis Ayemba, (HC) Civil Case No. 37 of 1998** and **Agnes Simbambili Gabba vs David Samson Gabba, (CAT) Civil Appeal No. 26 of 2008** (both unreported). Mr. Hillary added that the right to legal representation should not be denied to those who can afford such services. That, a party who cannot afford such services, is at liberty to seek such services from legal aid schemes available to indigent persons. He concluded by imploring the Court to allow the appeal by quashing and setting aside the decision of the district court with costs.

On her part, the Respondent faulted the Appellants for not attending hearing of the case to conclusion as after their application was dismissed by the district court, the record was remitted to the trial court so as to proceed with determination of the case. That the trial court decided in her favour, but the Appellants, instead of appealing against the decision of the trial court, they have appealed against the decision of the district court which, in her view, is inappropriate.

Regarding the merits of the appeal, it was her submission that the reason advanced by the Appellants that they intended to engage services of an advocate does not constitute sufficient reasons for transferring the case.

He relied on the decision of **Aboubakar Mohamed Mlenda vs Juma Mfaume [1989] TLR 145**. The Respondent also cited section 13 of the Civil Procedure Code, Cap. 33 [R.E 2019], which requires suits to be instituted in courts of lowest grade with competent jurisdiction to try them. It was her further submission that jurisdiction of courts is statutorily conferred, therefore engaging an advocate cannot confer jurisdiction to a court that is not ordinarily vested with such jurisdiction. The Respondent was of the view that allowing the appeal would invite every person with economic ability to transfer his case to the district court, which will deny rights to lay persons like her. According to the Respondent, Primary courts deal with normal issues of customary laws which the Appellants are acquainted with. She prayed for dismissal of the appeal with costs.

I have considered the grounds of appeal as well as the record of the lower courts. I agree with both parties that in an application where a party seeks to transfer a case from a primary court to a district court, such party is duty bound to advance sufficient reasons for the transfer. The issue for determination is whether the Appellants advanced sufficient reasons for transferring Civil Case No. 179 of 2019 from the trial court to the district court.



According to the submissions by the counsel for the Appellants, the main reason for the transfer of the case from the trial court to the district court is that they wished to engage an advocate so that they have legal representation. In her submission, the Respondent opposed that reason stating that engaging an advocate in itself does not confer jurisdiction to the district court.

I am aware that this Court has, in some instances, held that mere ability to engage an advocate does not constitute sufficient ground for transfer of a case. In the cited case of **Abubakar Mohamed Mlenda vs Juma Mfaume** (supra), it was stated *inter alia*:

"Mere financial ability to engage an advocate without any qualification therefore will not, I think, merit for grant of leave under section 63(1) or transfer under section 47 both of the Magistrates Courts Act, 1984."

I must add that, in principle, once a party indicates that he intends to be represented by an advocate, prudence requires that the requested court grants such request, unless there are compelling circumstances to deny such request. In this appeal, however, the circumstances demands that the request be denied. I say so for the following reasons: One, as pointed out earlier, the only reason advanced by the Appellants was that they intended to engage the services of an advocate. There was no further

reason put forth for the requested transfer. As already stated, I would in a fit case allow the request considering that legal representation, as stated by the Appellants, is a right that should not be curtailed if one can afford it. However, one should not use such a right to the detriment of another. If one deems it appropriate to have legal representation, he should seek the same at the earliest opportunity.

I am aware that section 47(1)(b) of the MCA allows transfer of proceedings of any case from a primary court to a district court at any time before judgment. But, ordering a transfer of a case after closure of the defence evidence should be done sparingly. There has to be cogent grounds other than or in addition to legal representation. In the appeal at hand, the record shows that the Appellants readily gave their defence, and the case was fixed for visiting the *locus in quo* which would then be followed by fixing a judgment date. It is also on record that the prayer for visiting the *locus in quo* was unanimous. If the Appellant had an issue on the conduct of the trial, they ought to have stated the same before the district court and before this Court. Without sufficient explanations why it was deemed necessary to halt the hearing at that advanced stage, this Court harbours no hesitation to decide that the application was *malafide*. Engaging counsel appear to me to be an afterthought.

Two, as pointed out earlier, after the district court declined to grant the transfer request, the file was sent back to the trial court for continuation of the hearing. There is record that the Appellants were served with summons to appear for continuation of the proceedings but they declined service. They were duly served by the trial court on 2/3/2020 through Ward Executive Officer. They should have attended and informed the trial court of the existence of this appeal. The record shows that they were absent on 6/3/2020 and 16/3/2020. They thus left no option to the trial court other than proceeding to finality. Judgment was delivered on 23/3/2020 and was not appealed against. There is no record showing that the trial magistrate had knowledge of existence of the present appeal before delivering judgment. Ordering hearing of the case in either court at this stage may not be in the interest of justice. The best the Appellants can do at this point is to explore the possibilities of appealing against the decision of the trial court, if they are still aggrieved.

Consequently, the Appellants have failed to advance sufficient reasons warranting transfer of Civil Case No. 179 of 2019 from the trial court to the district court. This appeal is therefore devoid of merits. It is dismissed in its entirety. The decision of the district court is hereby confirmed. The Appellants shall pay the Respondent's costs.



Order accordingly.




Y. B. Masara

JUDGE

6th May, 2022