

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND REVISION NO. 6 OF 2021

(Originating from the decision of the District Land and Housing Tribunal for Mbeya at Mbeya Land Application No. 166 of 2020)

DAVID RAUDEN MWANGWALE (By virtue of special power of Attorney.....) APPLICANT

VERSUS

KAPITAO MAGALLA..... RESPONDENT

RULING

Ngunyale, J.

The applicant **DAVID RAUDEN MWANGWALE (By virtue of the special power of Attorney from Amosi Mista)** filed an application for revision in this Court. The applicant was aggrieved by the ruling of the District Land and Housing Tribunal for Mbeya at Mbeya, in land application no.166 of 2020 where the trial tribunal determined the matter in favour

of the respondent. The applicant filed chamber summons made under PART VIII, in s.79(1) and section (3) of the Civil Procedure Code (cap 33 R.E 2019) and s. 43(1)(2) and s. 44(1-3) of The Land Dispute Court Act, (Cap 216 R.E 2019), supported by an affidavit.

The applicant through chamber summons prayed for the following orders;

One, the Court be pleased to call for the records, examine the rulings and make revision and set aside the decision and orders of Mbeya District Land and Housing Tribunal in land case no. 166/2020. **Two**, costs of this application and any other reliefs the Court will deem fit to grant.

A brief background giving rise to this application may be stated that, the applicant represents one Amosi Mista through the special power of Attorney. At first during hearing of the main case Amosi Mista testify on his own. Later on, the applicant prayed before the Land Tribunal Chairman that he is sick and prayed to be represented by one David Rauden Mwangwale through Power of Attorney. The prayer was granted. But the learned counsel for the respondent prayed before the trial Tribunal to revoke such Special Power of Attorney for reason that the bearer is a bush lawyer and he had already represented Anna Mbwete in another application, therefore, he is not a relative of Amosi Mista. David Rauden

Mwangwale resisted the prayer, although he accepted that at once he represented Anna Mbwete.

The trial Tribunal granted the prayer as prayed by the learned Counsel on 5/05/2021, the Special Power of Attorney was cancelled on ground that he is a bush lawyer. The applicant was ordered to stand on his own to prosecute his case. From there the applicant could not attend before the trial Tribunal, hence the application was dismissed for want of prosecution.

David Rauden Mwangwale the bearer of Special Power of Attorney from Amos Mista preferred the present application for revision. The application was heard by way of written submissions. The applicant appeared in person, relying on the contents of the affidavit. Basing on paragraph 1 and 2 of the affidavit he submitted that he was granted with the special power of Attorney by Amosi Mista and he did abide to all legal procedures. The special power of Attorney was registered to a senior Assistance Registrar of Documents. It was tendered before the Land and Housing Tribunal. He annexed as annexure "ATTORNEY 1".

In his affidavit he deponed that the learned Chairman of the Tribunal revoked the power of attorney without legal justification. The applicant submitted that the trial Chairman failed to provide any circumstances of

the law which provide for the said revocation. The Chairman ended with an abuse to the legal processes infringing the legal rights of the applicant.

He further submitted basing on paragraph 4 of the affidavit that, the trial chairman used the rumours to revoke the special power of attorney. Each case was to be dealt in its circumstance, the allegations that he represented other persons were unfounded.

He further submitted that the documents he tendered followed all process as required by the law. He cited s. 14 of Law of Documents Registration Act, cap117; Order III Rule 2 of the Civil Procedure Code cap 33 R.E 2019, section 94 of the Law of Evidence Act Cap 6 R.E 2019, section 30 of The Land Dispute Courts Act Cap 216. All the above cited provisions were not considered in the trial tribunal ruling.

The preliminary objection raised orally by the respondent was defective because preliminary objection ought to be on point of law and not on point of fact. But it was raised orally during the hearing, and he did not state which provision has been contravened. The trial Chairman occasioned a failure of justice to act that way.

The applicant prayed that the ruling of the District Land and Housing Tribunal to be set aside and the applicant be allowed to represent Amosi Mista in the land case no. 166 of 2020.

In reply the respondent was represented by the learned counsel W.P. Mashoke from Mwakolo and Company Advocates. In his submission he submitted that what has been submitted by the applicant basing on his affidavit has been overtaken by event because the main case (application No. 166/2020), which the applicant is referring has been struck out for want of prosecution with cost.

The issue of the applicant was that it was struck out after he was recognized as a bush lawyer. It has been a tendency and custom, which is frequently done in the District Land and Housing Tribunal. The respondent counsel further submitted that he met with the applicant in two different cases apart from the current one. The applicant did not attend Tribunal proceedings until the case was struck out. The power of attorney by the applicant was revoked due to fraud and misrepresentation. The applicant claim that he is representing his uncle while the respondent stated that he is not known to their family.

The respondent counsel prayed this application be dismissed with costs.

The respondent counsel submitted that application no. 166/2020 has already been struck out. But there is no any ruling which has been attached in order to prove that the same has been struck out. The respondent counsel knows that the power of attorney was revoked

illegally. The said Amosi Mista (donor) was required to attend by himself. But he was still sick then he decided to notify the tribunal through two different letters about his absence. He annexed annexure marked BARUA letters where the donor used to notify the tribunal about his absence.

He went further to submit that the respondent counsel used the word bush lawyer which is an insult to the applicant. Hence it is for the court discretion to make a wise decision against respondent.

Having summarised the rival submission of the parties. There are **two main issues** to be determined; whether the applicant special power of attorney was legally granted and whether it was legally revoked.

Regarding the first issue as to whether the applicant special power of attorney was legally granted. It is important to understand the meaning of power of attorney. The power of attorney is a formal instrument by which one person empowers another to represent him or act on his behalf for a certain purpose. The power of attorney is governed by Order III rule 2(a) of the Civil Procedure Code [cap 33 R.E 2019] which provides;

The recognised agents of parties by whom such appearances, applications and acts may be made or done are;

(a) persons holding powers -of -attorney, authorising them to make appearances or application and to do such acts on behalf of such parties.

The donee of power of attorney is competent to go to Court and make an application on behalf of the donor, provided the instrument gives the donee such authority. The same was held in the case of **Emmanuel Marangakis as an Attorney of Anastasias Anagnostou V. The Administratoe General** , Civil Case No. 1 of 2011 , In the High Court of Tanzania(Main Registry) at Dar es Salaam(unreported), It was stated that;

“In this case by power of attorney, the said Anastasias Anaguoston appointed Emmanuel Marangakis, who is acting on his behalf herein to be an attorney and agent in respect of his interests in the estate of his late sister. The power of Attorney also gave the said Emmanuel Marangakis the power to donate the property by gift inter vivos to anyone, including himself by self-agreement and generally to deal with the property as he deemed fit”.

Therefore, from the case above the present suit was filed on behalf and in the name of the donor. As in this case at hand the applicant (donee) has an authority to attend before the tribunal on behalf of the donor. He was empowered under such power of attorney to prosecute and give evidence in land application no.166 of 2020 and all proceedings incidental thereto, to prosecute or defend any appeal, application or any other proceedings in any Court or Tribunal which was the result of the above case and to perform any and all relative matter for the fulfilment of the given authority.

Once the power of attorney has been made by the donor must be registered with the Registrar of Documents as per requirement of the Registration of Documents Act [cap 117 R.E 2019] for it to have legal effect. The same was done in this special power of attorney, it was registered by the registrar of title.

But before such power of attorney is granted there are reasons which legally allow one to make a power of attorney. It is necessary such reasons to be considered. Such that the donor is outside the jurisdiction of the Court, this means is outside the country and where the donor is unable to carry out his business in his own capacity, this may be due to some of the reasons such as accident which may cause incapacitation, serious illness, loss of legal capacity due to bankruptcy, old age and any other reasons recognised by the law as the case may be. In this case at hand the donor said that he is sick he cannot stand at his own therefore the applicant (donee) to have power of attorney. The same was provided in the power of attorney that the donor is having health problem. Those factors were mentioned in the case of **Hassan Marare Magori & Another v. Juma Marare & 4 others** (HCT) (1992) (Unreported), where it was stated that;

"...where the person who is party to a case is unable to pursue the case himself or herself for reasons of old age, sickness or where such party is dumb or deaf,

or when the party to the proceedings is away in a foreign country and getting such party back would be tedious or expensive. His lordship added that the donor of the power of attorney must be sure the donee of the power of attorney would step into donor's shoes and that the donor of the power of attorney must accept all the consequences that may arise in the course of the litigation. Lastly his lord ship said that the grant of the power of attorney should not be made subject to remuneration...."

The donor in this case on 8/4/2021 said that he is sick and he want to be represented by the applicant. In his letter dated 1/6/2021 said that he is still sick and he will not be able to attend at the tribunal and he has been hospitalised. Even in the special power of attorney the reason for such grant was health problems.

In my view I think the donor managed to establish that he has a good reason to appoint the attorney. Therefore, the special power of attorney was legally granted.

In the second issue as to whether the Special power of attorney was legally revoked. The law is very clear in this aspect that the principal is the one to revoke the power of attorney. This was held in the case of **S.Zahir Roshanali Hirani V. Registrar of Titles** [1990]TLR 122, the court stated that;

"... Revocation of a power of attorney is only effective if brought to the attention of the donee..."

In this case the issue is different whereby the donor did not revoke the power of attorney. But it was claimed by the respondent counsel in the trial tribunal that such power of attorney was granted to the person who is acting as a bush lawyer. This made the trial tribunal to nullify the said power of attorney. The law is settled that the special power of attorney should not be granted to the person who is there for carrying business or representation in Court for gain, in the present case it has not proved to the contrary. This is settled principle in the case of **Julius Petro V, Cosmas Raphael** [1983] TLR 346, Mwalusanya ,J held as follows;

"...appearance by a recognizes agent who works for a gain by dint of agency is expressly prohibited by section 41(1) and section 70 of the Advocate Ordinance implies that representation on behalf of the parties is not prohibited altogether but permitted in certain circumstances only; these are given under section 33 of the Magistrates Courts Act and in respect of the Civil Procedure Code, where a "genuine "recognized agent represents a party in a suit; and not a professional agent who makes his living by representing clients in court..."

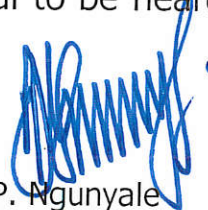
Therefore, the respondent counsel was supposed to prove before the trial tribunal that the applicant is a bush lawyer or the donor has no health problems. But there was no such proof. There were several factors the respondent counsel would have established for the applicant power of attorney to be revoked. But the reasons granted by the respondent counsel were not sufficient to revoke the power of attorney. The Tribunal

erred to revoke the power of attorney without sufficient grounds recognized in law and practice.

The law direct three modes of appearance before the Court of law. It may be in person, an advocate or recognized agent. Order III rule (2) of the CPC provide for the recognised agents. Therefore, the applicant was right to represent Amosi Msita.

Hence, the ruling by the trial tribunal is tainted with illegality, there is no reasonable ground for the said power of attorney to be revoked. The act done by the Tribunal prejudiced the applicant Amos Msita because his case was struck out for want of prosecution without justification.

I hereby invoke revisional jurisdiction under section 43 (2) of the Land Disputes Courts Act cap 216 R. E 2019, the entire proceedings and decisions reached by the trial tribunal are hereby nullified. The file to be remitted back to the trial Tribunal to be heard by another Chairman. No order as to costs.

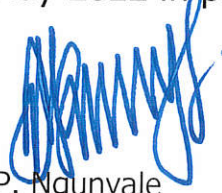


D. P. Ngunyale

Judge

31/05/2022

Ruling delivered this 31st day of May 2022 in presence of both parties in person.

A handwritten signature in blue ink, appearing to be 'D. P. Ngunyale', written over the text of the ruling.

D. P. Ngunyale

Judge

31/05/2022