

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA SUB-REGISTRY**

**AT ARUSHA**

**PC CIVIL APPEAL NO. 04 OF 2023**

*(Resulting from Civil Revision No. 3 of 2022 at the District Court of Karatu at Karatu. Emanated from Karatu Primary Court Civil Case No. 49 of 2022)*

**ADESIANA LEONCE \_\_\_\_\_ APPELLANT**

**VERSUS**

**KARATU DEVELOPMENT ASSOCIATION \_\_\_\_\_ RESPONDENT**

**JUDGMENT**

07/02/2024 & 08/03/2024

**BADE, J.**

The Appellant above named, was aggrieved by the Ruling of Karatu District Court dated 06/01/2023 (Hon. Mbonamasabo, Principal Resident Magistrate) appeals to this Court against the decision as mentioned earlier on the following grounds:

- i) That the trial magistrate issued an arbitrary decision based on assumed and extraneous matter not stemming from the record.

- ii) That the decision reached by the trial magistrate is wrong and arbitrary for failure to consider deponed facts and arguments by the parties advanced during the hearing.
- iii) That the trial magistrate was biased in hearing and deciding the Civil Revision No. 3 of 2022, consequently issuing a wrong decision.
- iv) That the decision issued by the trial magistrate is wrong in law for upholding the trial court's ruling disqualifying one Leonce Bura Amsi from representing one Adesiana Leonce without affording neither appointor nor appointee right to be heard on the reason for doing so.
- v) That in alternative to ground no. 4 above, the trial magistrate erred in law for not holding that the trial court was functus officio to discuss and rule on the reasons for representation of the appellant by Leonce Bura after issuing its approval on 16/09/2022.
- vi) That the trial magistrate erred in law for failure to quash the trial court's proceedings relating to the hearing of the raised preliminary points of objection which were mishandled and commenced to be heard as ordinary evidence (by examination in

chief, cross-examination, and re-examination) while it was a preliminary objection on point of law.

vii) That the decision issued by the trial magistrate is bad in law for failure for his failure to exercise his revision power against proceedings of the trial court despite the appellant's denial of a right to be heard, irregularity in handling case file, and biases on the part of the trial court in hearing and writing the ruling dated 07/11/2022.

viii) That the trial magistrate wrongly and without valid reasons ordered the appellant to pay costs of the case in Civil Revision no. 03 of 2022.

ix) That the trial magistrate erred in rejecting representation by power of attorney duly executed and registered pursuant to law.

The factual account of this appeal lies on the fact that the Respondent sued the Appellant before Karatu Primary Court, (the "trial court") claiming that the Appellant owes her a total of TZS 6,648,000 which is a loan and its interest she borrowed from the Respondent plus the cost for follow up of the said loan.

The Appellant appointed one Leonce Bura, her husband to be her representative in the suit while the Respondent appointed her accountant one Onester Elius to be her representative. Before the commencement of the hearing of the suit, the Appellant raised two points of preliminary objections to the effect that the suit was time-barred and that the Respondent instituted the suit in her name instead of the name of the institution which is Karatu Development Association (KDA).

The Trial Court concluded hearing the preliminary objections on the Appellant side on 27/09/2022 and adjourned the hearing to 10/10/2022 to hear the reply to preliminary objections on the Respondent side, but on that date the Respondent was absent and the suit was adjourned to 24/10/2022 where the Appellant was absent and the Respondent claimed that she was ready to reply to the preliminary objections. She argued that the Appellant aims to delay the suit or destroy it, praying for the Trial Court to intervene and rescue the situation. The suit was again adjourned to 01/11/2022. On that date the Appellant was again absent and the Respondent wrote a letter requesting a court to speed up in hearing the case and disqualify Leonce Bura as representative of the

Appellant on the reasons that he is a disrupter of the suit and is the one who helped the Appellant to defraud them by issuing a fake title deed. After receiving the complaint from the Respondent, the Trial Court adjourned the suit to 07/11/2022 for ruling on both prayers, i.e. prayer by the Appellant requiring the Trial magistrate to recuse and the prayer by the Respondent to disqualify Leonce Bura as the Appellant's representative. On that date, the Trial Magistrate ruled that he saw no reason advanced by the Appellant for him to recuse from conducting the suit and it granted the prayer of the Respondent, disqualifying Leonce Bura from representing the Appellant, required the Appellant herself to appear or if so wishes, to appoint another representative. The appellant was aggrieved by that decision and decided to knock on the doors of the District Court by way of a Revision application praying for the Court to call and examine the records of the proceedings of the Trial Court in respect of Civil Case No. 49 of 2022, to satisfy itself as to the legality, propriety, and regularity of the proceeding. They sought for the District Court to revise the said proceedings and make directives/orders as it deemed just and fair in the circumstance and provide for the costs of the application.

After the first Appellate Court heard the submission of both sides, the Magistrate upheld the decision of the Trial Court, proceeded to nullify all rulings in relation to the objections, and ordered the file to be remitted back to the Trial Court for continuation of the hearing before the same Trial Magistrate where it ended, before Leonce Bura was appointed as representative of the Appellant. The Magistrate also ordered the Appellant to appear before the Trial Court to continue with her case as the reasons she advanced are not among the reasons which make her legible for being represented. He also advised the Appellant to engage an advocate if she thinks it will be difficult for her to defend her case. Further, the District Court ordered Leonce Bura to pay costs for his disturbances. The Appellant was not amused by this decision, preferring the instant appeal.

In the instant appeal, the Appellant was represented by Leonce Bura, her personal representative, while her submission was drafted by Mr. Felichismi Baraka, advocate, while the Respondent appeared in person, unrepresented.

Concerning the 1<sup>st</sup> ground of appeal, Mr. Baraka submitted that the statement made by the Magistrate on page 4 paragraph 1 of the Ruling was neither introduced by parties nor has it any relevance to

Civil Revision No. 03 of 2022, instead, it was introduced by the Magistrate based on knowledge obtained from an unknown source contrary to law. Mr. Baraka further argues that as a result the Appellant was prejudiced because his side of the story was not considered or analyzed before reaching the decision, and denied the right to be heard and a fair hearing. He referred to this court on page 4 paragraph 2 of the Magistrate's Ruling, citing the case of **Juma s/o Hussein vs Republic, Misc. Criminal Case No. 18 of 2020** to support his position.

On ground 2 of the grounds of appeal, the counsel drew the attention of this court to the affidavit filed by the Appellant at the District Court specifically paragraphs 5, 6, and 9 where it pinpointed a number of irregularities in Civil Case no. 49 of 2022 reiterating the same during hearing of the Revision by the parties for directives. These irregularities/illegalities included the manner in which the point of preliminary objection was handled, denial of a right to be heard when disqualifying the Appellant's Representative to represent the Appellant, denial of the Appellant of the right to be heard on the concern as to the disqualification of the Trial Magistrate to continue

with the hearing of the case, and propriety of the Trial Court to overrule his previous decision as to representation of the Appellant.

Moreover, Mr. Baraka submitted that the counter affidavit filed by the Respondent had no material proposition in opposition to the facts deponed by the Appellant other than evasive denials, arguing that, constituting in law admission of the existence of the alleged irregularities. That, even during the hearing, the Respondent had nothing material in the contest of the pointed irregularities other than stating matters that are not reflected in her affidavit, adding that *instead of examining the alleged irregularities in the trial court's proceedings, the Magistrate seemed to make personal attacks to the Appellant's representative on the assertion that instead of representing the donor of the power of attorney, he started a new case. That, in the words of the Magistrate, it is as if a holder of the power of attorney or other representative of the litigants is forbidden by law to raise any legal concern even if it is apparent on the face of the case file. He referred to this court on pages 3 and 4 of the District Court's Ruling.*

Concerning the 3<sup>rd</sup> ground of appeal, Mr. Baraka submitted that the evidence that the Magistrate was biased is seen when the Magistrate



skipped from working on irregularities presented by the Appellant, and when he introduced in his Ruling matters not supported by the pleadings against the Appellant; resulting in prejudicing the Appellant by denying a fair hearing.

Arguing grounds 4, 5, 7, and 9, the learned counsel submitted that the Trial Court's record is clear that Leonce Bura was initially permitted to represent the Appellant pursuant to section 33(2) of the Magistrates Courts Act, [Cap 11 R.E 2019] (the "MCA") as her husband and members of the household to the family of Adesiana Leonce and there was no objection to this plea. The Respondent appeared before the Trial Court and prayed for the Court to remove Leonce Bura as representative of the Appellant on the reason that he was not related to the case, and on 07/11/2022, the Court proceeded to so do without according to the Appellant the right to be heard overturning its own decision which approved Leonce Bura to act on behalf of the Appellant. In his opinion, that decision was improper for two reasons, viz the Trial Magistrate was functus officio after issuing its order on 16/09/2022 approving the representation by Leonce Bura, and secondly, the decision was against the rules of natural justice on the right to be heard as neither the Appellant nor her

representative was heard before reaching that decision, and that the said decision contravenes the dictate of section 33 (2) of the Magistrates Courts Act, which allows representation of a party to a case by a member of the household/relative. Leonce Bura had both, a letter and registered power of attorney authorizing him to appear on behalf of the Appellant. He argues further that the denial of a right to be heard is fatal and renders the entire proceedings a nullity, citing the case of **Danny Shasha vs Samson Masoro & 11 Others**, Civil Appeal No. 298 of 2020 to support his position. His contention is that in the premises of the above arguments portraying the legal principles, the first appellate court was bound to nullify the entire Trial Court's proceedings for being tainted with irregularities, irrespective of whether the same decision was to be reached had the Appellant be given a right to be heard. He referred to this court on page 5 of the Court's Ruling.

On the 6<sup>th</sup> ground of appeal, the learned counsel submitted that it is common knowledge that a preliminary point of objection must be centered on a pure point of law, predicating the fact that its hearing is conducted either orally or through a written submission, arguing that was not what happened in the Trial Court, as the record reveals

that on 17/08/2022 the Appellant filed a notice of preliminary objection, on 16/09/2022 the Court scheduled it for hearing on 27/09/2022. On the said date the parties were sworn and testified as if they were adducing evidence, while in fact, they were only submitting on the said points of objection. This he insists is against a well-known procedure for hearing preliminary points of objection and on Revision, the District Court was legally supposed to give directives to the said irregularities in the conduct of the proceedings.

Arguing ground 8 of the grounds of appeal, the counsel submitted that the District Court wrongly and without a valid reason ordered the Appellant to pay costs for Civil Revision No. 03 of 2022. He referred to this court on page 5 of the Ruling, pointing out that the said order is legally unjustified nor is it supported by valid reasons. He contends that nowhere in the Ruling such disturbances by the Appellant's representative were reflected, making it apparent that the Magistrate was influenced by extraneous matters in the composition of the said Ruling and resultant order for costs making reference to pages 3 and 4 of the same.

**Opposing the appeal**, the Respondent submitted in response to the 1<sup>st</sup> ground of appeal that his understanding is that Leonce Bura was

allowed to represent the Appellant in Civil Case No. 49 of 2022 to speed up the hearing of the case, but what followed was a serious setback and complaints aiming at stalling the hearing of the case to date, pointing to the first hindrance as the preliminary objection that the case is time-barred. The Respondent further contended that objections were heard and before the Trial Court could give out its Ruling, the Appellant through her representative wrote a letter of complaint seeking recusal of the Trial Magistrate from the case since he had no faith in him, contending that the Trial Magistrate after examining the reason requiring him to recuse himself rightly found it *without merits and decided to continue with the case.*

He argues that on the same token, the Trial Magistrate disqualified Leonce Bura from representing the Appellant after finding that he is a disrupter and ordered the Appellant to appear herself and defend her own case.

Regarding the 2<sup>nd</sup> ground of appeal, the Respondent submitted that on the day when his objection was heard with respect to the power of attorney of the Appellant's representative, he was absent and no notice was given as to his whereabouts, hence the Court had to proceed ex-parte, and in his opinion, the Appellant cannot complain

that he was not given the right to be heard, arguing that the Appellant can only blame herself for this.

Responding to the 3<sup>rd</sup> ground of appeal, the Respondent submitted that the Ruling of the District Court is clear and effective finding no illegalities or irregularities that have been shown or occasioned by either the Ruling or the conduct of the Trial Court, that all parties were given a chance of fair hearing and each submitted for and against the Revision and still found no illegalities. He insists that there was no bias exhibited by the Magistrate, citing the case of the **Registered Trustee of Social Action Trust Fund and Another vs Happy Sausage Ltd and Others [2004] TLR 264** to support her position.

Responding to 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> grounds of appeal, the Respondent conceded to the fact that there was an order of the Trial Court allowing Leonce Bura to represent the appellant, and he was required to present a power of attorney. However, he failed to do so thus he did not comply with the said order, failing which could not have made the Trial Court functus officio. The Magistrate in his view, had the power to rescind the said order as he did. In further contention, he offered that when the matter was scheduled for necessary orders on

1/11/2022 after the Appellant's representative was disqualified from representing the Appellant, she did not appear without any reasons, so, the Trial Court had to continue with the case.

On the 6<sup>th</sup> grounds of appeal, the Respondent conceded to the fact that when the hearing of the objection was being conducted the parties were sworn before making their submissions, but was quick to justify it as the practice could not vitiate the proceedings or the actual hearing despite its unusualness in procedure and practice, since all parties were given the right to be heard and to respond, arguing that this situation is cured under section 37 (2) of the Magistrate Courts Act. The Respondent insisted that no failure of justice has been occasioned by this unusual way of hearing objection.

Concerning the 8<sup>th</sup> grounds of appeal, it is the Respondent's contention that the Trial Magistrate was right in condemning the Appellant's representative for costs after taking into consideration the whole Revision and the Ruling of the lower court and making a finding that there was no injustice caused; and parties should go back to the Trial Court and proceed with the hearing. To cement her position, she cited the case of **Bahati Moshi Masabile T/A Ndongdo Filling Station vs Camel Oil (T)**, Civil Appeal No. 216 of

2018. In her view, since the Appellant was challenging a decision that the first appellate court had no jurisdiction to revise or appeal (sic), it is justifiable for the Magistrate to order costs after the Revision proceedings as he did.

In the final account, the Respondent prays for the appeal to be found meritorious as it emanates from an interlocutory decision and dismisses it with costs.

In rejoinder, the counsel making submissions for the Appellant stood by his position adding that registration of a power of attorney used in court is not a legal requirement in Tanzania.

He also joined issue with the submission by the Respondent that this appeal offends section 33 (2) of the Magistrate Courts Act and is misleading the Court as the Appellant is challenging the decision of the District Court which had the effect of final determination of the matter before the District Court and therefore it is appealable by right.

The learned counsel discerns that there is a difference between an application for revision and other suits like an appeal, arguing that unlike an appeal where parties are expected to explain and expound

on the grounds of appeal, in an application for revision parties are expected to state in their affidavits facts forming the basis for revision. In further explanation, he states that an affidavit being a substitute for oral testimony can be well considered in composing a decision even if there will be no submission from the parties.

He also points out that the issue of *ex parte* hearing before the Trial Court is a new issue being introduced at this stage, as nowhere in the trial proceeding an ex-parte order is reflected, to which he objected.

On the argument that the Trial Court was not *functus officio* in its order to allow Leonce Bura to represent the Appellant, Mr. Baraka submitted that it is not a principle of law that representation in the Primary Court must always be done by a person holding a power of attorney. That, in the record of the Trial Court there is nowhere the Trial Magistrate issued an order for the Appellant's representative to submit a power of attorney for his status of representation to be complete, insisting that there was no justification for the Trial Court not to afford the Appellant's representative with the right to be heard on the concern raised by the Respondent.

I have perused the records of the file, and put into consideration the rival submissions made by the parties, and found the task before me



is to determine whether the District Court erred by upholding the decision of the trial court which disqualified Leonce Bura from representing the Appellant.

Section 33 (2) of the Magistrates Courts Act empowers a Primary Court to permit any relatives or any member of the household of any party to any proceedings of a civil nature, upon request by such party, to appear and act for that party. Subsection (3) on the other hand allows the employee of the body corporate duly authorized to represent that body corporate if it is a party to the suit. Now according to this section, the representer is not required to present a power of attorney as it was alleged by the District Court. What a relative or member of the household is required to do is only to pray for that representation and the Primary Court is at discretion to allow them or to reject their prayer. As seen on the record, both the Appellant and the Respondent presented their letters praying for the Trial Court to permit them to be represented by their respective parties. In the instant case, the Trial Court granted the prayer. It is also on record that before the hearing, the Appellant's representative raised two preliminary objections, and before the Trial Court could rule on the preliminary objections on 24/10/2022, the Respondent

prayed for the Trial Court to intervene and rescue a situation on the plea that the Appellant's representative one Leonce Bura has started some dramatic actions to destroy or delay the suit. On 01/10/2022 the Respondent's representative once again brought a letter praying that the Trial Court speed up the hearing of the case as well as disqualify the Appellant's representative on the reason that he is becoming a disrupter of the suit, while the suit is not related to him.

Based on this prayer the Trial Court adjourned the case to 07/11/2022 for the Ruling on the prayers of both parties, since the Appellant had also brought his own letter requiring the Trial Magistrate to recuse himself from hearing the case. On that appointed date the Trial Magistrate rejected the prayer by the Appellant's representative to recuse himself from hearing the case. Notably, the Magistrate also granted the prayer by the Respondent's representative, without affording the Appellant's representative the right to be heard on the allegations levelled against him, proceeding to disqualify the Appellant's representative from representing the Appellant, and ordered the Appellant herself to either appear or appoint another person to represent her.

This is a violation of one of the cardinal rules of natural justice. Where natural justice is violated, it is no justification that the decision was in fact correct. Natural justice is an irreparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statutes, unless there is a clear mandate to the contrary.

Needless to say, natural justice is the essence of fair adjudication, deeply rooted in our constitution and conscience in delivering justice to parties. It is really fair - play in action; something founded in equity, honesty, and right; it is the very essence of an inquiry and decision, entailing that the person enquiring must not carry any bias and must give a decision on a judicial basis. To comply with the cardinal principles of natural justice, it is mandatory that a Court/Tribunal must afford a reasonable opportunity to the parties to have their say and avoid arbitrariness.

In the case of **Abbas Sherally & Another vs Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) it was held by the Court of Appeal:

*"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by*

*the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

See also **Independent Power Tanzania Ltd & Standard Chartered Bank (Hong Kong) Ltd** (Civil Revision 1 of 2009) [2009] TZCA 17. In this case, the Justices of Appeal scolded the practice of not affording a fair hearing on a party in these words:

*"The prevailing view, however, is that a hearing before a decision is taken is a sine qua non of any judicial proceeding. We subscribe wholly to this view. The "hang him first and try him later" syndrome mockingly spoken about by Mark Twain, is an affront to the rule of law and our fair senses for justice. It is a relic of the past which is relished no more. "*

The argument by the Respondent's representative that it was an *ex parte* hearing as the Appellant's representative was absent does not hold water on the reason that if the Trial Court finds out that the Appellant's representative refused to appear before the court to defend his case, the best option would have been to continue with

the hearing of the case *ex parte* on the point raised and pronounce its reasoned decision at the end of the hearing.

Having said so this appeal is allowed. The file should be remitted back to the Trial Court before another Magistrate for a fresh hearing of the suit. According to the nature and circumstances surrounding this Appeal, I order no costs.

It is so ordered.

**DATED at ARUSHA this 08th day of March 2024**



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**A. Z. Bade**  
**Judge**  
**08/03/2024**

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **08th** day of **March 2024**



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**A. Z. BADE**  
**JUDGE**  
**08/03/2024**