IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

PC. CIVIL APPEAL NO. 157 OF 2022

RAMADHAN ULIMWENGU ..... APPELLANT

VERSUS

SHAWWAL ABDULAZIZ MSAMI ..... RESPONDENT

(Appeal from the Judgment and decree of the District Court of Kigamboni at Kigamboni
(K. M. Kariho, SRM)
Dated 8th day of September 2022
In
(Civil Appeal No. 8 of 2022)

JUDGMENT

Date: 21/09/2023 & 25/03/2024

NKWABI, J.:

The respondent lodged, in the primary court of Kigamboni district at Kigamboni, Civil Case No. 100 of 2021. The relief, the respondent was aspiring to be availed by the trial court was payment of T.shs 12,000,000/= being debt for unpaid school fees for the children and dependents of the appellant. Perhaps, reechoing Form C/F 52 which is used for filing a civil suit in primary courts would be helpful in clarifying what was claimed in the trial court:

MDAIWA NI MZAZI WA WATOTO (2) AMBAO WALIKUWA WAKISOMA KATIKA SHULE YA MDAI MSINGI NA

SEKONDARI, MTOTO WA MSINGI ALIMALIZA NA ALIKUWA ANADAIWA NA SEKONDARI ALIMUAMISHA HIVYO NAMDAI TSHS 12,000,000/=.

The respondent signed on the document to signify (own) the claim. It was on 25/10/2021. When the claim was read over and explained to the appellant, he replied that he knows he is indebted T.shs 3,000,000/= and not T.shs 12,000,000/=. The appellant signed under his statement which is quoted as above. The trial court entertained the matter on merit and delivered its judgement on 30th May 2022. It awarded the respondent T.shs 10,845,000/= which were to be paid by the appellant, according to the judgment. Piqued by the judgment of the trial court, he unsuccessfully appealed to the district court. The district court, before Kifungu Mrisho Kariho, SRM, dismissed the appeal in its entirety.

At the moment, the appellant, being discontented with the decision of the first appellate court, is in this Court striving to obtain a nullification order of the concurrent findings of the lower courts. He has two motives as I emulate:

1. That the first appellate court erred in law and facts by entering judgment in favour of the respondent who lacks locus standi to sue the appellant.

2. The honorable presiding magistrate in the first appellate court erred in law and in fact in improperly evaluating the evidence on record thereby reaching to unreasonable conclusion or findings.

Established on the above vindications of the appeal, the appellant is invocating this 2nd appellate Court to quash and set aside the decision of the 1st appellate court and grant the reliefs prayed by the appellant, costs and any other relief(s) this Court deems fit and equitable to grant.

I demanded the parties to dispose of the appeal by way of written submissions. The parties duly complied with that instruction. Mr. Saulo Kusakalah, learned counsel for the appellant drew and filed the submission in chief and the rejoinder submission. The respondent drew and filed the submission in reply by himself.

Mr. Kusakalah was of a strong stance, on the first ground of appeal, that the school is an institution, thus it is not proper for the respondent to sue in his own capacity. He cited among other cases a Malawian decision in **AG. V. Malawi Congress Party & Another,** Civil Appeal No. 32 of 1996 where it was held that:

"Locus standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he or she has an interest in the subject of it, that is to say unless he stands in sufficient close relation to it so as to give a right which require prosecution or infringement of which he brings."

He added that the proper way was the school to sue on its own capacity under section 26 (3) of the National Education Act, 1978, Cap. 353 R.E. 2002 which provides that:

"Upon the registration of a private school, the Commissioner shall issue to the owner or the manager of that school a certificate of registration in the prescribed form, and the owner or manager to whom it is given shall cause that certificate to be kept exhibited in a conspicuous place in the school."

The counsel for the appellant further made reference to section 2 of the Trustees Incorporation Act Cap. 318 R.E. 2002 saying it was incumbent on the school to apply for registration under the Trustees and Incorporation Act which according to Mr. Kusakalah, sections 2, 3 and 8 read together stipulate

for incorporation of associations of education, religious, scientific and other civic associations upon registration, the association becomes a body corporate with a common seal, perpetual succession and automatically acquire the right to sue in its name.

Mr. Kusakalah exemplified the case of **Board of Trustee of St. Thadeus Primary School v Board of Trustees of St. Thadeus Secondary School and Another,** Land Case NO. 26 of 2020 HC where this Court held that:

> *"... Upon perusing the Education Act, I have noted that the School Boards and School Committees are established under section 39 and 40 of the Education Act. Their functions are basically supervisory. The Education Act does not indicate that the School Board and School Committees shall have legal personality capable of suing and being sued.*
>
> *It is noteworthy that entities are creatures of statutes. They have to be registered under a specific law, such as the Companies Acct or the Trustees Incorporation Act or*

established by statutes which states categorically the legal personality of an entity established therein ..."

Then, the counsel for the appellant stressed that the exhibit which is a bank slip which was tendered by the respondent was signed by the appellant and the management of the registered school, thus the respondent had nothing to do with the appellant accordingly. He urged I find that the respondent lacks the locus standi to sue the appellant in Civil Case No. 100 of 2021 in the trial court.

In reply submission, the respondent maintains that he is the registered owner/manager of Daarul Arqam School, so the respondent is trading as such and cites section 26(3) of the National Education Act for requirement of registration. He is of a stand view that a school so registered has no locus standi to sue or of being sued. As the owner of the school, he has interest in his school, pointed out the respondent. He can sue to claim for the unpaid school fees. He cites the Civil Procedure Act. He was of the opinion that the counsel for the appellant has misconceived the provisions of the Trustees Incorporation Act. He added that the appellant did not tender any document in the trial court to prove that the respondent is a registered trustee. He prays the ground be held to fail.

In rejoinder submission, the counsel for the appellant reiterated his submission in chief that the respondent lacked locus standi to institute the case. He beefed up that there is no any proof that Daarul Arqam and Shawwal Abdulaziz Msami are the same person and if he were trading as Daarul Arqam he was supposed to make it clear at the beginning and plaintiff at the trial court supposed to be Shawwal Abdulaziz Msam t/s Daarul Arqam.

The counsel for the appellant decried the introduction of Tax identification number in the reply submission which he says is prohibited in **VETA v Ghana Building Contractors & Another,** Civil Case No 198 of 1995 HC (which he did not provide a copy) and **Bish Inter & Another v. Charles Yao Sarkodie,** Civil Case No. 9 of 2006 HC (without attaching a copy).

It is added that the power of attorney was not tendered nor admitted at the trial court. Further it is contended that one Mgumi was not indicated anywhere at the trial court that he was holding a power of attorney which was required as per **Afro Aid Development Consultants (T) Ltd v. The Commissioner for Lands, & 4 Others,** Land Case No 80 of 2019, (HC). So, it was not proper to use his evidence and document tendered by him to be expunged, pressed Mr. Kusakalah. To that end, he cited **AMC Trade**

Finance Ltd v. Sanlam General Insurance (Tanzania) Ltd, Civil Appeal No. 393 of 2020 to the effect that document not admitted in evidence should not be used in determining the suit.

I have had an ample time to go through the submissions of both parties. I have also closely examined the trial court's record in respect of the evidence on record. I have no doubt that in failure to raise the objection at the earliest time, the appellant was aware that objection would require evidence, thus would not fit in the threshold of **Musika Biscuit Manufacturing Co. Ltd. v. Westend Distributors Ltd.** [1969] EA. 696 and **COTWO (T) OTTU Union & Another v Hon. Idd Simba, Minister of Industries and Trade and Others** [2002] T.L.R. 88 CAT where in the latter case, it was stated that a preliminary objection rests on assumptions that:

a. It must be pure point of law.
b. It must be based on ascertained facts.
c. It must not touch on the Court's exercise of judicial discretion, and lastly
d. It must be able to dispose of the matter before the court completely.

Did the appellant give evidence on that allegation that the respondent has no interest in the matter for this Court to decree that in fact the respondent has no locus standi? The appellant testified as SU1. He said nothing about the respondent having no any locus standi. It should be remembered, submissions from the bar are not evidence thus cannot be relied on deciding on factual issue. See **The Republic v. Donatus Dominic @ Ishengoma & 6 Others,** Criminal Appeal no. 262 of 2018, CAT, (unreported) which quoted with approval the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2 EA where it was stated:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

It is trite law that he who alleges must prove. Because the appellant was a defendant in the trial court had the onus of proof as opposed to the burden of proof. See **Sarkar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon,** 14th Edition 1993 at P. 1338 where it was underscored thus:

> *"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but*

the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

He failed to discharge that onus, the complaint should be disregarded. To say the least, all the provisions of the law and the case law cited by the counsel for the appellant are irrelevant in the circumstances of this case.

Concerning the complaint about the power of attorney, I think that the same is as well unjustified. One Mngumi Samadani Suied, the donee of the power of attorney, signed the form for lodgment of the suit due to the power of attorney, instead of the respondent himself one Shawwal Abdulaziz Msami, the donor. Matters pertaining to power of attorney are matters of evidence and will be determined once there is any at the earliest stage as stated in **Hamidu N. M. Mandagani v. Raynold Msangi & Another,** [2007] T.L.R. 405, Massati, J.

"I agree, on the other hand, that in principle, a power of attorney is to be used to represent persons who are absent from the local jurisdiction of the Court, or with physical disability. However, once again, I am of the firm view that whether or not a person is in or outside the local jurisdiction of the Court or whether or not he is physically or mentally

unfit are questions of fact ... unless the same are not disputed they cannot properly be determined at this stage."

In evidence, the appellant complained nothing about it. He cannot be heard to complain at this stage. The 1st ground of appeal is therefore unmerited. I accept the submission maintained by the respondent while I disapprove the submissions of the counsel for the appellant. It is crumbles to the ground.

On the second ground of appeal, the counsel for the appellant, he complains that one person namely Mgumi Samadan Sued who is legal representative of the respondent, when he testified before the trial court, he did not tender the power of attorney as exhibit to give him mandate to act as a recognized agent as required under Order III Rule 1, 2(a) (b) & 6(1) (2) of the Civil Procedure Act Cap. 33. R.E. 2019. He backed his view with **Afro Aid Development Consultants (T) Ltd** (supra) where it was stated that:

"I am in accord with Mr. Roman that DW3 was supposed to tender the power of Attorney to form part of his evidence since the said annexure attached to the plaint is not evidence. The 5th defendant was in a position to call DW3 to testify in court without obtaining the power of attorney save for the documentary tendered in court. For that reason, I

cannot rely on DW3 evidence is expunged from the court record."

It was added by Mr. Kusakalah, in connection to that, failure to adduce the evidence by trial court and failed properly to formulate the issues which pave the way on making decision since it was noted that, there is a voluntary agreement between the said school and appellant herein, hence the court failed to make equitable findings by evaluating clearly the evidence adduced by the parties.

It is further elucidated that the clear evidence which shows that the appellant paid T.shs 500,000/= for orphans or charity was included in the claim. He prayed the 2nd ground of appeal be determined in favour of the appellant

In the end, the counsel for the appellant prayed the appeal be allowed, the judgment, decree and orders of the trial court be quashed and set aside with cost and any other reliefs this Court may deem fit and just to grant.

In reply submission, the respondent stated that Mgumi Samadan Sued represented the respondent through power of attorney dated 16th day of September 2021 which was filed in the trial court and showed to the appellant, thus the case cited by the counsel for the appellant is irrelevant.

It is added that Mgumi acted on behalf of the respondent, the owner of the schools.

In respect of T.shs 500,000/= the respondent maintained that it is not reflected in the judgment of the trial court because the trial court awarded only 10,845,000/=. He stressed, the appellant admitted a debt of T.shs 9,700,000/= as proved from the copy of the trial court judgment at page 3. It was also admitted by the appellant through issuing of a dishonoured cheque in the name of Kangwete Engineering Co. Ltd and the description of debt of each student was submitted to corroborate the statement of the school accountant. It is prayed that the 2nd ground of appeal be dismissed. To wrap it all up, the respondent prayed that I dismiss the appeal with costs for want of merits while upholding the concurrent findings of the trial court and the first appellate court.

I have no doubt that by the appellant sending his children and dependents to the school of the respondent to study, there was a contract between the parties. That contract be it written or oral, is not disputed by any party to this appeal. Parties to this appeal should bear in mind that parties to a contract have to honour their obligations as stated in in **Philipo Joseph**

Lukonde v. Faraji Ally Saidi [2020] 1 T.L.R. 556 where it was stressed that:

> *"Once parties have entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."*

See also **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018, (CAT) where it was underscored that:

> *"On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19(1) of the Law of Contract Act, Cap. 345 R. E. 2002."*

Now, this being a second appellate Court, in what to do, I am guided by **Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores v.**

A.H. Jariwalla t/a Zanzibar Hotel [1980] T.L.R. 31 where it was stated that:

> *"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

I having revisited the evidence on record, I think that the trial court was entitled to decide as it did because there is the evidence from SM.3 Hawa, the bursar, who testified that the appellant is indebted T.shs 10,845,000/=. The added T.shs 1,155,000/= as disturbance charge *(fidia ya usumbufu)* was properly disregarded by the trial court. The appellant had nothing in substance to cross-examine SM.3. This witness corroborated the evidence of SM.2, Juma.

The appellant's defence has nothing to negate the strong evidence of the respondent. Actually, there is exhibit 2 *(Kilelelezo Na. 2)* which shows that the appellant is not trustworthy. On 15/03/2018 he issued a cheque of an amount of T.shs 12,000,000/= via Kangwete Engineering Co. Ltd which bounced. That being the position, I have nothing to fault the concurrent

findings of the lower court. For avoidance of doubt, failure to properly frame the issue, is not fatal. Further, for suits originating from primary courts, the Civil Procedure Code, Cap. 33 R.E. 2022 is inapplicable.

In the upshot, I dismiss the appeal with costs for being patently devoid of merits. The concurrent findings of both lower courts are upheld.

It is so ordered.

DATED at **KIGOMA** this 25th day of March, 2024.

J. F. NKWABI
JUDGE