

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

PC CIVIL APPEAL NO. 16 OF 2023

(C/F Civil Appeal No. 06 of 2023 of Moshi District Court; Original Shauri la Madai

Na.01/2023 of Kirua Vunjo Primary Court)

GUSTAVU AGUSTI SHIRIMA APPELLANT

VERSUS

PROSPER ROBERT NJAU (Administrator of the estate of the late Robert Focus Njau) **RESPONDENT**

JUDGMENT

22/01/2024 & 26/02/2024

SIMFUKWE, J.

This is the second appeal. The factual background of the matter briefly is that, the respondent herein instituted a civil case against the appellant before Kirua Vunjo Primary Court (the trial court) claiming TZS 10,000,000/=, which were deposited into the account of the appellant. The said monies were deposited by the deceased Robert Focus Njau on agreement of buying shares

for partnership with the appellant Gustavu Agust Shirima in the Logistics project. It was alleged by the respondent herein that the appellant had refused to pay back the said amount or comply to the agreement which he had entered with the deceased. In the alleged agreement, the appellant was supposed to pay the said deceased a profit of TZS 100,000/= every month. The records show that upon demise of the said Robert Focus Njau, the respondent herein, successfully sued the appellant before the trial court whereby the appellant herein was ordered to pay Tshs 10,000,000/- to the respondent within three months. The appellant being aggrieved with the said decision, unsuccessfully appealed to the District Court of Moshi at Moshi (first appellate court). Still aggrieved, the appellant preferred the instant appeal on the following grounds:

- 1. That, the honorable court first appellate court erred in law by disregarding binding authorities of higher courts and reached erroneous decision that the trial court was vested with territorial jurisdiction.*
- 2. That, the honorable first appellate court erred in law by affirming that the respondent is an administrator of the estate of the deceased without any proof on record.*

- 3. That, the court erred to transfer burden of proof to the appellant who was the defendant at the trial court to prove existing of partnership agreement with the deceased.*
- 4. That, the court erred to find that the monies deposited into appellant's account was for the purpose of partnership agreement without any proof.*
- 5. That the first appellate court erred to affirm the decision of trial court condemning the appellant to pay TZS 10,000,000/= to the respondent within three months without any legal basis.*

On account of the above grounds of appeal, the appellant prayed this court to allow the appeal, quash and set aside the decisions of the trial court and the first appellate court.

When the appeal was set for hearing the appellant and the respondent were unrepresented. The hearing of this appeal was conducted through filing written submissions.

Supporting the first ground of appeal, the appellant contended that the common law doctrine of stare decisis which is applicable in our jurisdiction

requires superior court's decision (precedent) to bind courts subordinate to it. Thus, the first appellate court was bound by the authorities which were cited. The appellant faulted the first appellate court for disregarding the cited authority of **Daniel Godwin Mamkwe vs Paul Temu**, Civil Appeal No. 7 of 2021.

Elaborating the first ground, the appellant continued to submit that **section 3 of the Magistrates Courts Act** [Cap 11 R.E 2019] provides that the territorial jurisdiction of the primary court is within the district it is established. He cited further rule 10 of the **Magistrates Courts (Civil procedures in Primary courts) Rules** G.N 310 of 1964 which allows parties to institute proceedings relating to immovable property at the place where such immovable property is situated. The appellant stated that, in this matter, the cause of action arose within Rombo District and the parties are residents of Kirua Vunjo within Moshi District. He believed that Kirua Vunjo Primary Court had no jurisdiction to determine the matter as per **section 3 of the Magistrates Courts Act** and **the Magistrates Courts (Civil Procedure Code) Rules** (supra).

Arguing the second ground, the appellant submitted that, the first appellate court misdirected itself by concluding that, there was a letter of administration tendered as exhibit to prove that the respondent was appointed as administrator of the estate of the deceased. That, as per the court's records of 21st February the respondent tendered two exhibits only; the alleged partnership agreement and NMB bank fund transfer slip. To cement his argument, the appellant referred the case of **Shahali Vicent vs Richard Charles**, Misc. Land Appeal No.14 of 2019 (Tanzlii) in which the court insisted that there should be documents to prove the appointment of administrator of the estate instead of mere words. He affirmed that the respondent lacked **locus standi** to prosecute the claim.

Concerning the third ground, the appellant submitted that the trial court erred in law in holding that there was partnership agreement as per the requirement of **section 190 of Law of Contract Act** (Cap 345 R.E 2002) which is to the effect that partnership is a creature of law not status. That, once partnership is formed, the same is required to be registered under **Registration of Documents Act (Cap 117 R.E 2002)**. The appellant complained that the proceedings of the trial court and the district court did not show if the legal requirement was adhered during the formation of the

said partnership. He alleged further that the said partnership deed agreement lacked witnesses and it was merely a letter which both courts below wrongly relied upon as exhibit.

On the fourth ground of appeal, the appellant condemned the first appellate court for finding that the monies deposited into the appellant's account were for the purpose of the partnership Agreement without any proof. He insisted that, the appellant is very close relative to the deceased and the deceased had neither wife nor child. He said, he was the one who took care of him when he was sick and they used to assist each other in numerous things. He faulted the first appellate court for failure to consider those facts when composing its judgment.

Submitting on the fifth ground, the appellant claimed that the first appellate court ordered him to pay TZS 10,000,000/= within three months without any legal basis. He said that the agreed amount was Tshs 100,000/=.

In his final remarks, the appellant implored this court to revisit the proceedings of the trial court and first appellate court and allow this appeal.

In reply to the first ground of appeal that the trial court had no territorial jurisdiction, the respondent made reference **to section 3(1) of the**

Magistrates' Court's Act (supra) which provides that, the territorial jurisdiction of the primary court is within the respective district in which it is established. The respondent admitted that as per the case of **Mrisho s/o Pazi vs Tatu d/o Juma (1968) HCD 119** a party may file a case in any primary court within the district even though his or her choice causes inconvenience and expense to the defendant. He added that, as per the case of **Ahmed H. Suleiman vs Salvatory Christopher**, Civil Appeal No. 49 of 1984 (HC) Dar es Salaam (1986) (unreported) the primary court may in such a case exercise its discretion and disallow or reduce the costs of the plaintiff, if he or she succeeds in the case.

The respondent expounded further that, the territorial jurisdiction of primary court extends to the whole district as per the Fourth Schedule to the MCA and **Magistrates Courts (Civil Procedure in Primary Courts) Rules** (supra) which stipulates that: a primary court has a territorial jurisdiction; (i) in respect of the immovable property where the immovable property is situated; (ii) if the immovable property is situated within the jurisdiction of different courts, the proceeding may be instituted in any court within the local jurisdiction of which any portion of the property is situated (iii) where the cause of action arose and where the defendant is ordinarily resident.

Based on the above-mentioned factors, the respondent believed that he met all the requirements when he instituted the case at hand as Kirua Vunjo which is located within Moshi Municipal. Thus, the primary court of Kirua Vunjo had jurisdiction to determine Civil case No. 01/2023. He contended that the appellant's submission that Kirua Vunjo is located in Rombo District does not hold water.

Responding to the issue of stare decisis, it was averred that, the case which was referred by the appellant is distinguishable to the circumstances of this case.

Replying the second ground of appeal that there was no proof that the respondent was the administrator of the estates of the deceased, the respondent submitted that the records show that he was the administrator in Mirathi No. 22 of 2022 as it was upheld by the first appellate court. The argument that the letter of administration was not tendered and admitted in court has no legal basis as the same was tendered and admitted in court as exhibits. He insisted that he had locus standi as celebrated in the case of **Registered Trustee of SoS Children's Village Tanzania vs Igenge Charles**, Civil Application No. 426/08 of 2018 (CAT) at Mwanza (Unreported)

in which the Court subscribed to the decision of the Supreme Court of Malawi in the case of **Attorney General vs Malawi Congress Party and Another**, Civil Appeal No. 32 of 1996 which observed that:

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

Moreover, the respondent argued that the law is settled that a party who commences proceedings in representative capacity, must plead and attach the instrument constituting the appointment. He stated that failure to plead and attach the instrument of appointment is a fatal irregularity which renders the proceedings incompetent for want of necessary standing as stated in the case of **Ramadhani Omary Mbuguni (as legal representative of the late Rukia Ndaro) vs Ally Ramadhani and Another**, Civil Application No. 173 of 2021 (CAT) at Tanga.

On the third ground of appeal where the appellant faulted the trial court for shifting the burden of proof to him; the respondent contended that the requirement to register was fully complied with. Therefore, the said argument should be disregarded and the decision of the district court should be upheld.

Countering the fourth ground of appeal that the first appellate court erred to find that the monies which was deposited into the appellant's account was for the purpose of partnership agreement without any proof, the respondent submitted that there was no witness in the said agreement to prove that the money which was transferred into his account was a gift to assist in construction of his house and that the deceased never claimed back the money.

On the last ground of appeal that the first appellate court erred to affirm the decision of the trial court which ordered the appellant to pay Tshs 10,000,000/= within three months, the respondent supported the findings of the first appellate court on the reason that there was proof of existence of partnership agreement between them.

The respondent implored this court to dismiss the appeal with costs and uphold the decision of the District Court.

In his rejoinder the appellant reiterated his submission in chief and added that, the letter of administration was attached without being tendered which was a fatal irregularity.

I have thoroughly gone through the grounds of appeal, the lower courts' records as well as submissions for and against this appeal. Apparently, since there are concurrent findings by the two lower courts, this court will not interfere such findings on points of fact unless it is found that the concurrent findings are perverse, demonstrably wrong or clearly unreasonable or a result of complete misapprehension of the substance, nature or non-direction of the evidence or violation of some principles of law or procedure. Recently, the Court of Appeal confirmed the said principle in the case of **Shakila Lucas vs Ramadhani Sadiki** (Civil Appeal 349 of 2020) [2024] TZCA 36 (14 February 2024) Tanzlii at page 12 by stating that:

"Ordinarily, a court can rarely interfere with concurrent findings of facts by two courts below save where there are mis-directions or non-directions on the evidence, or where

there was a miscarriage of justice or a violation of some principle of law or practice...”

In another case of **Idd Hamis v. R (Criminal Appeal No. 119 of 2022)** **2024** TZCA 67 (20 February 2024) at page 5 the Court of Appeal buttressed that:

*"As we sit to determine this matter, we wish to restate what is now a certainty in our legal system, which is that, when it sits on a second appeal, this Court should rarely interfere with concurrent findings of the lower courts on points of fact. It should only do so if the concurrent findings of fact are perverse, demonstrably wrong or clearly unreasonable or a result of complete misapprehension of the substance, nature or no-direction of the evidence or violation of a principle of law or procedure – see **Mussa Mwaikunda v. Republic** [2006] T.L.R 387; and **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported)."*

Starting with the 1st ground of appeal which faults the trial court and the first appellate court on the issue of jurisdiction. It is trite law that jurisdiction of the court is the creature of statute. The court cannot assume the jurisdiction

not conferred upon it by the law. In the case of **Yohana Balole vs Anna Benjamini Malongo**, Civil Appeal No. 18 of 2020, (CAT), the Court discussed the concept of jurisdiction and stated that:

"It is common ground that jurisdiction of the court is a creature of statute and is conferred and prescribed by the law and not otherwise. The term "jurisdiction" is defined in Halsbury's Law of England, Vol.10 paragraph 314 to mean "... the authority which the court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim or as to the area which jurisdiction extended or it may partake of both these characteristics,"

See also the case of **Aloisi Hamsini Mchuwau & Another vs Ahamadi Hassan Liyamata**, Criminal Appeal No. 583 of 2019 (CAT).

In the matter at hand, the trial court being the primary court its territorial jurisdiction is governed by the law that established it, which is the **Magistrates Courts' Act** (supra). Section 3(1) of the Act, provides that:

"There are hereby established in every district, primary courts which shall, subject to the provision of any law for the time being in force, exercise jurisdiction within the respective district in which they are established."

In the present case therefore, in order to determine whether the trial court had the required territorial jurisdiction to entertain the matter at hand, two things are to be looked at; that is, defendant's residence and the place where the cause of action arose. This is provided under **Paragraph 1(b) of the Fourth Schedule to the Magistrates Courts Act** as rightly submitted by the respondent.

According to the record, roman (iii) of the agreement titled "**MKATABA WA KUNUNUA HISA**" indicated that the project was within Moshi Municipality. Thus, Kirua Vunjo primary court which is within Moshi district had territorial jurisdiction to entertain this matter. Based on that fact, I find the first ground of appeal devoid of merit.

On the second ground of appeal, the appellant lamented that there was no proof that the respondent was the administrator of the estate of the late Focus Robert Njau or Robert Focus Njau as referred by the parties. On the other hand, the respondent argued that he had *locus standi* as he was appointed as administrator of the deceased's estate through Mirathi Na. 22 of 2022 and there are evidence and exhibits to that effect.

It is trite law that for any person to sue on behalf of the deceased person, he/she must be administrator/administratrix of such deceased person. In other words, such person must establish that he/she had *locus standi* at the time of instituting the suit.

While addressing this issue, the trial court at page 3 of its typed judgment had this to say:

"Kwa kujibu hoja hizo mahakama tumechambua kwa kina ushahidi uliowasilishwa pande zote mbili na tumeridhika vya kutosha kuwa mdai ni msimamizi wa Mirathi ya Marehemu Robert Focus Njau kama ambavyo ushahidi na vielelezo vinajieleza, kupitia Shauri la Mirathi Na. 22/2022."

In the judgment of the trial court, the respondent herein who was the plaintiff is indicated to be the administrator of the estate of the deceased Robert Focus Njau.

Also, the first appellate court had an opportunity to discuss this issue whereby at page 7 of its judgment it found that:

"...I have passed through the proceedings of the Kirua Vunjo Primary Court and found that respondent was appointed as administrator of the estate of the deceased via letters of administration in Mirathi no.22 of 2022. Therefore, the Respondent is an administrator of the deceased estate hence this ground of appeal has no merit."

I had ample time of perusing the proceedings of the trial court. The issue of *locus standi* of the respondent was among the raised issues for determination. After considering evidence and exhibits tendered, the trial court was satisfied that the respondent herein was the administrator of the estate of the late Robert Focus Njau. It is settled that the trial court is the best in assessing credibility of witnesses compared to the appellate court. In

the case of **Ally Abdallah Rajab v. Saada Abdallah Rajab [1994] TLR 132**, it was stated that:

"Where a case is essentially one of fact in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to erroneous conclusion."

In the case of **Kaimu Said v. Republic (Criminal Appeal 391 of 2019) [2021] TZCA 273** (7 June 2021) at page 15, the Court discussed the importance of considering and evaluating evidence so as to arrive at a balanced conclusion.

In the instant case, as quoted herein above, both courts below considered and evaluated evidence adduced by both parties and concluded that the respondent had *locus standi*. In the circumstance, I do not see any justification to disturb concurrent findings of fact of the two courts below.

The same applies to the 3rd, 4th and 5th grounds of appeal which are to the effect that the trial court erred to decide in favour of the respondent while there was no proof nor legal basis. The trial court and the first appellate court upon consideration of evidence of both parties found that the claim against

the appellant was proved on balance of probabilities. At page 4, second paragraph of its judgment the trial court stated inter alia that:

"Pia kielelezo Bank Statement ya NMB inaonyesha muamala wa Tshs. 10,000,000/= kuingizwa kwenye akaunti namba yenye namba 40302515316 yenye jina Gustavu Agusti Shirima ambaye ni mdaiwa katika shauri hili. Ilikuwa ni jukumu la mdaiwa kuieleza mahakama kama kweli hajaingia makubaliano na marehemu aliingiziwa pesa za nini. Mdaiwa amuogope Mungu, mtu akifariki siyo kigezo cha kutaka kudhurumu haki zake. Msimamizi wa mirathi anajukumu la kukusanya mali za marehemu, kulipa madeni ya merehemu kama yapo, kukusanya madeni ya merehemu kwa faida ya warithi halali."

The first appellate court after evaluating evidence on record found that the appellant alleged that the money which was deposited into his account by the deceased was a gift. It was the opinion of the first appellate court that there was no proof that the deposited money was a gift to the appellant. I totally agree with the findings of the two courts below that the partnership agreement and the fund transfer slip sufficed to prove that the deposited money was for buying shares and not a gift. The appellant is trying to twist

words of the deceased which he filled in the fund transfer slip that he deposited the monied for the project and building his house. Therefore, the three grounds of appeal are also devoid of merits.

In the event, the decisions of the trial court and the first appellate court are upheld accordingly. Hence, the appeal is dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 26th day of February 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

26/02/2024