

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

CONSOLIDATED PC CIVIL APPEALS NOS. 2 & 12 OF 2020

Arising from judgments and decrees of Masasi District Court, respectively,
Civil Appeal No. 17 of 2019 and No. 15 of 2019. Original Civil Cases Nos. 6 &
7 of 2018

HAMIS MOHAMED.....APPELLANT

VERSUS

DAMIAN MICHAEL MGALAGASYE.....RESPONDENT

JUDGMENT

10 Nov. & 10 Dec., 2020

DYANSOBERA, J.:

This is a second appeal in which the appellant has set out two grounds of appeal reproving the judgments and decrees of the first appellate District Court of Masasi as follows:-

1. That the appellate court erred in law and fact when failed to observe that the respondent has no locus standi to sue the appellant in his personal capacity.
2. That the appellate court erred in law and fact to observe that a mere letter filed by the respondent in the Primary court is as good as the special power of attorney.

The facts relevant for determination of these appeals may be summarised as follows. In Civil Case No. 6 of 2018 before the trial Primary Court, the respondent's claims against the appellant was couched in the following terms:

“Namdai mdaiwa fedha taslimu Tshs. 13, 572,700/= ambazo ni thamani ya mali ya dukani ambayo alikuwa anachukua wakati tofauti hadi kufikia kiwango hicho na makubaliano ya kurejesha hizo fedha ulikuwa kila baada ya siku 7 au siku 14 lakini mdaiwa ameshindwa kufanya hivyo kwa muda wote huo na kufikia deni kuwa kubwa”

The evidence led by the respondent to establish the above claims showed that he was claiming that sum from the appellant while acting as a representative of Nilesh Patel. He made reference to exhibit P. 2. According to the respondent, there was a time he and the appellant entered in to a written agreement after the appellant failed to pay the claimed amount and it is due to that failure that the respondent instituted the suit against the appellant. The respondent insisted during cross examination that he was suing the appellant as a representative and on behalf of Nilesh Patel and not as an advocate.

Mr. Honorius Kando (PW 2), a Resident Magistrate stationed at Masasi District Court testified in support of the claim. He recalled that the appellant and Nilesh Patel went to the office whereby the latter owed the former some money and agreed that in case the appellant defaulted payment, two houses would be in the hands of Nilesh Patel as mortgaged property. PW 2 further testified that after the agreed time had elapsed, the appellant went to him and asked for extension of time but PW 2 told him that he had no such power as he acted as a mere witness and advised him to ask Nilesh Patel.

PW 2 swore that during the agreement before him, the respondent was not present.

In his defence, the appellant denied to owe the respondent. He argued that he had contracted with Nilesh Patel to work at with him for five years, that is from 2011 to June, 2017 and that when he was in need of some goods, Nilesh Patel would supply them to him as remuneration or payment in return of the service rendered. The appellant also denied to have entered into any contract before PW 2.

The appellant was supported in this by Nileshkumar Shashbhai Patel (DW 2) who testified that he knew the appellant who was his friend and that they were in good terms. It was DW 2's evidence that the appellant met his (DW2's) wife and told her that he wanted to start business at Mwena and they gave him goods on credit. Further that they were giving him money amounting to Tshs. 40,000,000/= but then he was robbed and suffered a loss. He then went to Court and mortgaged a house as security and before the said court he admitted the debt which amounted to Tshs. 13, 000,000/=.

The same respondent instituted a suit- Civil Case No. 7 of 2018 against the appellant claiming as follows:

Namdai mdaiwa fedha shs. 20, 205, 000/= ambazo mdaiwa aliingiziwa kwenye akaunti shs. 15, 000,000/= ili mdai akirudi safari yake aje atoe afanyie shughuli zake za biashara na fedha shs. 5, 205,000/= hizo alichukua vifaa vya dukani kwake kwa makubaliano ya kurejesha kwa kila wiki. Na mdai baada ya kurudi safari fedha hiyo hakuikuta kwenye akaunti an kufanya deni ninalomdai ni shs. 20,205,000/=.

In his testimony, the respondent emphasised that he was representing Nilesh Patel after he had appointed him to be his representative. The appellant denied to have made any transaction with the respondent. He also denied to owe Nilesh Patel.

At the end of the day, the trial court found that the respondent was legally representing Nilesh Patel and that the claims against the appellant had been proved. It ordered the appellant to pay the respondent the claimed and adjudged amount.

The appellant's first appeals at the District Court of Masasi were dismissed hence these appeals.

Due to the nature of these actions, the two appeals have been consolidated. This judgment, therefore, covers two appeals, namely, PC Civil Appeal No. 17 of 2019 (Original Chikundi Primary Court Civil Case No. 6 of 2019) and PC Civil Appeal No. 15 of 2019 (Original Chikundi Primary Court Civil Case No. 7 of 2018).

Following the consolidation order, the parties become as follows:

Hamis Mohamed.....Appellant

Versus

Damian Michael Mgalagasye.....Respondent

At the hearing of these appeals, Mr. Shadrack Rweikiza, learned Advocate stood for the respondent whereas the Appellant prosecuted the appeal on his own.

Arguing in support of the appeals, the appellant asserted that he had no communication with the respondent on either borrowing or receiving any thing and wondered in what capacity was the respondent suing him. The appellant also questioned the validity and legality of the 'power of attorney'.

In his response to the 1st ground of appeal, Mr. Rweikiza was of the view that the respondent had locus standi to sue the appellant. He contended that the said respondent appeared as a representative of Nilesh

Patel through a letter filed in the trial court which letter was not objected by the appellant. He said that the respondent's appearance on behalf of Nilesh Patel was proper. Reliance was placed on section 33 (2) of the Magistrates' Courts Act [Cap. 11 R.E.2019] and further that the respondent's appearance was valid under rule 21 of the Primary Courts Civil Procedure Rules, GN No. 310 of 1964. It was learned counsel's argument that the court was not requested to order Nilesh Patel to appear physically and, therefore, challenging the respondent's appearance at this stage is an afterthought.

On the second ground of appeal, Mr. Rweikiza responded by arguing that the letter was valid and sufficient to prove the representation and that the appellant did not object to its admissibility meaning that he agreed the document to be a proper authority authorising the respondent to represent Nilesh Patel. He emphasised that failure to cross examine a witness on an important matter implies the acceptance of the truth of the evidence. Counsel for the respondent relied on the cases of **Bomu Mohamed v. Hamis Amiri**, Civil Appeal No. 99 of 2018 and **Nyerere Nyague v. R**, Criminal Appeal No. 501 of 2010 quoted at p. 12 in the above cited case. Mr. Rweikiza urged this court to dismiss this appeal.

The appellant reiterated his grounds of appeal and submission in chief when re-joining.

I have considered the records of the lower courts and the arguments of both the appellant and Mr. Shadrack Rweikiza, learned counsel for the respondent. In issue in this appeal is whether the respondent was legally competent to sue the appellant in his personal capacity. This is the appellant's complaint in his first ground of appeal.

There is no dispute and the record is clear that the respondent at the trial court featured as the claimant. It is indicated in the complaint form as follows: **Jina la Mdai: Damian Michael Mgalagasye**. Besides, the first sentences in the claim forms run as follows:

“Namdai mdaiwa fedha.....”

The said form was signed by the very respondent as a claimant. All this indicates that the respondent was suing the appellant in his personal capacity. The respondent’s argument which is also reflected in the evidence that he was suing on behalf of and as a representative of Nilesh Patel is not borne out by his own pleading, the written statements of the claim, in particular. The trial court was, therefore, wrong to entertain the suit which had been filed by a wrong person who had no *locus standi* to sue the appellant in his personal capacity. Likewise, the first appellate District Court miserably erred in finding as the trial court did, that the respondent had *locus standi*. The argument by Mr. Shadrack Rweikiza that the respondent had *locus standi* and appeared at the trial court as a representative of Nilesh Patel through a letter filed in the trial court is but a misconception as will be demonstrated later in this judgment. The appellant’s first ground of appeal has merit.

In his second ground of appeal, the appellant is challenging the first appellate court’s finding that the letter filed by the respondent at the trial court qualified as a power of attorney.

In his judgment, the learned Resident Magistrate in the District Court, in upholding the judgment of the Primary Court, observed at page 3 of the typed judgment as follows:

“What is the law says, where one issued power of attorney to another, the court in which trend taken place, is the primary court

which is codified with written laws and customary law as recognised via JUDICATURE AND CUSTOMARY LAW IN PRIMARY COURT 1963 (JALA)

The primary court normally applies customary laws, is a court which does not apply technicalities of laws. Therefore, the letter written by Nilesh Patel, to authorise respondent to stand for him, was made under customary law which is codified and recognised in primary court....”

With respect, the learned Resident Magistrate went off tangent. Apart from the fact that I am at a loss to grasp what he meant by the phrase ‘JUDICATURE AND CUSTOMARY LAW IN PRIMARY COURT 1963 (JALA)’, I am certain that a power of attorney is a legal instrument that gives another party authorisation to represent or act on behalf of someone in affairs relating to legal matters. Not any document can be termed as a power of attorney. The issue for determination in this second ground of appeal is whether the document the lower courts relied on as authority for the respondent to sue the appellant qualified as a power of attorney properly so called.

According to the records of the lower court, the letter subject of this ground is couched in the following terms:

*"NILESH PATEL
CHIKUNDI
S.L. P.22'
NDANDA*

*HAKIMU MAHAKAMA YA MWANZO CHIKUNDI
S.L.P. 88
MASASI
YAH: KUMTEUA NDG. DAMIAN M. MGALAGASYE KUSIMAMIA
KESI YA MADAI DHIDI YA HAMSIS MOHAMEDI.*

*Somo tajwa hapo juu
Nimemteua Ndugu Damian M. Mgalagasye kuniwakilisha katika
kesi ya madai dhidi ya Ndugu Hamis Mohamed.
Naomba asimamie badala yangu.
Ahsante
Sgd
Nilesh Patel.”*

As rightly argued by the appellant, the said document did not qualify as a power of attorney envisaged under Order III rule 2 of the Civil Procedure Code. According to the above provisions, all acts and appearances by the attorney must be made or done on behalf of and in the name of the principal. The said document lacked signature of the attorney acknowledging the appointment, there was no details of what the attorney was required to do, the said document was not attested and no reasons were given by the principal for making the power of attorney. The argument by the Resident Magistrate at the District Court that the document was made customarily holds no water because a power of attorney is a legal instrument which must abide by the legal requirements.

Even if, for the sake of argument, the said document qualified as the power of attorney, it is doubtful if the same was applicable in a Primary Court in view of the provisions of sections 2 and 3 of the Civil Procedure Code which define court by excluding primary courts.

Even then, representation in Primary Courts is as stated by Mr. Rweikiza, governed by section 33 (2) of the Magistrates' Courts Act [Cap.11 R.E.2019] and rule 21 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964. Section 33 of the Magistrates' Courts Act provides as hereunder:-

“33.

(2) Subject to the provisions of subsections (1) and (3) of this section and to any rules of court relating to the representation of parties, a **primary court may permit any relative or any member of the household** of any party to any proceedings of a civil nature, **upon the request of such party, to appear and act for that party.**"(Underlining mine)

Further Rule 21 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules states that

"21.

When any party to a suit appears by a relative or member of his household and it appears to the court that for the purpose of arriving at a just decision in the matter it is necessary for the party to appear in person, it shall adjourn the hearing to another day and direct such party to appear on such day."

Going by the said provisions, permission by the primary court to a person to be represented is discretionary and not automatic. In the present matters, there was no suggestion leave alone indication that Nilesh Patel applied before the Primary Court to be permitted to be represented by the respondent and the Primary Court exercised its discretion and granted the permission. Besides, there was no evidence that the respondent was the relative or a member of the house hold of Nilesh Patel so as to qualify to appear and act for him. In such circumstances, I am constrained to hold that Primary Court erred in permitting the respondent to sue the appellant in the capacity as he did. The provisions of section 33 (2) of the Magistrates' Courts Act [Cap. 11 R.E.2019] and rule 21 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964 were wrongly invoked in the circumstances of this case. Whether or not the

appellant consented to the production of the said letter was inconsequential as the respondent lacked *locus standi* altogether. The cases cited by the learned advocate for the respondent are inapplicable and distinguishable. The appellant's second ground of appeal is also meritorious.

Assuming that the respondent was properly authorised by Nilesh Patel to represent him in those two matters, still, the claims were not proved as the evidence of the respondent was mere hearsay and inadmissible. This is particularly so because, it appears Nilesh Patel appointed the respondent as holder of power of attorney and surrendered everything to him including testifying in court on his behalf. This is clearly demonstrated by the fact that the respondent in proof of the sum of Tshs. 13, 572,700 in Civil Case No. 6 of 2018 and the sum of Tshs. 20,205,000/= in Civil Case No. 7 of 2018 fielded only one witness that is Honorius Kando (PW 2). Nilesh Patel was not called to testify in support of the claims. Besides, PW 2 was clear in his evidence that when the appellant was admitting the debts and mortgaging his property before him (PW 2) at the office, the respondent was not present. This means that the evidence of the respondent that the appellant owed Nilesh Patel the said sums of money was but a hearsay, inadmissible and incapable of being acted upon to found liability. It should be recalled that donors of power of attorney should be very careful when giving powers of attorney. As I understand it, powers to testify in court cannot be delegated otherwise, it would be a hearsay as was the case here.

In the upshot and for the reasons stated above, I allow the appeals, quash and set aside the decisions of the lower courts. The respondent is condemned to pay costs to the appellant here and in the courts below.

Order accordingly.




W. P. Dyansobera

Judge

10.12.2020

This judgment is delivered under my hand and the seal of this Court on this 10th day of December, 2020 in the presence of appellant, the respondent and Mr. Robert Dadaya, learned advocate for the respondent.

Rights of appeal to the Court of Appeal explained.




W. P. Dyansobera

JUDGE