

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT TANGA

MISC. LAND APPEAL NO.97 OF 2008

*[From the decision of the District Land and Housing Tribunal  
of TANGA District at TANGA in Land case Appeal No.48 of 2008  
and original Ward Tribunal of MOMBO – KOROGWE Ward]*

YAHAYA DAUDI MBURA.....APPELLANT

VERSUS

MANSOOR DAUDI MBURA.....RESPONDENT

Date of last order; 15/11/2011

Date of Judgment: 18/11/2011

#### JUDGMENT

Mussa, J;

This is a second appeal originating from the Mombasa Ward Tribunal. In those proceedings, the appellant sued his blood brother, the respondent, over a piece of land comprised on plot No.6B, Block "A", Mombasa urban area. It was common ground that the appellant mounted the suit through Majid Daud Mburu; in favour of whom a special power of attorney was duly executed. Again, it was commonplace that before the Ward Tribunal, three witnesses were featured in support of the case for the appellant and; these were, namely, Majid Daud Mburu, Juma Kichenje Katibu and Yahaya Daudi Mburu, respectively, witnesses Nos.1 to 3. It may be pertinent to apprise, at this stage, that Yahaya is, actually, the donor of the power of attorney. In a nutshell, the appellant gave testimonial account to the effect that the premises at issue were his belonging and; indeed,

the offer of a right of occupancy comprised in the trial record is drawn in his name. The respondent did not quite refute the detail about the plot being a belonging of the appellant. Nonetheless, he took pains to elaborate that he entered upon it on the instructions of his father in the wake of an encroachment by a third party. At the close of a contested enquiry, it was the appellant who emerged the winner. Dissatisfied, the respondent preferred an appeal to the Tanga District Land and Housing Tribunal. Amongst his grounds of appeal, there was this:-

*... having admitted Mr. Majid Daud Mbura as holding the power of attorney to persecute (sic) the whole case on behalf of the respondent erred in law by again admitting the physical presence of the respondent to persecute the same along Majid Daud Mbura after the later (sic) had concluded his function described in the power of attorney.*

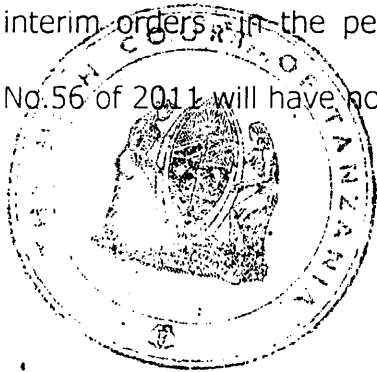
Upon due consideration, the District Tribunal upheld the extracted grievance in consequence of which the trial proceedings were, seemingly, set aside. In doing so, the first appellate Tribunal paid full homage to a decision of this court comprised in **Parin A.A. Jaffer and Another Vs Abdulrasul Ahmed Jaffer and two others [1996] T.L.R. 110**. That case, it should be recalled, related to an appearance, application or act that may be done to a court by a recognized agent, on behalf of a party; in terms of Rules 1 and 2 of Order III. Thus, it was held: Where the principal himself/herself enters appearance, makes

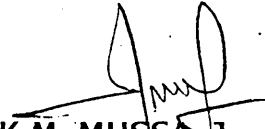
an application or does to court any given act; his/her attorney would, then, have no *locus standi*. To me, what was decided in *Parin* pertains, exclusively, to the appearance or the taking of certain courses of action by a recognised agent on behalf of the principal. The decision did not relate to the situation, as here, where the principal enters appearance for the purpose of making testimony. In his own right, the appellants' appearance for testimony was, in my view, not derogative of the power of attorney. To insist upon more would be to overstretch the scope of the provisions of Rules 1 and 2 of Order III. As has been previously stated:-

*A person may act and represent another person, but we know of no law or legal enactment which can permit a person to testify in place of another (Nafco V. Mulbadaw [1985] T.L.R. 88).*

All said, I am disinclined to endorse the District Tribunal's finding to the effect that the trial proceedings were vitiated by the appellants' appearance as a witness. On account of the Tribunal proceeding on that footing, the matter was not decided on its merits. I should assume, the powers of this court on appeal are inclusive deciding a matter on the merits where appropriate. Stepping into the shoes of the first appellate court, I so find, on the strength of the three witnesses, that the appellant established his claim on a balance of probabilities. If anything, the respondent cannot be allowed to capitalise on lame excuse; to grab upon a belonging of another. In the result, the decision of the trial Tribunal

is, accordingly, resurrected with costs. I note that the respondent applied for interim orders in the pendency of this appeal. Given the verdict, application No.56 of 2011 will have no legs to stand on and is, hereby, vacated.



  
K.M. MUSSA, J.  
15/11/2011


18/11/2011

Coram: Mussa, J.

Appellant: Present [donee of power of attorney]

Respondent: present

Judgment pronounced.

  
K.M. MUSSA, J.  
18/11/2011