IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPEAL NO. 01 OF 2023

(Originated from the judgment and decree of the District Court of Mpanda at Mpanda in Civil Case No. 07 of 2022 before Hon. G.B Luoga, SRM)

1. **DAVID THADEO KANANGU**
2. **GAUDENCE THADEO KANANGU**
3. **NOEL THADEO KANANGU**
4. **FREDRECT THADEO KANANGU**
5. **EMMANUEL THADEO KANANGU** ..... **APPELLANTS**
6. **SABINA THADEO KANANGU**
7. **GENOVEVA THADEO KANANGU**
8. **FRANK THADEO KANANGU**

VERSUS

JOSEPH MATINDE.....**RESPONDENT**

JUDGMENT

13th December, 2023 & 19th March, 2024

MRISHA, J.

The present appeal is premised on a four (4) ground memorandum of appeal filed with the court by the abovenamed appellants following the

decision of the trial court namely the District Court of Mpanda at Mpanda which upon a full trial, entered judgment in favour of the respondent, Joseph Matinde and proceeded to order the appellants to pay the former a total sum of Tshs. 49,000,000/= as a principal sum for their allegedly breach of contract with the respondent.

The grounds of appeal through which the instant appeal is pegged on, can be paraphrased as follows: -

1. That, the judgment and proceedings of the trial court are not maintainable as the same are tainted with several irregularities which vitiate the whole proceedings and judgment.
2. That, the judgment, proceedings of the trial court cannot be maintained as the trial of the case against the appellant was not open and the case was prosecuted by a person who has no locus standi to do so.
3. That, the trial court erred in law and fact by deciding the matter in favour of the respondent who failed to prove his case on the required standard as far as the standard of proof in civil cases is concerned.

4. That, the trial court erred in law and fact by its failure to make evaluation and analysis of evidence hence reached to the erroneous decision.

Through the above memorandum of appeal and the raised grounds, the appellants pray for the following orders: -

i. That, this appeal be allowed with costs.

ii. That, the judgment and decree delivered by the District Court of Mpanda at Mpanda in Civil Case No. 07 of 2022 be quashed and set aside.

The appeal was heard by way of written submissions and both parties abided to the court scheduled order by filing their respective written submissions timely. As for legal representation, the appellant enjoyed the services of Ms. Sekela Amulike, learned advocate whilst the respondent represented himself and filed his own drafted, but understood brief written submission.

Commencing with the first ground of appeal particularly on the first point alleging irregularity, Ms. Sekela Amulike submitted that Order VIII rule 40 (1) of the Civil Procedure Code, Cap 33 R.E 2019 (The CPC) requires the case to be set for Final Pre Trial-Conference (Final PTC) soon after the mediation fails.

She relied on the case of **Bunda Town Council & Another vs Elias Mwita Samo & Others,** Civil Appeal No. 309 of 2021 in which the Court of Appeal emphasized the provisions of Order VIII, Rule 40 (1) of the CPC are couched in mandatory terms especially where the negotiation, conciliation, mediation or arbitration fails.

In applying the above principle to the case at hand, the learned counsel submitted that the trial court failed to conduct a Final PTC contrary to the above legal requirement, as is shown at page 7 of the trial court typed proceedings where the trial court just indicated that:

> *"**COURT**-This suit is due for hearing after mediation was marked failed"*

It was the argument of the learned counsel that from the above excerpt, it is apparent that after failure of mediation process, the trial magistrate did not conduct a Final PTC. She was of the view that such omission is bad in law as it goes contrary to the mandatory requirement of law; hence vitiates the whole proceedings of the trial court.

In respect of the second point supporting ground one, the appellants counsel submitted that the trial court failed to set appropriate speed track of the case in accordance with the law as provided under Order

VII, Rule 22 (3) of the CPC which failure, the counsel argued, rendered the whole trial court proceedings null and void.

She referred to page 3 of the trial court typed proceedings where the trial magistrate wrote that:

"Speed track is agreed case to be finalised on 24 April, 2023."

According to the learned counsel, the above entails that the trial court just agreed upon only the time frame upon which the matter could be finalised and not the speed track of the case which also is bad in law for lack of legal procedure.

As for the third point of the first ground of appeal, it was the submission of the appellants counsel that the trial magistrate committed another irregularity by his failure to make mediation session/records confidential as provided under Order VII, Rule 31 of the CPC which specifies that Mediation proceedings is confidential between the parties and Mediator.

Conversely, the learned counsel submitted that the trial court proceedings were not kept confidential as it appears at pages 5 to 6 of the trial court typed proceedings. She finally argued that such act influenced the decision of the trial court.

Arguing in respect of the fourth point supporting the first ground of appeal, Ms. Sekela Amulike submitted that the trial court misdirected itself by permitting the respondent's representative to appear and be heard before it without such person tendering a Power of Attorney for it to be admitted by the trial court.

In a bid to bolster her stance, she made reliance on the case of **Ramadhani Omary Mbuguni vs Ally Ramadhani & Another**, Civil Application No. 173 of 2021.

Back to the instant appeal, the appellants counsel submitted that Mr. Katobasho claimed to represent the appellant without producing a Power of Attorney before the trial court and worse still he sometimes acted as if he was an advocate while in actual sense, he was not, which is contrary to the law, as it was emphasized in the case of **Richard Patrick and Another vs Elizabeth Mpendakazi** [2014] TLR 549 that:

> *"...holders of power of attorney should not only perform their roles diligently but also should not transform themselves into the like of advocates."*

The last point supporting the first ground of appeal was to the effect that the trial court framed issues for determination without consulting

parties. In that regard, Ms. Sekela Amulike submitted that the trial magistrate misdirected himself on that omission, which is contrary to the law as provided under Order XI, Rule 1 (5) of the CPC which requires the trial court upon ascertaining what material proposition of fact the parties are at variance, to frame and record the issues on which the right decision of the case appears to depend.

She referred to page 7 of the trial court typed proceedings where it is shown that the trial court framed issues without involving the parties which irregularity, the counsel argued, goes to the root of the case; hence rendered the whole trial proceedings not maintainable. She, thus, prayed to the court to set aside the judgment and decree of the trial court.

Turning to the second ground in which the appellants complains that the case against them was prosecuted by a person without a *locus standi*, the appellants counsel relied on the case of **Lujuna Balonzi Snr vs Registered Trustees of CCM** [1996] TLR No. 203 where it was stated that:

"Locus standi is governed by Common law, according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with"

In applying the above principle to the present case, Ms. Sekela Amulike argued that one Mr. Katobasho who appeared on behalf of the respondent (plaintiff) in the case before the trial court, had no *locus standi*; hence she was of the view that his appearance before the trial court was illegal and contrary to the law.

She added that representation, as the one done by the abovenamed person, ought to have complied with the proper procedure and not just by him appearing in court, as he did. To cement that proposition, the learned counsel referred the court the case of **Monica Danto Mwansasu (by virtue of Power of Attorney from Atupakisye Kapyeia Tughalaga) vs Esrael Hosea and Another**, Land Revision No. 2 of 2021.

Still on the fifth point, the appellants counsel submitted that the Power of Attorney suffered another irregularity because it was not registered as per the law contrary to what was emphasized in the case of **Rashidi Salimu vs Sabina Sumari**, Misc. Land Case Appeal No. 51 of 2019.

The learned counsel went on putting more salt on the wound by submitting that in dilution of the law, on the 02.12.2022 one Mr. Katobasho continued to illegally appear before the trial court even when

the respondent (plaintiff) himself entered appearance before the trial court.

She argued that the law provides that a Power of Attorney ceases when the principal/donor appears, as it was held in the case of **ParIn A.A. Jaffer and Another v. Abdurasul Ahmed Jaffer and Two Others** [1996] TLR 110 that:

> *"...Where, however, the principal under a power of attorney applies to or appears before the court, his attorney has no locus standi"*

As for grounds three and four of which Ms. Sekela Amulike proposed to merge and argue altogether, it was her submission that civil cases are decided on the balance of probabilities. In that regard, reliance was made on the cases of **Anthony Masanga vs Penina Kitira and Lucia Maiko** [2015] TLR 46 and **Export Trading Co. Ltd vs Mzartc Trading Co. Ltd** [2014] TLR 242.

Having relied on the above cases, the learned counsel submitted that the trial magistrate failed to evaluate and analyse the evidence adduced during the trial which render the trial court to reach to the erroneous decision by holding that the respondent had proved his case on the balance of probabilities.

She further argued that in the case before the trial court though there was a contract between the appellants and the respondent which was admitted as Exhibit P1, the respondent failed to prove that the same was breached which was indeed necessary for the respondent so to prove in order for his claim to succeed.

As if that was not enough, Ms. Sekela Amulike submitted that although in the course of his evidence the respondent testified that the appellants got another investor who paid them some money, no proof whatsoever was produced by him before the trial court that there was such investor. Hence, it was her argument that mere allegation without proof cannot sustain the said allegations.

The learned counsel further submitted that the appellants disputed categorically that proposition from the respondent as according to their evidence, there was no any other investor and that the production of minerals had not yet commenced. Hence, the counsel argued that in the circumstance, it was not possible and it was contrary to the terms of contract between the appellants and the respondent to commence payment before commencement of production; to hold otherwise would be absurd and contrary to the principle of sanctity of contract.

Moreover, while referring to article 4 and 5 of the contract which was tendered and admitted as Exhibit P1, the appellants counsel argued that because the production of gold had not yet commenced, it was absurd and indeed contrary to the wording of the contract for the trial court to order the appellants to refund the respondent.

The counsel further submitted that as the breaching party was the respondent by his act of illegally instituting the case, hence the rightly cited case of **Abualy Alibhai Azizi vs Bhatia Brothers Ltd** [2000] TLR 288 which was quoted by the trial magistrate in the course of composing his judgment, applies against him, not the appellants.

In winding up her submission, Ms. Sekela Amulike submitted that despite having a duty to prove his claims on the balance of probabilities, the respondent failed to prove his allegations of contractual breach and even the trial court did not reason how and when the contract was breached. Based on the foregoing submissions, the appellants counsel urged the court to allow the instant appeal with costs, quash and set aside the judgment and decree of the trial court.

In his response to the above counterparts' submissions, the respondent submitted that the appellants first ground of appeal is devoid of merits. He argued that since mediation failed, just as the mediator had recorded

in the trial court's proceedings, there was nothing to be put confidential on what was tried to be mediated.

Also, as regards the issue of final pre-trial conference and speed track of case, the respondent argued that since all parties were laymen, the trial court could not adhere to those requirements.

Concerning the fourth point, the respondent submitted that the allegation raised in that point is not true because he gave the power of attorney to Mr. Katobasho on 29th March, 2022 which was accepted by the trial court. He went on submitting that although he filed the suit himself, he decided to give Mr. Katobasho power of attorney for him to attend before the trial court on his behalf due to being busy.

He further argued that registration of Power of Attorney is necessary under section 96 of the Land Registration Act, Cap 334 only on matters relating to land, but the case between him and the appellant was about a breach of contract; hence, it was not necessary for his Power of Attorney to be registered.

Regarding the complaint that the trial magistrate framed issue without consulting parties, it was the respondent's submission that since both parties were laymen, the trial court could not consult them because they knew nothing about framing of issues.

As for the second ground of appeal, the respondent submitted that the same is devoid of merits because he is the one who instituted suit and Mr. Katobasho just came late with a Power of Attorney granted by him which was accepted by the trial court.

In regard to the third and fourth grounds, the respondent submitted that the same are also devoid of merits because the case against the appellants was proved to the required standard. He added that the whole case based on the deed of agreement tendered before the trial court as Exhibit P1 which was not objected by the appellants who borrowed money from the respondent to the tune of Tshs. 54,000,000/=, but they never paid it back to him.

Based on the foregoing submissions, the respondent implored the court to find that when there is contract, every party to it should clearly fulfil the agreed terms as per the contract and that the principle of sanctity of contract should not be misused by just hiding around the bushes. He thus, concluded by praying that the appeal be dismissed with costs.

In rejoinder, Ms. Sekela Amulike maintained her previous submission that the fist ground of appeal has merits as the same is based on legal procedures which are the creature of statutes, therefore, the same need be followed and adhered to by the courts of law as well as the parties.

She also reiterated her previous prayer to the court to find fault in the trial court's proceedings as by leaving them in the trial court's file such act affected the trial magistrate's mind in his decision.

Also, the learned counsel argued that final pre trial conference and setting of a proper speed track of case is a procedural matter and the procedural laws knows no one; hence, it was necessary for the trial court to conduct a final pre trial conference, as it was emphasized in the case of **Bunda Town Council and Others vs Elias Mwita Samo and Others**, Civil Appeal No. 309 of 2021.

On the issue of entertaining a person with no locus standi, the appellants counsel submitted that one Mr. Katobasho had no legal stand to represent the respondent. On the issue of trial court's failure to consult the parties, it was her submission that framing of issues is an important aspect of trial that is why both parties and the trial magistrate are supposed to frame issues after parties' consultation.

Regarding ground number two, the learned counsel submitted that the power of attorney alleged to be given to the respondent's donee was not presented before the trial court for it to form part of the trial court proceedings as the trial court records do not show it the same was accepted by the said trial court.

In her submission in chief in respect of the remaining two grounds, Ms. Sekela Amulike contended that the respondent failed to prove his case on balance of probabilities as he did not lead evidence before the trial court to show that there was breach of contract between him and the appellants and if that is not enough, the respondent also failed to prove whether there was another investor the fact which was disputed by the appellants.

With the above submission, the appellants counsel prayed for the court to consider what she had stated in her submission in chief and in her rejoinder submission and proceed to quash and set aside the proceedings, judgment and decree of the trial court.

Those were the parties' rival submissions. Now the court's determination of the instant appeal. As it has already been stated above, the appellants have come up with four grounds of appeal with a view to fault the decision of the trial court.

On my part, having gone through the above submissions together with the authorities referred thereto, the entire records of the trial court and the impugned judgment, I find that the issue for determination is whether the present appeal has merits.

I will start with the first ground in which the appellants have argued that the trial court's judgment and proceedings are not maintainable for being tainted with several irregularities. Although the respondent has tried his level best to show that there were none, but on my careful reading of the trial court proceedings, I am of the settled view that there were serious irregularities which not only go to the root of the case at hand, but also renders the judgment and proceedings of the trial court to be null and void.

For instance, in the third point supporting the first ground of appeal, it has been argued by the appellants' counsel that the trial magistrate committed an irregularity by his failure to make mediation records confidential which according to her, is contrary to the requirement of Order VII, Rule 31 of the CPC which specifies that mediation proceedings is confidential between parties and the mediator. She referred the court to pages 5 to 6 of the trial court's typed proceedings to support her proposition.

At this juncture, I wish to make it clear that while I agree with Ms. Sekela Amulike that it is a mandatory requirement for the mediator to make the records of the mediation confidential, with all due respect to

the learned counsel, I do not agree with her that such requirement is provided under Order VII, Rule 31 as she would like the court to believe.

Order VII of the CPC provides for a plaint and it has got only eighteen (18) rules, whereas as Order VIII of the CPC which in my considered opinion is the correct one, provides, inter alia, for mediation and in particular, Rule 31 of Order VIII provides for confidentiality of mediation records. For ease of reference, I propose to reproduce it as hereunder:

> *"31. Confidentiality*
>
> ***All communications at a mediation session and the mediation notes and records of the mediator shall be confidential*** *and a party to a mediation may not rely on the record of statement made at or any information obtained during the mediation as evidence in court proceedings or any other subsequent settlement initiatives..." [Emphasis is mine]*

Going by the above provision, it is obvious that the records of mediation session are not supposed to be disclosed to other persons not involved in mediation session, particularly the trial magistrate. The mediator is bound to ensure that the same are being kept confidential throughout the whole proceedings involving the parties to a particular case so as to avoid influencing the trial magistrate.

In the case of **EAC Logistic Solution Limited vs Falcony Marines Transportation Limited**, Civil Appeal No. 1 of 2021 (HCT at Kigoma, unreported) my brother Mugeta, J. had the following to say regarding the necessity of keeping mediation session records confidential: -

"It is a settled rule of practice that when mediation fails, mediators are not supposed to put on record reasons that broke it down. The rationale is simple, mediation process is confidential if it fails, disclosure of information can prejudice the trial magistrate/judge. In such cases the duty of the mediator is limited to recording the failure in this form: -

*"**Court/Order**- Mediation has failed..."*

While I subscribe to the above commentary from my brother Mugeta, J., I wish to say that the above rule applies to the instant case where it appears plainly that after failure of mediation session, the mediator of parties herein did not comply to the requirement of Order VIII, Rule 31 of the CPC. The above court's observation is fortified by the typed proceedings of the trial court particularly at page 6 of the same where the mediator recorded thus:

*"**2nd Defendant**: I am ready for mediation*

***1st Defendant**: I am ready too*

***Plaintiff**: Let them say their offer.*

2nd (sic) Daff: We are ready to pay the plaintiff claim as per the contract we entered before. Failure of that, then let's go for a full trial.

***Plaintiff:** I am not ready to accept what they prayed for unless (sic) say deposit half of the claim*

1st (sic) Deffendant : let's go for a full trial.

Court: Mediation has failed file be returned to the trial Magistrate.

R.M Mwalusako
SRM
18/11/2022"

The above excerpt clearly depicts that despite recording that the mediation of parties herein failed, the mediator disclosed the reasons for its failure. In view, that was an irregularity and it influenced the trial magistrate, as correctly submitted by the counsel for the appellants. It was enough for the mediator to record the failure in the form proposed by this court in **EAC Logistic Solution Limited vs Falcony Marines Transportation Limited** (supra).

It is therefore, my hope that mediators will be recording failure of mediation in the form as proposed in the above case so as to avoid misapprehension of the law.

Another alleged irregularity is that the trial court entertained a person who had no power of attorney. It is on record that the respondent's case (plaintiff) was prosecuted by one Mr. Katobasho from the beginning to the end. The parties' contention is centered on the competency of that person.

While the counsel for the appellants has contended that the trial court misdirected by permitting the respondent's representative to appear and be heard by it without tendering a Power of Attorney, the respondent has disputed such argument by submitting that he gave a Power of Attorney dated 29th March 2022 to Mr. Katobasho and the same was accepted by the trial court.

In a bid to convince the court that his Power of Attorney was valid and followed all the procedures, the respondent went on submitting that he instituted the suit against the appellants (that is Civil Case No. 07 of 2022) himself, but due to being busy, he told Mr. Katobasho to attend the court on his behalf. The nagging question here is whether the said Power of Attorney was valid before the eyes of the law.

I would unhesitant answer the above sub issue negatively because first, my careful examination of such Power of Attorney reveal that it was executed by the donor and donee on 29th March, 2022 and the respondent's suit was instituted on 24th November, 2022 but the respondent's representative did not amend the plaint in order to show that and plead that he was suing in representative character.

That was an irregularity because the law in our jurisdiction provides a room for either party to apply for amendment of his/her pleading. This is provided under Order VI, Rule 17 of CPC which provides that:

> "17. **Amendment of pleading**
>
> *The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

As indicated above, the respondent has submitted that at first, he instituted the civil suit against the appellants himself, but because of being occupied, he decided to appoint one Mr. Katobasho through a Power of Attorney to be his representative in prosecution of the above case.

However, the trial court records are silent whether after being so appointed, Mr. Katobasho applied to the trial court to have the respondent's plaint be amended so as to show that he was suing on behalf of the respondent.

Secondly, it is a trite law that where a plaintiff sues in representative character the plaint must show that he has interest in the subject matter and that he has taken steps, if any, necessary to enable him to institute a suit concerning it. This is provided under Rule 4 of Order VII, CPC.

The steps to be shown by the representative include attaching the Power of Attorney with the plaint and to plead in the plaint that he/she is suing under representative capacity. This was stated in the case of **Ramadhani Omary Mbunguni vs Ally Ramadhani & Another** (supra) where the Court of Appeal stated that:

> *"It is now a settled law that, where, like the instant case, a party commences proceedings in representative capacity,* ***the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceedings incompetent for want of the necessary standing****..."*
>
> *[emphasis is mine]*

In the instant case, having scrutinized the plaint filed with the trial court by the respondent, I have failed to come across any paragraph of the same which indicates that the respondent's donee averred that he had attached with such plaint a Power of Attorney granted to him by the respondent. Nor have I come across an averment that one Mr. Katobasho was suing under representative capacity.

In the circumstance, I am constrained to be guided by the principle stated in the case of **Ramadhani Omary Mbunguni vs Ally Ramadhani & Another** (supra) and proceed to find that failure by the respondent's donee to attach the Power of Attorney with the plaint and plead in the plaint that he was suing in representative capacity was a fatal irregularity which rendered the whole proceedings of the trial court incompetent for want of the necessary standing. Thus, owing to the foregoing reasons, I find that the first ground of appeal has merit.

In dealing with the second ground of appeal, the appellants counsel has submitted that one Mr. Katobasho who appeared before the trial court on behalf of the respondent, had no locus standi; hence his appearance before the trial court was contrary to the law.

On the other side, the respondent has contended that such ground is devoid of merits because he is the one who instituted the suit against

the appellants and Mr. Katobasho just came in later by a Power of Attorney which was accepted by the trial court.

Flowing from the above contentions, there are two questions which come to the focus; first is whether the alleged Power of Attorney was properly admitted by the trial court and second, whether Mr. Katobasho had a locus standi to sue the appellants under representative capacity.

To start with the first question, was the alleged Power of Attorney properly admitted by the trial court? Before I answer such question, I find it opportune to provide the meaning of Power of Attorney. The **Blacks law Dictionary**, 4th Edition, page 1334 defines the term Power of Attorney to mean:

> *"An instrument authorizing another to act as one's agent or attorney."*

On my part, I have no qualm about the manner in which the alleged Power of Attorney was drafted because looking at it, one may find that it has almost all the features, save for some procedural flaws which, as I have alluded earlier, makes it to be incompetent.

However, my concern here is on the manner in which the trial court entertained the donee of such instrument. In my careful examination of the trial court records, it appears that there is nowhere the trial magistrate admitted the Power of Attorney of Mr. Katobasho. The only

thing the said magistrate did, was to indicate in the court coram of 25th November, 2022 at page 2 of the trial court records that Mr. Katobasho was present on that date with a Power of Attorney.

Also, as I have pointed hereinabove, the said power of attorney was neither pleaded in the plaint by the respondent's representative, nor was it attached with the said plaint in order to form part of the trial court proceedings which again makes it to be improperly admitted by the trial court. Hence, in the light of such discrepancies, I am of the settled view that the alleged Power of Attorney was improperly admitted by the trial court, thus making it to be invalid under the above circumstances.

Next is whether Mr. Katobasho had a locus standi to sue the appellants under representative capacity.

There are number of authorities which defines the issue of locus standi; See **Lujuna Balonzi Snr vs Registered Trustees of CCM (supra)** and **Abdala Ramadhan vs Joyce Balige**, Misc. Land Appeal No. 46 of 2022 (HCT at Bukoba, unreported).

For example, in the foreign case of **Julian Adoyo Onginga versus Francis Kiberenge Abano Migori**, Civil Appeal No. 119 of 2015 which was referred by this court in **Abdala Ramadhan vs Joyce Balige** (supra), the High Court of Kenya held that:

"The issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. ***Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists****. Locus standi relates mainly to the legal capacity of a party.* ***The impact of a party in a suit without locus standi can be equated to that of court acting without jurisdiction****." [Emphasis is mine]*

Reverting back to the present appeal, even assuming that the respondent had a valid cause of action against the appellants, still under the given circumstances, Mr. Katobasho whom he appointed as his donee to proceed against the appellants in Civil Case No. 07 of 2022 ought to have passed the test of proving before the trial court that he had a legal capacity to do so.

It has to be borne in mind that there are several ways for a person to acquire locus standi; one, is by being appointed as the administrator/ administratix of the deceased's estate and two, is by being granted with a Power of Attorney. In this case the respondent's agent falls under the second way.

However, it is a trite law that mere possession of a Power of Attorney alone does not entitle a person to appear before a trial court and

represent a party in court proceedings; there must be proof of genuine reason (s) before such person can be allowed to make such representation; See **Monica Danto Mwansasu (by virtue of Power of Attorney from Atupakisye Kapyeia Tughalaga) vs Esrael Hosea and Another** (supra) and **Ally Mohamed and 18 Others vs M/S Sungura Textile (1997) Ltd, Civil Appeal No. 169 of 2000** (HCT at Dar es Salaam, unreported).

In the latter case, this court through Utamwa, J. (as he then was), stated that:

> *"...the genuine reasons for this court to permit a representation by power of attorney, I would venture to say, include all reasons which may, before the eyes of the law, legitimately cause undue hardship for a party to appear and defend his case. The reasons may thus include, and not limited to long-standing absence from the country or jurisdiction of the court, inability for prolonged serious illness or old age [see **Hamidu Ndalahwa Magesha Mandagani v. Raynold Msangi and Reda Farm & Livestock Partners**, HC (Commercial Division), Commercial Case No. 52 Of 2007, at Dar Es Salaam]. Other factors of the like, being beyond the control of the party to proceedings may for genuine reasons for the representation."*

I had enough time to peruse the records of the trial court along with the written submission of the respondent only to satisfy myself whether there were genuine reasons which entitled his representative to appear before the trial court on his behalf. What I observed therein was that the only reason assigned by the respondent is that he was busy.

Also, at paragraph 1 of his plaint, the respondent (plaintiff) indicated expressly that he is a natural person who resides and work for gain at Mpanda. In my view, that entails that the respondent was at the time his suit was instituted, residing within the trial court's jurisdiction; hence, he was not abroad.

Again, his plaint does not contain any averment, whatsoever, that he appointed Mr. Katobasho to represent him in the prosecution of his civil case against the appellant because he was occupied.

Not only that, but also despite the fact that in his submission the respondent has stated that the reason for appointing Mr. Katobasho to act on his behalf was due to the fact that he was busy, he did not clarify what caused him to be busy.

Worse still, the records of the trial court are silent, as I have said earlier, whether the trial magistrate took any measure to test the legality of the reason assigned by the respondent's agent before permitting him to take the floor on behalf of the respondent.

In my view, all the above shortfalls indicate that the representation made by Mr. Katobasho was without genuine reasons, thus making him to lack a locus standi to represent the respondent. Again, in the course of revisiting the trial court proceedings, particularly from page 9 to 12, I noticed that on during hearing of the respondent's (plaintiff) case, the respondent was present and testified before the trial court as PW1 after taking oath and his representative was present, but something interesting and which goes contrary to the law, I must say so, is that Mr. Katobasho acted as an advocate while in actual sense he was and is still not!

This is shown at 11 of the trial court typed proceedings where it was recorded thus:

> *"...Re examination by Mr. Katobasho*
>
> *NIL..."*

Again, at page 12 of the trial court proceedings, the following is what transpired before the trial court: -

> *"...MR Katobasho with (POA) we pray to close prosecution case."*

From the above excerptions, there are two serious irregularities to be observed. The fist one is that once the respondent entered appearance and testified before the trial court, the power of attorney granted to Mr.

Katobasho ceased automatically. Hence, it was wrong to allow him continuing to appear as the respondent's agent.

In the circumstance, that person lacked a locus standi to appear and act for the respondent. That court's position is fortified by the principle stated in the case of **Parln A.A Jaffer and Another vs Abdulrasul Ahmed and Two Others** (supra) where it was held that:

> *"Where, however, the principal under a power of attorney applies to or appears before a court, his attorney has no locus standi"*

The second irregularity committed by the trial court is its act of permitting Mr. Katobasho to act as an advocate while knowing that such person presented himself through a Power of Attorney and was not practicing advocate. In the case of **Ally Mohamed and 18 Others vs M/S Sungura Textile (1997) Ltd** (supra) this court while discouraging the similar conduct of some person who act as advocates in the courts of law while they are not, had the following words which I find crucial to subscribe and reemphasize before I wind up: -

> *"This kind of representation is typically of an advocate, hence prohibited because he (Mr. Mzuwanda) is by far, not an advocate. If this kind of Mr. Mzuwanda's freelance legal representation by power of attorney is condoned by courts of law its impact to our legal practice will be lethal; flood gates of illegal practices by*

rampant group of people branded as "Bush Lawyers" will be opened, there will be no any meaning of having laws regulating representations in courts, poor Tanzanians will lose their rights for being misled, courts will be subjected to unnecessary inconveniences as they will miss the expected useful assistance from registered advocates in reaching into fair and just decisions, ultimately chaos will be an order of the day."

It is therefore, my settled view that since it has been found that one Mr. Katobasho had no locus standi to represent the respondent in Civil Case No. 07 of 2022 the subject of the appeal now before me, the second ground of appeal has merits.

In the premise, I am now in a good position to answer the above main issue positively that the present appeal has merits. Since, the answers to the first and second grounds of appeal are in my view, enough to dispose of the instant appeal, I do not see any pressing reasons to delve into the rest of the grounds of appeal.

The above being said and done, I allow the present appeal with costs, quash the proceedings as well as the impugned judgment of the trial court and set aside the orders passed thereto. The respondent is at liberty to reinstitute his civil suit against the appellants either himself or

by engaging an advocate or a recognized agent subject to compliance of the available legal procedure, if he so wishes.

It is so ordered.

A.A. MRISHA
JUDGE
19.03.2024

DATED at **SUMBAWANGA** this 19th day of March, 2024.

A.A. MRISHA
JUDGE
19.03.2024