IN THE HIGH COURT OF TANZANIA
AT TABORA

(DC) CIVIL APPEAL NO. 13 OF 1977

(From the decision of the District Court of
Sumbawanga at Sumbawanga in Civil Case No. 4/77)
BEFORE: P. P. MOYO, ESQ., RESIDENT MAGISTRATE

PIUS MSIGWA
VITALIYA DONALD .... APPELLANTS
BETELINA PANGAZI

Versus

THE SECRETARY OF KIJIJI CHA UJAMAA MAROCHA .... RESPONDENT

JUDGMENT

SAMATTA, J., - Sumbawanga district has many villages. One of them is called Marocha. It is an ujamaa village. Its members are sworn enemies of exploitation of man by man. The village has been in existence at least since 1974. In 1976 its members included the three appellants. Before the end of that year all the three appellants flitted from the village. None of them gave a three - month notice (in writing) of resignation, as they were required to do by s. 11 (2) of the village's constitution, before their emigration. Before leaving the village each of them had participated for more than two hundred days in communal work at the village. A few months after their departure the remaining members of the village shared between them the money which was realised out of the fruits of the communal toil. Each appellant believed that, since he had also toiled in the communal projects, he was entitled to be paid for his labour. The remaining members of the village did not agree with that stand. They argued that, as they had not given the required notice of resignation, the appellants had forfeited whatever rights they would otherwise have had in the fruits of the communal labour. The appellants were unimpressed by that argument. They refused to be victims of what they considered as exploitation by the village. They resolved to summon the law to their aid. On January 18, 1977, they jointly instituted civil proceedings before the district court of Sumbawanga district against the secretary of the village.

Each claimed shs. 600/= from the defendant. The latter strongly resisted the claims. He must have entertained the belief that the appellants wanted to use the law as an instrument for exploitation. As the end of the trial the suit was dismissed, the learned trial magistrate holding that the provisions of two sections in the village's constitution stood in the way of the claims. The learned trial magistrate concluded his judgment with these words:-

> "Section 11 of the village's constitution (Exh. D.1) says that a village member can resign after giving three months' notice. The three plaintiffs did not give any notice. Section 18 of the same constitution says that a village member who has resigned cannot claim any share from the village's proceeds. In view of the above provisions of the constitution of the defendant village, I hold that the three plaintiffs, who quit the village without notice, do not deserve a single cent as claimed in the plaint or otherwise. He it not been for the provisions of said constitution I would have held otherwise."

Taking into account of the nature of the order I intend to make later in this judgment, I think it would not be proper for me to express any views on the learned trial magistrate's interpretation of s. 18 of the village's constitution. What I can properly do is, I venture to think, to quote the section and leave it to the reader to determine for himself whether or not the section was relevant to the facts of this case. The section reads as follows, in Swahili:-

"Sharti la 18:

(1) Kila mwaka kijiji kitatenga fedha kwa ajili ya Mfuko wa Maendeleo na Mfuko wa Huduma kutokana na sehemu ya mapato ya kila mwaka;

(2) Fedha za Mfuko wa Maendeleo zitatumika katika utekelezaji wa mipango ya uchumi na maendeleo. Mfuko wa Huduma utatumika kwa shughuli za huduma na ustawi wa jamii kijijini;

(3) Mwanachama aliyejiuzulu na/au kufukuzwa hatakuwa na haki ya kudai malipo yoyote kutokana na Mfuko wa Maendeleo na Mfuko wa Huduma."

The record of the case is silent as to whether Marocha village was registered under s. 4 of the Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975. If it was, then the suit by the appellants should have been instituted against the Council of the village; see s. 11 (2) of the Act.

I am prepared, for the present purpose, to assume that the village had not been registered under that Act. On that assumption, it must be correct to say that the suit by the appellants was governed by the provisions of O.1, r. 8 of the Civil Procedure Code, 1966, which I proceed to read:-

> "8. - (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or ~~be~~ may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
>
> (2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit."

It will be readily noted from the above rule that institution of a representative suit is not a matter of right, a party wishing to commence such proceedings must first seek leave of the court to do so. Such leave must be sought by way of chamber application. This procedure was not followed inthe present case. It will also be readily noted from the rule that after leave has been granted by court and the representative suit has been filed, the court must give notice of the suit to all persons having the same interest with the plaintiff/s or defendant/s, as the case may be. The record of the present case does not give even a hint that the rest of the members of the village, who clearly shared a common interest with the respondent in the suit, were made aware by the court of the institution of the suit. That was a serious omission. It is quite possible - although not likely - that some of the leaders of the villagers would have wished to be made parties to the suit.

What, then, is to be done now? I have given the most anxious consideration to that question and, in the upshot, I have arrived at the opinion that a new trial should be ordered. The second procedual error made by the learned trial magistrate is so serious

that, in my view, it vitiates the proceedings conducted in the case. I am not disposed to think that the provisions of s. 73 of the Civil Procedure Code can be brought in aid to cure the error. The rest of the members of the village were denied their right to elect to defend the suit. The fact that the suit was resolved in their favour is unimportant because it is quite possible that if the present appeal were to be determined on its merits this court might not share the learned trial magistrate's conclusion.

For the reasons I have endeavoured to state, I hope not at an unreasonable length, I have reached the view that the appeal must be allowed. The lower court's decision is, accordingly, set aside. It is ordered that the case be dealt with andheard de novo by another magistrate of competent jurisdiction. Of course if the village is registered under s. 4 of the Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975, the new trial magistrate should consider allowing the appellants to amend their plaint by substituting the village's Council as the defendant for the respondent. I make no order as to costs of this appeal.

D. A. SAMATTA
JUDGE

November 8, 1978