IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 34 OF 2019

(C/F Civil Case No. 01 of 2018, in the Resident Magistrate Court of Arusha at Arusha)

FRANCIS JOHN MUSHI.....APPELLANT

VERSUS

MSHIKAMANO GROUP.....RESPONDENT

JUDGMENT

26/11/2020 & 18 /02/2021

GWAE, J

In the Resident Magistrate Court ("trial Court") the respondent, Mshikamano (group) filed a suit against the appellant, Francis John Mushi for the recovery of Tshs. 18,558,729/=the amount of money which was alleged to have been taken by the appellant without authorization/permission from the respondent.

Supporting her claim, the respondent summoned a total of four witnesses and three exhibits these were, group's business name registration form (PE1) appellant's admission in taking the respondent's money in the tune of Tshs. 18,558,729/= (PE2) and an audit report (PE3) of the group.

The secretary of the group, PW1 and group's chairperson, PW2 testified in the trial court that the respondent is a registered association with more than 70 members. They further testified that the appellant was the treasurer of the group and that sometimes on 25/05/2017 they discovered that there was misuse of the respondent's fund by the appellant, consequemntly, they decided to involve an auditor, PW4 who after inspection prepared an audit report. In the report it was revealed that a total of Tshs. 18,558,729 /= was missing and has not been deposited in the bank by the appellant.

After the report the appellant was given a chance to defend himself where he admitted to have misused the association money for his private usage and promised to return the said amount within one year. A copy of the agreement to repay back the money entitled "Ukiri wa kuchukua hela za kikundi by Francis John Mushi". Nevertheless, the appellant did not pay back the amount as promised despite several reminders until when the respondent decided to file a suit at the trial court.

In defending his case, the appellant admitted to have been a member of the respondent and a treasurer however he contested the audit report stating that it had some mistakes as the monies appearing to have been missing were used by the group on agreements by the members. He further testified that he admitted

to have taken the money and promised to pay back for fear of being taken to Police.

In deter mining the matter, the trial court framed four issues which after the analysis, the findings of the trial court were in favour of the respondent and the appellant was thereafter ordered to pay the respondent the claimed amount in the Tshs. 18,558,729/=.

Dissatisfied by the decision of the trial court the appellant has filed this petition of appeal with a total of six grounds of appeal. However, in the course of submission the appellant's counsel abandoned grounds No.1, 3, & 6 and argued only on grounds No. 2, 4, & 5 which are as follows;

1. That, the trial Magistrate erred in law for considering the respondent as a Cooperative Society relying on a certificate for business names registration from BRELA.
2. That, the trial Magistrate erred in law and facts by conducting the trial without the valid reasons for transferring of the file from one Magistrate to another hence render the proceedings null and void.

5. That, the trial magistrate erred in law by relying on insufficient evidence adduced by the respondent's witnesses. No receipts, bank statement and books of accounts was

tendered to prove the amount that was deposited to the bank and expenses by the group.

During hearing of this appeal, the appellant and the respondent enjoyed legal services from **Mr. Daniel Lyimo** (advocate) and **Ms. Upendo Msuya** (advocate) respectively.

Supporting his appeal, Mr. Lyimo started by addressing on the 2nd ground of his appeal where he argued that, the respondent in the plaint introduced itself as a cooperative society however the same is not reflected in the certificate of registration (exhibit PE1) tendered by the PW1 as the same appears to have been issued with BRELA while in real sense the respondent being a cooperative society ought to have been registered by RITA under the Society Cooperative Act Cap 20 of 2003.

The counsel went on submitting that the appellant had tried to raise this issue in the trial court by filing a preliminary objection however the same was overruled. He thus urged this court to allow this ground of appeal since according to him, the respondent was neither a legal entity nor a cooperative society capable of instituting a suit as per Order XXVIII Rule 1 of the Civil Procedure Code Cap 33 R.E 2019.

On the 4th ground of appeal the counsel for the appellant submitted that the case before the trial court was first assigned to Hon. Jasmin- RM, then to Hon.

Chitanda-RM, and thereafter the file was reassigned to Hon. Mushi-RM. In all these re-assignments no reasons were given which is a mandatory requirement as per Order XVII Rule 10 of the CPC. The counsel argued that, failure to do so renders the proceedings to be null and void. Supporting this ground, the counsel cited the case of **Arusha Hardware Traders Ltd vs. Exim Bank (T) Ltd**, Civil Appeal No. 139 of 2016 (Unreported-CAT).

On the 5th ground of appeal, Mr. Lyimo argued that, the trial court's decision was not backed up by sufficient evidence such as records of accounts which would have revealed the amount used for expenditure, cash at hand and cash at bank. Consequently, the counsel urged this court to declare the trial court's decision and proceeding especially those of Hon. Chitanda-RM a nullity.

Arguing the 4th ground of appeal, Ms. Upendo submitted that, the trial court gave reasons for re-assignment and more so, the issue of giving reasons for re-assignment is paramount where the matter has reached a hearing stage. According to the counsel for the respondent the case at hand is distinguishable as the former magistrates did not hear any of the witnesses and therefore no miscarriage of justice was occasioned.

On the 2nd ground of appeal the counsel submitted that the respondent is a registered entity registered by both BRELA and RITA therefore it has the capacity to sue.

On the 5th ground, Ms. Upendo submitted that the audit was properly conducted by a professional auditor adding that the appellant admitted to have misused the respondent's funds. Therefore, the counsel is of the view that this was a mere delaying tactic by the appellant.

This is all that has been submitted by the parties in this particular appeal. As grounds No. 1, 3 and 6 were abandoned, I am therefore to determine only grounds No. 2, 4 and 5.

In ground No. 2, the appellant is basically challenging the legal capacity of the respondent in the sense that, in the plaint the respondent introduced herself as a cooperative society and tendered a certificate of registration from BRELA which according to the appellant does not prove its existence as cooperative societies are registered under the Cooperative Societies Act No. 05 of 2013 and not BRELA.

As the respondent had introduced herself as a cooperative society registered under the Cooperative societies Act vide her para. 3 and 4 of her plaint duly filed in the trial court on the 23rd January 2018, I think the respondent was duty bound to establish its legal existence as per the Cooperative Societies Act. During trial the respondent through PW1 stated that the respondent was registered he tendered exhibit P1 as a proof of its registration which is the Certificate for registration from

BRELA. Essentially, this is the center of the controversy between the appellant and the respondent.

I have also noted that the same was raised as a preliminary objection by the appellant during trial, the trial court rightly overruled the preliminary objection for the reason that it was not a pure point of law.

As already stated by the appellant's counsel that, since the respondent was a cooperative society then it ought to have its registration under the Cooperative Societies Act and not BRELA. I think I would share the same view as that of the learned counsel for the appellant since the law is very clear that, cooperative societies shall be registered by the registrar of Cooperative Societies who shall issue the certificate for registration pursuant to Section 33 (2) (a) of the Act (supra). The Act further states that the certificate of registration signed by the registrar shall be a proof that the society is duly registered and is a body corporate capable of suing and being sued (See section 34 and 35 of the Act).

However, the testimonies of the PW1, PW2 and PW3 together with para. 5 of the plaint, are to the effect that the appellant was lent or given loan rather by the group registered by BRELA and that the appellant, as an accountant of the group used or misappropriated the claimed amount of money for his own personal use (See page 17 to 26 of the trial court typed proceedings).

At current time, our courts are required to focus on substantive justice to parties or litigants despite disparities which in one way or other does not occasion injustice to parties as was rightly demonstrated by the Court of Appeal of Tanzania (**Ibrahim, CJ**) in **Yakobo Magoiga Gicherevs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) where it was held;

> "With the advent of the principle of overriding objective brought by the written law (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 which requires the courts to deal with cases justly and to have regard to substantive justice

Considering the case at hand whose evidence is direct and straight forward that the appellant herein misused the respondent's money, perhaps he did so merely because he was in a position to squander the respondent's funds as he was entrusted with by respondents' members. He was evidently given a period of one year to pay back the money but he did not honour his promise.

Courts are believed to be the temple of justice, under the circumstances surrounding this case the appellant who is also a member of the respondent cannot escape from his liability on the reason that the respondent did not prove its registration with the registrar of cooperative society which is seen to be a mischief on the party of the respondent's advocate. Social groups of this nature should not therefore be deterred from instituting cases against its members who squander or misappropriate social groups' funds

On the 4th ground of appeal where the appellant claim that at the trial court the case file was transferred from different Magistrates without giving reasons for the said transfer of the case file from one Magistrate to another.

A carefully scrutiny of the trial court's records by the court reveal that the matter was undoubtedly handled by different magistrates as rightly complained of. Initially, the case was assigned to Hon. A. Jasmin-RM, later on Hon. Chitanda- RM came in and no reasons were explained as to why she had taken over the case. Again, at the commencement of hearing or immediately after mediation had failed, the records show that, Hon. Mushi-RM presided over the matter and no reasons were given as to what prevented Hon. Chitanda from presiding and determining the case.

To begin with, Order XVIII Rule 10 (1) gives powers for a Judge or a Magistrate to deal with evidence that has been taken before another Judge or Magistrate. It reads as follows:

> "10.- (1) Where a judge or magistrate is prevented by death, transfer or other cause **from concluding the trial of a suit,** his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed

with the suit from the stage at which his predecessor left it (bold supplied)".

This provision has been interpreted in a number of decided cases by both the Court of Appeal of Tanzania and the High Court, and the rationale behind Order XVIII Rule 10 being that reasons for taking over a matter from another magistrate or judge should be clearly stated and should be a mandatory requirement to avoid mischief from persons who would want to temper with the records.

Among such cases include; **M/S Georges Limited vs. The Honourable Attorney General and Another,** Civil Appeal No. 29 of 2016 (unreported), **Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas vs. Masoud Mohamed Josh & 2 Others,** Civil Appeal No. 109 of 2016 (unreported) and **Director of Public Prosecution vs. Laurent Neophitus Chacha & 3 others,** Criminal Appeal No. 252 of 2018 (Unreported).

In the case of **M/S Georges Limited vs. The Honourable Attorney General and Another,** it was held that;

"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor Judge or Magistrate an obligation to put on record why he/she has to

take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witnesses is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

Citing the above decision with approval, the Court of Appeal in **Mariam Samburo** (supra) stated that:

"The above quoted extract provides for a clear interpretation and the rationale behind existence of Order XVIII Rule 10(1) of the CPC in the effect that, recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement as it promotes accountability on the part of successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective principle as suggested by Dr. Lamwai."

From the above authorities it goes without saying that failure to record reasons for taking over the trial of a suit by a Judge or Magistrate amounts to a procedural irregularity which according to the decision in the case of **Mariam samburo** cannot be cured by overring objective principle. It should however be

noted that Order XVIII Rule 10 of CPC together with the above cited cases speak of circumstances where the trial of a case has begun which is not the case here

In the case at hand, the change of Magistrates was done before hearing began, the records are to the effect that when hearing commenced, Hon. Mushi – RM presided over and she had been able to complete the hearing till when she composed the judgment and delivered it. To my considered view, a change of Magistrates in this case did not occasion any substantive injustice to the parties since trial had not begun before her learned colleagues. To my understanding our case is distinguishable from the above cited cases where it appears that trial had already begun. This ground of appeal also fails, it is dismissed.

On the 5th ground of appeal, the appellant alleges that the trial court relied on insufficient evidence adduced by the respondent and his witnesses. According to him, receipts, bank statements and books of accounts were not tendered to prove the amount that was deposited to the bank and expenses by the group.

In respect to this ground of appeal, I had to revisit the evidence adduced at the trial court in particular the evidence of PW1 and PW 4. I shall not reproduce their evidence as the same has already been summarized above. PW1's evidence is basically on the appellant's admission to have misused the respondent's money. From his evidence this court noted a crucial point on the exhibit P2 which was a

written admission by the appellant admitting to have misused the respondent's money, the document was tendered and admitted in court without any objection from the appellant.

Testimony of Gilbert Balton Masasi, PW4, introduced himself as an auditor hired by the respondent to audit their cash flow as from the year 2012 to 2017. In the course of auditing, PW4 stated that he was assisted by the appellant who showed him the cash flow of the respondent together with other information on cash books. The appellant further supplied PW4 with all books that he kept records of all collections together with receipts books, after conducting the auditing PW4 prepared a report which revealed that a total of Tshs. 18,558,729/= were missing as they were not deposited at the bank by the appellant. The report was tendered in court, again, the same was admitted without objections by the appellant.

With the above evaluation of the evidence in the trial court record and without further ado I am not convinced by the complaint by the appellant that there was insufficient evidence to prove the amount that was deposited to the bank and expenses by the group, in fact the same were used by the auditor and actually it was the appellant who supplied him with the same. If at all the appellant was of the view that there was no enough evidence to hold him responsible, I expected an objection to have been raised when the court was admitting exhibit P2 and P3, the least to say the appellant here was represented by the learned

counsel, I am therefore of the view, that the appellant's assertion is nothing but an afterthought and a delaying tactics as correctly alluded by the respondent's counsel. How could he be threatened by his group members, civilians.

More so the appellant can not contend that he was forced or threatened or he feared being arrested by police that is why he signed a letter acknowledging the debt. He was matured by then and able to refuse signing whatever was against his wishes. The evidence on record entails that the case was proved to the required standard.

That being said, this appeal is entirely dismissed with costs.

It is so ordered.

M. R. GWAE
JUDGE
18/02/2021

Court: Right of appeal to the Court of Appeal of Tanzania fully explained

M. R. GWAE
JUDGE
18/02/2021