IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.215 OF 2004

DILOLE COOPERATIVE SOCIETY..... APPELLANT

VERSUS

1. **DAR ES SALAAM CITY COUNCIL... 1ST RESPONDENT**
2. **THE REGISTERED TRUSTEE OF THE CHAMA CHA MAPINDUZI (CCM)..... 2ND RESPONDENT**
3. **THE CCM SECRETARY, MZIMUNI..... 3RD RESPONDENT**

Date of last order: **24/4/2006**
Date of Judgment: **20-6-2006**

JUDMENT

MANENTO, JK:

This is a judgment originating from an appeal by the Dilole Cooperative Society on a ruling of Kisutu Resident Magistrate's Court dated 14th April, 2004. Before the subordinate court, the appellants had filed a rather confusing suit or petition. The title of the case was titled RM Civil 105/1998. Then after the names of the parties the title is **"PETITION".** In all the contents of the said civil suit, it was referred as a petition. During the hearing, a preliminary objection was raised in that there was nothing in court to deliberate on because the alleged civil suit was not in conformity with section 22 and Order V of the Civil Procedure Code, 1966 and so, it should

be dismissed. The preliminary objection was upheld, by the following words:

"The law is clear under section 22 and Order IV rule 1(2) of the CPC of 1966 that a suit should be instituted by way of a plaint, failure to do that, the preliminary objection raised by the respondent side is granted, thus the suit is dismissed, no order for costs."

The appellants are aggrieved by that decision hence this appeal. They preferred two grounds of appeal, namely:

1. That the learned magistrate erred in law and fact in giving the ruling exparte on allegation that the applicant filed no written submissions while the same was filed on 10th September, 2003.
2. That the learned magistrate erred in law and fact in treating the matter as a suit which the same was filed as a Miscellaneous Application.

In his submissions in support of the appeal, the learned counsel for the appellants withdrew the 1st ground of appeal and made short submissions on the second ground, ending by saying that the appeal should be allowed. As to the reasons for the dismissal, the learned counsel submitted that, dismissal was due to the heading of the

petition, though substantially, it was a suit. That the title as a petition did not prejudice the defendants. That the trial court ought to have ordered that the suit be amended so that it could be determined on merits.

On the other hand, Mr. Tasiga learned counsel for the 1st respondent submitted that the courts should be guided by memorandum of appeal. He submitted so because the 2nd ground of the memorandum of appeal is challenging the trial courts decision for the fact that it was treated as a suit whereas it was a miscellaneous application. That it was an omission for the appellants, instead of filing as a suit, it was filed as a petition. Then, that was a contradiction in the part of the appellants. I agree with that short submissions. Dr. Lamwai, learned counsel for the 2nd respondent, who seemed to be more prepared, made a long and legal submission. On the withdrawal or abandonment of the 1st ground of appeal, he conceded, but prayed for its costs because he had already prepared to argue it. Submitting in reply to the submissions of the appellant, he urged that the submissions were a different thing contrary to what is in the 2nd ground of appeal. That he had not been allowed to add another ground of appeal. That tallies with what Mr. Tasiga, learned counsel

for the 1st respondent had submitted and I agree with both the two learned counsel. In short, it meant that there were no submissions in support of the 2nd ground of appeal. That contention is fortified by Order XXXIX rule two which provides inter alia that:

> 2. The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; ...

It is true as submitted by Dr. Lamwai, learned counsel that the appellants referred their memorandum of appeal to Original Miscellaneous Application No.105/1998. But the said Misc. Application was filed as civil case No.105/1998. The application filed was titled RM. Civil 105/1998 with a title called **"Petition"** and the receipt acknowledging the payment of the court fees is titled **PETITION RM CIVIL 105/98**. All those confusions were brought in by the appellants who were not sure of what they were filing in court. The appellants had referred to their suit as a petition in all the paragraphs they had included in, yet they submitted in court that what they had filed was a suit not a petition. I totally agree with what Dr. Lamwai had submitted that what was filed in court was neither an application nor was it a suit or a petition because it never fulfilled the requirements of either of them. If it were an application, it ought to be by way of chamber summons, if it

were civil suit, it should have been titled **"Plaint"** and if it were a petition, the specific law which required it to be titled a **"petition"** should have been indicated. For a suit, there is no option, it must be instituted by the presentation of a plaint to the court. Nothing more to the contrary is allowed in the absence of any specific prescription by law. Section 22 of the Civil Procedure Code, 1966 as well as Order IV r.1 (1) of the same code. I wonder why the appellants, instead of complying to the legal and free advise of the trial magistrate, they come to this Court, challenging the decision of the trial court without refreshing their minds in the relevant law.

Again, I agree with Dr. Lamwai's submissions that the fact that there was no plaint filed at Kisutu Resident Magistrate's Court, then there were no pleadings within the meaning of Order VI r1 and therefore, there could not be any amendment to be made under order VI r 16 of the Civil Procedure Code. There could only be an order to struck out what was filed in court because it did not comply with the procedures or requirements of any known law in the country.

What I have tried to show is, on my opinion, more that what I ought to have said in this appeal. However it meets the end of justice. On the whole, the appeal lacks some legs to stand with, and therefore, the decision of the subordinate court is withheld and the appeal is dismissed with costs.

A.R. Manento
JAJI KIONGOZI.

20-6-2006

Coram: P. Lyimo- DR-DSM

For the Appellant – Mr. Taslima

For the 1st Respondent Mr. Mnyanyi

For the 2nd Respondent)

For the 3rd Respondent) Absent

Cc: Livanga.

Order: Judgment delivered in court this 20thd ay of June, 2006 in presence of Mr. Taslima learned counsel for the appeilants and Mr. Mnyanyi for the 1st Respondent and in the absence of the 2nd and 3rd respondents.

P.A. Lyimo
DISTRICT REGISTRAR-D'SALAAM
20/6/2006