

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA**

**CIVIL APPEAL NO. 30 OF 2019**

*(Appeal from the decision of the Resident Magistrates' Court for Manyara at Babati, Civil Case No. 3 of 2019 N.S Gasabile, RM)*

**ASHA IDDI ..... APPELLANT**

**Versus**

**BABATI SACCOS LTD ..... 1<sup>st</sup> RESPONDENT**

**TANFIL CONSULTANT (E.A) LTD ..... 2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 5<sup>th</sup> June, 2020*

*Date of Judgment: 12<sup>th</sup> June, 2020*

**Masara, J.**

On 18<sup>th</sup> March 2019, Asha Iddi, the Appellant herein, instituted Civil Case No. 3 of 2019 at the Resident Magistrate Court for Manyara Region at Babati accusing the Respondents for defamation. She alleged that the first Respondent, through the second Respondent, published defamatory words on the Appellant's wall to the effect that her house was subject to an auction for the reason that the Appellant had failed to repay the loan she advanced from the first Respondent. On that basis she claimed for damages to the tune of Tshs 50,000,000/=.

On the 25<sup>th</sup> May, 2019, the Defendants through their joint Written Statement of Defence raised two Points of Preliminary Objections claiming that the trial court had no jurisdiction to entertain the suit as the same was against Regulation 83 of the Cooperative Societies Regulations, 2015 (GN No. 272/2015) read together with Regulation 130 of the Savings and Cooperative Societies Regulations, GN No. 496 of 2014. The said provisions oust jurisdiction of the courts to entertain a dispute between a member of the society and the cooperative societies and infers mandatory reference of such disputes for reconciliation or arbitration. Having heard the parties on the preliminary objections, the trial magistrate found out that the trial court had no jurisdiction and, in her ruling, dated 24<sup>th</sup> September, 2019 she dismissed the plaint. The Appellant was aggrieved by the decision of the Resident Magistrates' Court and preferred this appeal on the following grounds:

- a) That, the trial court erred in law and fact in finding that the Resident Magistrates' Court for Manyara at Babati has no jurisdiction to determine the case;*
- b) That, the trial court erred in law in finding that the Preliminary Objections raised by defendants (respondents herein) counsel qualified to be points of law; and*
- c) That, the trial court erred in law in finding that the appellant herein was having business with the 1<sup>st</sup> Respondent herein without any evidence to support it.*

The Appellant is moving this court to allow the appeal by quashing and setting aside the decision of the said trial court with costs and order the hearing of Civil Case No. 3 of 2019 on merits. Before this Court, the Appellant appeared represented by Mr. Stephano James, learned advocate,

while the Respondents were both represented by Mr. Welwel Samwel, learned advocate. Hearing of the appeal proceeded viva voce.

In his submission, Mr. James opted to combine the grounds 1 and 2 of the appeal while the 3<sup>rd</sup> ground of appeal was argued independently. Mr. James contended that the trial court was not right in dismissing the suit before it on the preliminary points raised about its jurisdiction. He argued that what is stated in Regulation 83(1) of G.N 272 of 2015 and Regulation 130 of the Savings and Credit Cooperatives GN 496 of 2014 could not and does not cover persons such as the Appellant. He pointed out that persons governed by the said regulations are persons in membership of the society or a person claiming through a member. Furthermore, it has to be a dispute involving the business of the society. The learned counsel added that, according to the plaint filed at the trial, the Appellant was not a member of the first Respondent nor was she aware of its existence. She had not done any business with the SACCOS and those facts were countered in the Written Statement of Defence. He was of the view that as there was an issue of membership or that she had taken a loan, it was imperative for the court to determine the matter on merits. It could not be disposed of as a preliminary point as those facts were contentious and a full hearing was the only solution. He cited the case of ***Mukisa Biscuits Manufacturing Ltd Versus West End Distributors Ltd*** (1969) E.A 696 to back up his argument. In the cited case the defunct East Africa Court of Appeal expounded that a preliminary point must be a pure point of law. He

added that a preliminary objection cannot be raised on a fact to be ascertained.

Submitting on the 3<sup>rd</sup> ground of appeal, the learned counsel reiterated that the court erred in holding that there was business between the Appellant and the first Respondent. He argued that there was no evidence to back up that decision. The learned counsel therefore implores this court to allow the appeal and order that civil case No. 3 of 2019, which was dismissed, proceeds for hearing on merits.

In response, Mr. Welwel contended that the appeal lacks merits and should be dismissed. He supported the trial court decision on the reasons that suits or matters involving cooperatives have a special procedure. He was of the view that the Appellant did not follow that procedure as provided under Regulation 83(1) of GN 272/2015. In that provision, the phrase used is "any dispute concerning the business of cooperative society". He alluded that there is no dispute that the first Respondent is a cooperative society. He cited the case of ***Mussa Ngangandwa Versus Chief Japhet Wanzagi & 8 Others*** [2006] TLR 352 which stated that a cause of action is determined by looking at the plaint and its attachments. Mr. Welwel further stated that in paragraph 2 of the plaint filed at the trial court, the Appellant acknowledged the business of the first Respondent. He added that what the plaint stipulates at paragraph 11 and its attachment referred to the business of the cooperative society. According to Mr. Welwel, since the Appellant acknowledged the business of the first Respondent, he had

no option but to abide with the regulation and that the court did not require any evidence as per Mukisa's case.

Mr. Welwel added that the intention of the Parliament was to save the cooperative societies from multiplicity of cases as they do not have sources of income. The learned counsel was of the view that members and non-members are bound by the regulations. He concluded that the trial magistrate dismissed the plaint considering the mandatory nature of the regulation in question. He urged the Court to uphold the trial court's decision.

On a short rejoinder, Mr. James opposed the submissions made on behalf of the Respondents in that what was done by the first Respondent was not their usual business as per the regulations. The learned counsel acknowledged that the first Respondent is a cooperative society but that the Appellant's cause of action was "defamation" as per paragraph 11 of the plaint which cannot be said to be the usual business of a cooperative society. In any case, he contends, the issues raised in the plaint could not be dismissed before evidence was tendered in court. Mr. James was of the view that **Ngangandwa's** case was distinguishable since there is no dispute that the first Respondent is a cooperative society.

Having reiterated the rival submissions of the learned advocates for both sides and having considered the records of the trial court, the main issue

for determination is whether the trial court was proper in dismissing the suit before it on the basis of the preliminary points of objections raised.

There is no dispute that cooperative societies are governed by the Cooperative Societies Act and the Regulations made thereunder. Regulation 83(1) of Cooperative Societies Regulations, 2015 (GN No. 272/2015) and Regulation 130(1) of the Savings and Credit Cooperative Societies Regulation (GN 115/2015) are specific on the dispute settlement mechanisms between the society and its members. Regulation 130(1) of GN 115/2015 which is in *parimateria* with regulation 83(1) of GN 272/2015 provides:

*"Any dispute concerning the business of SACCOS between the members of the SACCOS or persons claiming through them or between a member or persons claiming and the Board or any officer, or between one SACCOS and another shall be settled amicably through negotiation or reconciliation."*

From the wording of Regulation 83(1), a dispute has to first concern the business of the Cooperative society to qualify thereof. The business of cooperative societies is savings and credit facilitation to their members. If the person is not a member of the society, he may also qualify where such person claims on behalf of a member or the board of the cooperative societies or when business transactions are undertaken between two cooperative societies. In those circumstances, a dispute thereof will be referred to reconciliation or negotiation. It is the opinion of this court that the Regulation excludes all other incidents, which, invariably, have to be dealt with in a normal suit.

Having gone through the trial court records, the plaint filed by the Appellant clearly stated that the Appellant's claims arose from what is said to be defamatory words promulgated by the first defendant through the second defendant. The alleged defamatory words are said to have been published on the Appellant's wall to the effect that her house will be subjected to an auction due to the Appellant's failure to repay the loan she was advanced by the first Respondent. This is shown under paragraphs 5, 9 and 11 of the said Plaint. Under paragraph 5, the Appellant denied being indebted to the first respondent. Paragraph 7 of the plaint denies existence of any loan advanced to the Appellant by the first Respondent or even mortgaging her house to the first Respondent in her entire lifetime.

The Respondents do not seem to deny the Appellant's assertions. In their joint written statement of defence, they aver that they made the publication so as to recover a loan taken by the Appellant's husband from the first Respondent. This appear to be the basis of the trial magistrate's ruling. This can be gleaned from the impugned ruling at page 9 where it is stated:

*"... And the law requires for any dispute among the members to be firstly referred for reconciliation a thing which the plaintiffs had never done for a reason that the plaintiff is not a member to a business of the first defendant. However, the plaintiff did never dispute a fact into a joint written statement of 1<sup>st</sup> and 2<sup>nd</sup> defendant (fact no. 3) **that what has done by the defendants was on recovery of the loan taken by the plaintiff's husband from the 1<sup>st</sup> defendant (cooperative society) where the property described under***

***paragraph 3 of the plaint was mortgaged as security for loan***”(Emphasis added)

The above extract portrays a serious misdirection on the part of the learned trial magistrate as the conclusion that the Appellant's husband had taken a loan from the first Respondent or that the property in question was mortgaged as security for the loan could not be ascertained in absence of evidence. The contention by the trial magistrate that the Appellant did not dispute the Respondent's joint written statement of defence was, to say the least, premature. As the case was yet to be heard, any averment in the pleadings could not be taken as proved. That conclusion could only be made by express admission of the same or upon hearing evidence thereof. I, therefore, subscribe to the submissions made by the Appellant's counsel that it was wrong on the part of the trial magistrate to uphold the purported preliminary points of objection as such. Those were not Preliminary Objection per excellence as their determination was conditional upon hearing the parties. They were not purely points of law as promulgated by the erstwhile Court of Appeal for East Africa in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** (supra). The trial magistrate ought to have overruled the said objections.

Before concluding the appeal, a corollary issue appear from the records of the trial court records. The trial magistrate dismissed the case after being satisfied that the alleged preliminary objections raised by the Respondents had merits. There has been a dilemma on the distinction as to which cases are subject to dismissal and which ones are to be struck out. In this Court's



however, the law appears to be well settled as to when to dismiss or strike out a matter before it. This was well explained well in the case of ***Mabibo Beer Wines & Spirits Limited Versus Fair Commission Competition and 3 Others***, Civil Application No. 132 of 2015 (Unreported) where the Court of Appeal cited in affirmation the decision in ***Ngoni Matengo Cooperative Marketing Union Ltd vs Aimahomed Osman*** [1959] EA 577. In the latter case, the defunct Court of Appeal for Eastern Africa made the following statement of principle:

*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

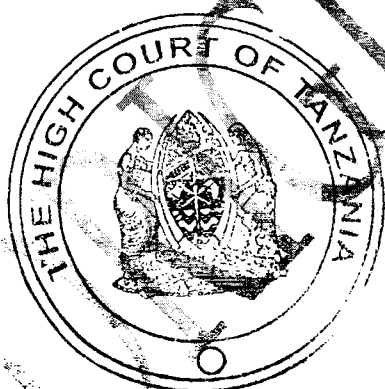
See also ***Francis Petro Versus the Republic***, Criminal Appeal No. 534 of 2016, ***The Director General NSSF Versus Consolata Mwakisu***, Civil Appeal No. 329 of 2017 and ***Yahya Khamis Versus Hamida Haji and 2 Others***, Civil Appeal No. 225 of 2018 (All unreported).

In the case at hand, the trial magistrate should not have dismissed the suit upon upholding the preliminary points raised. Dismissing the same outrightly have adverse consequences to the Plaintiff as the doors for appropriate remedies were shut. The dismissal order meant that the trial magistrate considered the matter on merits and decided to do away with the same. In this case, however, the trial magistrate thought she did not have jurisdiction and thus cannot be said to have considered the matter on

merits. The appropriate order would have been to strike out so that parties would have a chance to re-file the suit in a court or board with competent jurisdiction. A dismissal order brings the matter to an end, and the only remedy available is appeal, while striking out implies that the suit can be re-filed. The trial magistrate was therefore wrong in dismissing the plaint. On that basis the dismissal order by the trial magistrate was unjustified as it contravened the law.

In the results, based on the issues, reasons and authorities discussed, this appeal has merits. It is accordingly allowed. The decision of the trial court is quashed and set aside. The file to be remitted back forthwith in order that Civil case No. 3 of 2019 can proceed to be heard on merits. Costs to be in the course.

Order accordingly.



*[Signature]*  
Y. B. Masara

**JUDGE**

June 12, 2020.