IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 06 OF 2019

(Originating from Civil Case No. 85 of 2017, Arusha Resident Magistrate's Court at Arusha)

ARUSHA SOKO KUU SACCOS LTD.....1st APPELLANT

MAGWEMBE 2011 CO. LTD.....2ND APPELLANT

Versus

WILBARD URIO.....RESPONDENT

JUDGMENT

13/10/2020 & 27/11/2020

MZUNA, J.:

In this appeal, **Arusha Soko Kuu SACCOS Ltd** and **Magwembe 2011 Ltd,** the first and second appellant respectively, are challenging the award of Tshs 50,000,000/= (say fifty million) being the value of goods they seized from the respondent's shop one **Wilbard Urio** and his shares worth of Tshs 4,445,000/= after a default payment of the loan by the borrower Christopher Nyaratta Nyarasekera (now deceased). The respondent who is a Member of the 1st appellant, guaranteed a loan of Tshs fifteen Million (15,000,000/=) with monthly interest of 2% to the said borrower sometimes on 20th November, 2013. It accrued up to Tshs 21,056,600/-. The borrower passed

away after partial payment of the claim, even then after being served with a default notice.

After such confiscation of the respondent's shop items and shares, the respondent reported to the Registrar of Cooperatives in Arusha, who directed the appellants to surrender back the goods of the respondent allegedly that they were illegally taken, the order which however, was not complied with.

The trial court upheld the claim by the respondent and proceeded to make an order that the same must be refunded as prayed. This prompted the institution of Civil Case No. 85 of 2017, now subject for appeal.

In this appeal, the appellants have preferred five grounds of appeal which can easily be boiled into three namely: **First,** that the trial court had no requisite jurisdiction to decide the case (ground 1); **Second,** that the trial court failed to consider the appellants' evidence especially the fact that the respondent was a guarantor of the loan and his commodities were issued as a security (ground 2 and 3); and, **Third,** that the trial court failed to apply the relevant law governing the parties in deciding the case before it (ground 4 and 5).

The main issues for determination are:- **One,** whether the trial court was vested with requisite jurisdiction, and, **two,** whether the trial court considered the evidence adduced and the applicable law governing the parties to the case. **Lastly,** on the reliefs.

Let me start with the first issue of jurisdiction. Submitting on this, the appellant's counsel, Mr. Ngemela, argued that the trial court lacked the requisite jurisdiction to try the case. That, the dispute involved a cooperative society which under section 130 (1) of the Cooperatives [Societies] Act No. 6 of 2013 (herein after the Act) read together with regulation 83 (1) of the Cooperative Societies Regulations G.N No. 272 of 2015 (G.N No. 272 of 2015) gives first option of amicable settlement before the matter is referred to court by the Registrar.

It was his view that the law does not allow such dispute to be adjudicated by the ordinary courts of law. The case of **Evatha Michael v. Shalom SACCOS,** Civil Appeal No. 40 of 2016, High Court Arusha (unreported), among others was referred, to bolster his argument.

In reply Mr. Mofulu, the learned counsel stated that the matter was well canvassed through the District Cooperatives Registrar as per the

dictates of the law but the process was frustrated by the appellants who refused to heed to the orders issued. The learned counsel referred to section 94 (2) of the Act to state that it is not mandatory for the dispute of this nature to be referred to the court by the Registrar. The gist of his argument is premised on the use of the word 'may' which, to him, denotes discretion.

Having read the submissions by the parties herein; I find it undisputable fact the dispute was first referred to the District Cooperative Registrar as per the requirements of the law. However, this was done in response to the alleged appellants' illegal confiscation of the respondent's properties.

Regulation 83 (1) of Cooperative Societies Regulations, 2015 (G.N No. 272 of 2015) as well as Regulation 130 (1) of the Savings and Credit Cooperative Societies Regulations, 2015 (G.N No. 115 of 2015) are typically designed to deal with dispute settlement. Regulation 130 (1) of the G.N No. 115 of 2015 states thus:-

> *"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."
[Emphasis added]

Under sub regulation 2 of regulation 130 above, if the dispute is not resolved within 30 days it shall be referred to the registrar for arbitration.

As per the transcript above, it is clear that the dispute concerning the business of a SACCOS involving its members has to be settled through negotiation or reconciliation within the said SACCOS itself. According to the appellants, the 1st appellant being a SACCOS and the respondent being a member thereto, their dispute is no exception to the above position. On the other hand, the argument by the respondent's counsel is that the respondent exhausted the local remedies by reaching out to the District Saccos Officer who ordered them not to sell the respondent's properties as well as the Regional Registrar who ordered the appellant to return the respondent's properties, the order which was never complied with.

I have perused the trial court record carefully. The testimony of the 1st appellant's Manager, one Philipo Saimon Kulaya (DW1), states that in between their discussions, the Registrar intervened and sometimes later the Regional Registrar took over the matter with further directives. To them, this

was against their constitution. They thus decided to proceed with attachment of the respondent's properties.

Now the question is, <u>when did the appellant know that the matter was supposed to be referred to the negotiation and not to court?</u>

Assuming as it is argued by the appellant that the respondent ought to have exhausted the available avenues before going to the court what did they do? There is a letter on the record written by the Deputy Registrar of Co-operatives for Arusha region on 25th November, 2015, directing the appellants to handle back the confiscated goods to the respondent. The said letter also directed the parties to attend a conciliation meeting thereafter. I refer to page 2 of the said letter (*exhibit A4*) which reads-

> *"2. Nitaandaa na kuongoza kikao cha pamoja kati ya pande zote zinazohusika katika tarehe nitakayowajulisha."*

That was not done as there is no outcome of the directive given to the parties. Of course the case of **Evatha Michael Mosha v. Shalom SACCOS,** (supra) at page 4-5 held that:-

> *"...There is no dispute that, the law provides specific dispute settlement mechanism for cooperative societies. The issue is*

whether the society can refer the dispute to the court. Reading through the law it is obvious that the internal mechanism has to be exhausted first. It is only the registrar who may refer the matter to court; see section 94 (2), 95 (1)-95 (4) of the Act...Therefore it was wrong for the court to entertain the matter which the respondent had no proper resolution."

That case presuppose that the court's jurisdiction is ousted if the internal mechanism of dispute settlement is not exhausted. I am aware, each case is decided depending on the available facts. In the case before me, as well submitted by the respondent, there was a move to reach such settlement by negotiation as opposed to the above case of **Evatha Michael Mosha** (supra).

Second, even without the fear of being contradicted, as well argued by the respondent's counsel, the wording of the Act is "the registrar may" which presupposes discretionary powers as opposed to "shall" which is mandatory. If the matter was not referred to court, could a party sit by leaving his rights unattended? Further, the wording under Regulation 130 (1) of the G.N No. 115 of 2015 says: *"shall be settled amicably through negotiation or reconciliation"* that presupposes negotiation and arbitration fails, therefore to say "shall" must be conditional upon parties own wishes.

Third, the appellants never raised such issue of jurisdiction before filing a written statement of defence (WSD). There are other similar phrases where parties agree that the dispute should be resolved by way of settlement or arbitration. However, in view of what was held in the case of **East African Breweries Ltd vs, GMM Company Ltd** [2002] TLR 12, after filing the WSD a party is agreeable and has submitted himself to the jurisdiction of the court. The court held that:-

> *"Where a party to a contract has filed a suit in contravention of an arbitration clause the remedy open to the other party is to apply for stay of the proceedings at the appropriate time and before taking "a step in the proceedings".*

Surely, the appellant ought to have not filed WSD instead apply for the matter to be referred to "***negotiation or reconciliation.***" One can argue that the above case of **East African Breweries Ltd vs, GMM Company Ltd** was dealing with arbitration unlike this case where the law provides otherwise. I would say, reading closely regulation 83 (1) (2) and (3) of GN No. 272 of 2017 provides that the matter may be referred to arbitration by the Board or the cooperative society or by any party to the dispute. This case is therefore of no exception.

Courts, if I may hasten to add, should always be jealous not to be ousted its jurisdiction which is constitutionally granted, in view of what was held in the case of **James F Gwagilo vs Attorney General** [1994] TLR 73 (HC). The court, Mwalusanya, J (as he then was) held that:-

> *"Statutory clauses ousting the jurisdiction of the courts are ineffective to exclude the power of the High Court to exercise its supervisory role of judicial review conferred on it by article 108(2) of the Constitution."*

The above holding I am convinced had also in mind, Article 108 A of the Constitution of the United Republic of Tanzania which provides that:-

107A.

> *(1) Mamlaka ya utoaji haki katika Jamhuri ya Muungano itakuwa mikononi mwa... Mahakama ... na kwa hiyo hakuna chombo cha Serikali wala cha Bunge au Baraza la Wawakilishi la Zanzibar kitakachokuwa na kauli ya mwisho katika utoaji haki..."*

That means even the trial court had such powers to deal with the matter not necessarily the High court alone in its supervisory or judicial review powers. The court's power is not therefore ousted. I say so because, under Article 107A (2) (d) the said Constitution, provides that in the

dispensation of justice, the court should also promote mediation between the parties:-

> *"(d) kukuza na kuendeleza usuluhishi baina ya wanaohusika katika migogoro."*

Reading from the record, parties were subjected to mediation mechanism but it proved futile. If the appellant thinks, that "negotiation or reconciliation" could have brought fruitful results, no doubt that would have been an opportune time to make use of it at the mediation stage. Such technicalities of procedure cannot make this court fail to act as to do otherwise is abdication of its powers of dispensation of justice enshrined under the constitution.

Fourth, and this forms another ground to disagree that the court had no jurisdiction, the dispute was first referred there but seemingly parties never showed co-operation including the said Deputy Registrar as there is no any other letter apart from exhibit A4 which set a date to call them.

For the above stated reasons, I am convinced that the court was vested with jurisdiction to act as it did after even the first appellant subjected herself to the jurisdiction of the court. I agree with the respondent that the respondent exhausted the available local remedies including referring the

dispute to the Registrar for arbitration under regulation 63 sub regulation 2 of the GN 272.

I revert to the second issue as to whether the trial court considered the evidence and the relevant law. Mr. Ngemela submitted that it was a duty of the respondent to ensure that he cooperates with the administrator of the borrower in repaying the loan as per their loan agreement. On his part, Mr. Mofulu submitted that the appellants' properties were confiscated illegally based on the constitution of the 1st appellant. He was of the view that the primary liability was supposed to be on the borrower before attaching the shares and goods of the guarantor. He also stated that the respondent followed the procedure of the law but same was defied by the appellants. He therefore invited the court to dismiss the appeal with costs.

The respondent seems to say that it was improper for the first appellant to deal with the respondent's properties alone leaving aside that of the borrower who obtained the loan, as the first option. This court was referred to Part 9.1 (L) (i), (ii) and especially (iii) of the SACCOS Constitution (exhibit A5). That since the borrower died before servicing his debt, the appellants could have opted to involve his personal legal representative, something which they never did. It is true there were two guarantors. The

court was satisfied the first option was not fully realized including also to shift the burden to the appointed administrator after death of the borrower and therefore found the order was illegal, it proceeded to order for a refund.

My close reading of the record shows, PW1 Wilbard Urio, admitted when he was cross examined by Mr. Godfrey that the borrower never paid back the remaining balance of loan. He admitted as well when he was cross examined by Ms. Rachel, that if Christopher (borrower) failed to pay the loan he was (i.e the respondent) duty bound to pay it. That if the balance is not paid, sponsor's properties will be sold too.

There was also an argument that the borrower was sponsored by two people the respondent and one Hanifa. The respondent raised his concern that why did the appellant opt to impound the respondent's properties and his shares alone?

Philipo Simon Kulaya (DW1) then as the Manager Arusha Soko Kuu Saccos, said that in awarding the said loan the guarantors confirmed knew the borrower had a house which was used as mortgage. That they knew where it was. He said that the said house was mortgaged to another bank and the respondent promised to bring another house of the borrower. He

admitted however that he was shown a house of Kisongo but the respondent never brought the feed back on its proof of ownership by the borrower (i.e. documents).

The defence was of the view that there was sort of defrauding because the respondent upon noticing the borrower had died, wanted to take his shares after finishing his loan due on 18th August 2016. The appellant gave also an explanation for failure to realize by sale the borrower's property (house), he said it was because it had no documents. Nothing was said about the other guarantor.

In view of the above set of events, the trial Magistrate to some extent never considered the evidence on record. I am sure If that was properly done, could have arrived at the different conclusion including to find that the administrator of the estate could not have footed the liability where the guarantors employed fraud to the jeopardy of the first appellant. That fact of fraud, was proved beyond the normal proof in civil case as is required by the law.

This takes me to the last issue of reliefs. There is an argument that the loan could have been recovered from the administrator of the estate. Where,

a party (lender), notices that there was collusion between the guarantor and the borrower, I would think there is no harm to recover the debt straight from the guarantor.

I say so because the house used as mortgage was used to obtain loan in another bank. Definitely, the security was no longer the likely property to recover loan. The first appellant proved the loss she incurred. It was held in the case of **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137 at page 138 (CA) that:- *"It is trite law that special damages must be specifically pleaded and proved..."*

It was therefore correct to recover the advanced loan from the respondent, I would say together with another guarantor, Hanifa Rweikira. In other words, the remaining balance of the claimed loan should be apportioned to the two guarantors, the respondent inclusive. The seized properties should be used to cover ½ of the claim and if the same cannot fully settle it, part of the security should be used in addition thereto. The appeal by the appellant is partly allowed with no order as to costs.

M. G. MZUNA,

JUDGE.

27. 11. 2020.