IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

PC CIVIL APPEAL NO. 25 OF 2020

(C/f Arumeru District Court Civil Appeal No. 18 of 2019, Original Enaboishu Primary Court Civil Case No. 102 of 2019)

MAGRETH AUGUSTO (MTUNZA HAZINA KIKUNDI CHA EBENEZA) ..... **APPLICANT**

Versus

FRIDA GABRIEL ..... **1ST RESPONDENT**

ESTIANA BONIFACE ..... **2ND RESPONDENT**

JUDGMENT

7th December, 2020 & 12th March, 2021

Masara, J.

The Appellant herein is challenging the decision of the District Court of Arusha dated 25th February, 2020 which decision reversed the decision of Enaboishu Primary Court (the trial Court) and directed that the dispute between the parties be tried de novo by another magistrate. She has come to this Court armed with four grounds of appeal couched as follows:

(a) *That, the District Court misdirected itself on matters of law contrary (to) clear provisions of the Banking and Financial Institutions Act, Cap. 342 R.E. 2002 which do not require partnership of persons doing business for profit to be designated as a financial institution;*
(b) *That, the District Court erred in law when it held that the partnership which was doing business of providing funds for its members for purposed (sic) profit was required to carry a business licence under the provisions of Business Licencing Act, Cap. 208 of the law;*
(c) *That the District Court has interfered unnecessarily with the decision of the Primary Court; and*
(d) *That the holding that another magistrate with jurisdiction should try the case for assessment on what exactly the respondents herein borrowed, what they have paid and what has remained is*

contradictory because the said proceedings, decision and order had already been quashed.

She implored the Court to allow the appeal and at the same time uphold the decision of the Primary Court with costs. Hearing of the appeal proceeded by filing of written submissions, an order that was met by both parties. Before recapitulating the submissions and making a decision on the grounds of appeal, it behoves me to summarise the factual background leading to this appeal.

The Appellant herein sued the Respondents and two others at the trial Court for different amounts of money allegedly borrowed from Ebeneza Group. The Appellant preferred the suit on behalf of the group which she served as the cashier. The first Respondent is said to have borrowed 5 million shillings while the second Respondent borrowed Tshs. 4 million. The money borrowed attracted interests and at the time of filing the suit the 1st Respondent had not paid a total of Tshs. 4,584,700/= while the 2nd Respondent had not paid Tshs. 2,770,200/=. The two Respondents admitted to have taken the loans but stated that they had repaid in full. The trial Court held that the claims against the Respondents were proved. It directed that the 1st Respondent pays Tshs. 6,475,000/=; 2nd Respondent pays Tshs. 3,770,000/= and different amounts be paid by the other two. The two Respondent were aggrieved and appealed to the District Court. The other two did not appeal. On appeal, the learned appellate Magistrate partly allowed the appeal holding that, whereas there was no dispute about the Respondents taking loans from the Group, the amount decreed against them included profits and fines that the Group has no legal rights to impose as it was not registered as financial

institution under the law and did not have a business licence. The learned Magistrate therefore quashed the trial Court decision and directed that the case be tried by another magistrate for assessment on what exactly the Respondents borrowed, what they have paid so far and what remains excluding fines and "faida". It is against this decision that this appeal was preferred.

Mr. Nelson Merinyo, learned advocate, who appeared for and also filed written submissions on behalf of the Appellant opted to deal with the 3rd ground of appeal. He contended that the 1st Appellate Court erred to interfere unnecessary with the finding of the trial Court which had properly analysed the evidence before it. Quite unusually, the learned counsel annexed some documents from the trial Court records to substantiate his position. These documents include KE1 and KE3, both titled **"Muhtasari wa Kuhakiki Mahesabu ya Wanachama Walioacha Kikundi huku wakidaiwa"** dated 14/06/2019. Mr. Simon Mbwambo, learned Advocate for the Respondent strongly opposed the procedure taken by his counterpart. In his view, one cannot attach evidence in a written submission as submission are mere statement of fact meant to support or oppose the appeal or suit. He made reference to decisions in ***Vocational Education Training Authority (VETA) Vs. Ghana Building Contractors and Varsan Dewji Ramji & Company***, Civil Case No. 198 of 1995 (unreported) and ***B.V & Rudolf Teunis Van Winkelholf Vs. Charles Yaw Sarkodie & Bish Tanzania Ltd***, Land Case No. 9 of 2006 (unreported) to support his position.

In his rejoinder, Mr. Merinyo refuted the allegations made stating that the annexed documents are not new, but are meant to assist the Court in perusing the primary Court record. The Court did peruse the trial Court original file and confirmed that what was attached by Mr. Merinyo is not new evidence as contended by the counsel for the Respondent. The trial Court did receive minutes of meetings that came up with the resolution to sue the Respondents for the amounts they owed the Group. The rule set by the cited cases is therefore inapplicable in this case.

On the issue of analysis of evidence, Mr. Mbwambo supported the decision of the 1st Appellate Court on the premise that the trial Court's decision on the amount of money to be paid by the Respondents to the Group were incorrect. He contended that the decision of the trial Magistrate did not conform to the evidence brought before it and that in any case the interests charged appear to be exorbitant.

I have considered the evidence at the trial and the two decisions of the lower courts. I agree with Mr. Mbwambo that the amounts decreed against the Respondents may not be backed by the testimony of the Appellant. However, according to exhibit KE1, which the trial Court relied in reaching its decision, the 2nd Respondent owed the Group Tshs. 3,702,000/-. Exhibit KE3 which relate to the 1st Respondent indicate that up to the time the suit was filed, she owed the Group Tshs. 6,475,000/=. Both Respondents had agreed with the said claims and countersigned. These are the amounts that were decreed by the trial Court against the Respondent. The 1st Appellate Court while referring the suit back to the trial Magistrate did not consider the Exhibits that the trial Court relied

upon. It only faulted the interests charged on the loans. That was not in order. As the first appellate Court, the Magistrate had a duty to assess the evidence as presented and not merely confine itself on the evidence of one witness. I therefore uphold the 3rd ground of appeal.

Turning to the first ground of appeal, it was Mr. Merinyo's submissions that the learned first Appellate Magistrate misdirected herself when she held that the Group that the Appellant represented was not a registered financial institution and as such could not be expected to charge interest on the loans advanced as it was not licensed as such. In his view, the Group was not bound by the Microfinance Act of 2018 which came into force on 1st November, 2019. In response to this ground, Mr. Mbwambo raised a number of legal issues regarding the judgment of the trial Court. First, he contended that the Group was a Cooperative Society and therefore the Primary Court did not have jurisdiction to deal with a dispute arising from the Group. He made several references to the Cooperative Societies Act, 2013 and decisions of this Court to back up his position. Secondly, the learned counsel contended that the suit at the trial Court was illegal as it was filed by a wrong and non-existing party, as the Group was non-registered SACCOS Group. He further contended that the Appellant has no locus stand as she sued using her own name and not as a Group.

I have carefully considered the rival submissions regarding the issue whether the Group could or could not charge interest in the money advanced to its members, the Respondents included. I agree with the Appellant's advocate that the requirements of registration as a financial

institution cannot apply to the Ebeneza Group that the Appellant and Respondents were members as it started before the Microfinance Act, 2018 became operational. Furthermore, according to the Court of Appeal decision in ***Simon Kichele Chacha Vs. Aveline Kilawe***, Civil Appeal No. 160 of 2018, it is not illegal for a person to lend money with interest. The Court of appeal was considering a dispute where the appellant was disputing interest chargeable by an individual lender. The Court stated inter alia:

> *"With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit P1, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind. On our part we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or mis representation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2002. We therefore wish to emphasise here that* ***since the appellant at the time he concluded Exhibit P1 with the respondent was a free agent and he was of sound mind, he must adhere and fulfil the terms and conditions of it.****"*(Emphasis added)

With parity of reasoning, I see nothing wrong in the agreement that the Respondent entered with the Group represented by the Appellant. They did not allege to have been compelled to take the loans and did in fact honour some of its terms. The learned first Appellate Magistrate was therefore wrong to question the validity of the loan terms that the Respondents had freely agreed into. This ground has merits and is accordingly sustained.

Regarding the second ground of appeal, the counsel for the Appellant submitted that the first Appellate Court erred in raising the issue of a business licence of the Group, something that parties had not canvassed at the trial. Mr. Mbwambo, on the other part agreed with the findings of the 1st Appellate Court. He made reference to Section 3 of the Business Licencing Act, Cap. 208 which prohibits carrying on a business in Tanzania Mainland unless one possesses a valid business license.

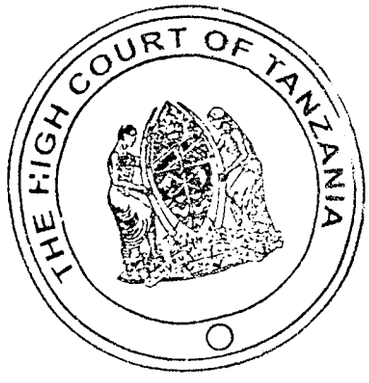
There was no issue at the trial about the type of group that the parties herein were members of. It is true that it was not registered, but the fact that it was not registered could not have been raised as a ground to dispute the validity of its existence. The manner in which the learned Appellate Magistrate raised it was uncalled for.

Submitting on the last ground of appeal, Mr. Merinyo contended that the order for retrial before a different magistrate was wrongly given as the first Appellate Magistrate did not fault the procedure adopted by the trial Magistrate or Court. The counsel for the Respondent did not directly deal with this ground. At the outset, I do agree with the counsel for the Appellant that the first Appellate Court did not justify its decision which directed that the matter be retied before a different magistrate. In essence, the appellate Court found nothing wrong with the decision of the trial Magistrate with the exception of the interest and "faida" charged on the loans. I do not understand why the appellate Magistrate did not step into the shoes of the trial Court and exclude the interests and "faida" that it found objectionable. The law allows a first appellate court to re-evaluate the evidence and reach its own decision. Even if it was deemed necessary

to refer the matter back to the trial Court, in the absence of procedural irregularity or bias, the matter should have been referred to the same Magistrate and assessors to exclude the objectionable items. This ground is equally upheld.

From the findings hitherto, this appeal has merits. It is accordingly allowed. The decision of the 1st Appellate Court is accordingly reversed and set aside. The trial Court decision is hereby restored. As none of the parties is to blame on the decision leading to this appeal, I direct that each party bears their own costs for this appeal.

Order accordingly.



Y. B. Masara
JUDGE
12th March, 2021