

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISRTY)
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 115 OF 2020

HAWA HASHIMU..... APPELLANT

VERSUS

SHARIFU HASSAN SELEMANI..... 1st RESPONDENT

SALMA MTUNGUJA.....2nd RESPONDENT

(From the decision of the District Court of Temeke)

(Kihawa- Esq, SRM)

dated 18th March 2020

in

Civil Appeal No. 74 of 2019

JUDGEMENT

8th April & 28th May 2021

Rwizile, J

This is the second appeal. Its origin can be traced in Civil Case No. 181 of 2019, filed at the primary court of Mbagala. The first respondent sued the second respondent and the appellant for payment of 10,740,000/= the amount alleged to be lost under their custody. It appears, parties belong to a women group as members called Tushikamane Women Group. Their partnership was registered under the Societies Act in 16th June 2011. To maintain their Membership in the group, they were depositing their savings in their bank account where the second respondent and the

appellant were their treasurer and chairperson respectively. In 2019, when their deposits grew to a reasonable amount of 13,286,000, members came to an agreement to share the same. It would appear, the leaders were adamant to do as agreed. This caused suspicion and the first respondent sought for information from their bank. To their surprise, only 2,882,000/= out of 13,286,000/= was found remaining. After many empty promises to pay it back, it was resolved by all members, that an action be commenced against them. On 3rd May, 2019, Civil Case was filed by the first respondent at the primary court of Mbagala to claim the same for and on behalf of the rest of the members. Powers of Attorney were also issued to her on 17th June 2019.

She successfully got the judgement against the appellant and the second respondent, for payment of 10,740,000/=. They were aggrieved by the decision. They unsuccessfully appealed to the district court of Temeke.

It would appear, the decision of the District court aggrieved the appellant who was the second respondent at the trial court and the first appellate court. She decided to appeal against the decision of the district court before this court against Sharifa Hassan Seleman , first respondent at the first appellate court, and Salma Mtunguja (second respondent) who was the first appellant before the first appellate court. Her grounds of appeal are as follows;

- 1. That the honourable trial magistrate erred in law and in facts for failure to determine that there was a requirement of important evidence and witness during the trial proceeding of primary court.*

- 2. That the honourable trial magistrate erred in law and facts for failure to consider that the 1st and 2nd respondents were authorised by the group to be signatories and drawers of money at bank.*
- 3. That the honourable trial magistrate erred in law and facts for failure to consider that the group is registered, hence it has capacity to sue for its name rather than the name of 1st respondent.*
- 4. That the honourable trial magistrate erred in law and facts to rely on certificate of Occupancy hold by the Local Government which had no direct connection with the matter at hand.*
- 5. That the trial magistrate of both lower courts erred in law and facts to consider relationship of appellant and second respondent with the matter*
- 6. That the honourable trial magistrate erred in law and facts for failure to analyse the reasons for decision to each ground of appeal.*

She therefore prayed for this court to allow this appeal, quash and set aside decisions of lower courts, order the local government of Machinjioni to give her back her title deed, a declaration that the appellant has no any liability towards the group money, costs of this appeal to be borne by the respondents and any other relief this court may deem fit and just to grant.

At the hearing the parties appeared in person. The appeal was argued by written submissions. In support of the appeal, the appellant abandoned ground six of the appeal. When submitting on ground one, the appellant argued that, the claim of money at the trial court was not proved, according to her, she said there ought to have been documentary

evidence like bank statement to show who withdrew the money. She added, nothing was tendered which is contrary to section 110 of the Evidence Act, [Cap 6 R.E 2019]. She then contended that, the appellate court failed to discover such weakness of the trial court.

Arguing ground two, she stated, she was not directly responsible in withdrawing the money from the bank unless in case of the absence of one signatory. She said, respondents were group signatories and the same was provided by the group constitution. She alleged that the trial court failed to consider the constitution in making its decision. Rather, it depended on mere words of the 1st respondent and her witnesses. To support this argument, she referred to the case of **Luther symphorian Nelson vs The Attorney General** and **Ibrahim Said Msabaha**, Civil Appeal No.24 of 1999 (unreported) and the case of **Hemed Said vs Mohamed Mbili** [1984] TLR 113

It was her argument on ground three that, since the group was registered there was no need for the 1st respondent to sue on its behalf, by doing so she said, the 1st respondent lacked locus. She added that even the power of attorney admitted at the trial court, does not have any legal effect since the same was not registered under the Registration of Documents Act, [Cap 117 R. E 2019]. According to her, it was a mere affidavit and reference was made to section 9 of the Act.

Dealing with the fourth ground, the appellant argued, the trial court erred considering the title deed which was submitted by the appellant at the local government Authority. According to her, she was forced to surrender the same. She said, the title deed was procured by the local government Authority under duress. She therefore prayed for her title deed.

Lastly, she argued the fifth ground that, the lower courts were so concerned with the relationship of the appellant and 2nd respondent and failed to properly examine the evidence brought before them. She referred to the last paragraph at page 9 of the trial court judgement. She added that it was the respondents who had the power to withdraw the group money from the group account. Her submission went further, that the 1st respondent is escaping from her liability as a signatory. The appellant prayed for this appeal to be allowed with costs and all the prayers on her petition of appeal be granted and that a retrial be ordered.

Contesting the appeal, the 1st respondent brought to the attention of this court a fact that parties to this appeal were changed. She said the appeal is against the decision of the first appellate court, but she instituted the same against the first respondent and her co-appellant at the first appeal. She said the same is an irregularity which renders this appeal incompetent before this court.

Submitting on the grounds of appeal, it was her submission on the first ground that, she proved her case at the trial. She submitted that, there was sufficient evidence, oral and documentary which proved her claim, as per section 110 of the Evidence Act. She asserted further that, it was her evidence which proved the case on balance of probability. She therefore said this ground is baseless.

It was her submission on ground two that, the appellant and 2nd respondent admitted to be responsible for the loss of the claimed money. She said, they promised to repay such amount but they failed. She added that, at the trial court the same was proved by evidence.

She also cited the case of **Hemed Said (supra)** and the case of **Luther Symphorian Nelson (supra)** that she proved her case by adducing heavier evidence. According to her this ground lacks merit.

On the third ground of appeal, she argued that the power of attorney was given to her so that she can represent the whole group in court. she said the same was admitted at the trial. She argued further that, the power of attorney cannot be registered under Cap 117, which deals with registration of documents in landed matters.

She asserted on ground four that, it was not true that the appellant was forced and threatened to surrender her title deed at the local government Authority. According to her, the same was done voluntarily by the appellant, believing she could get money to repay the debt, so that, she could repossess her title. She referred to page 9 of the trial court typed judgement and to exhibit D and E.

On the last ground, the 1st respondent argued by saying, it was a mere allegation that she conspired with the 2nd respondent to draw the group money from the account. She went on arguing that the same was not proved. She added that, no evidence was adduced to prove the same. She therefore asked this court to dismiss this appeal with costs.

As per the 2nd respondent she did not actually submitted on the ground of appeal as she was required to, rather she said it was a conspiracy between herself and the 1st respondent to draw the said money, for them to do business. However, she then submitted that the lower courts based their findings on the evidence of the 1st respondent, since according to her the same did not prove this case. She stated as well that, the trial court failed to call the bank personnel and documents to prove if the

money was withdrawn by her and the appellant. She also cited the case of **Hemedi Saidi** (supra) and **Lutter symphorian Nelson** (supra). She invited this court to consult the Magistrate Court's (Rules of Evidence in primary court) Regulation, GN No. 66 of 1972. She therefore prayed to this court to set aside judgements of the lower courts or order for retrial.

Having considered the submission of the parties and considered the grounds of appeal. I propose to determine the 3rd ground of appeal which disposes of the appeal. It has been submitted that the first respondent filed the suit with powers of attorney. According to the appellant, she was not empowered to stand for the registered society which has power to sue and be sued.

Without mincing words, this is not true. Tushikamane Women Group was indeed registered under Societies Act. It should be noted that not every registered society acquires a legal status empowered to sue or be sued. The Act where the same was registered is silent on that. It does not therefore provide for such powers.

But in order for such organisation to acquire such a legal status, it is to be first incorporated under the Trustees Incorporation Act [Cap 318]. Section 2 of the Act is categorical. It requires such bodies to apply to the Administrator- General to be incorporated as a body corporate. Upon being issued with the certificate of incorporation under section 5(1), the trustee becomes a body corporate by the name described in the certificate. This makes it have perpetual succession and common seal and therefore gets power to sue and be sued in such corporate name under section 8(1) of Cap 318. The group did not attain such status and therefore the point raised by the appellant in this aspect is baseless.

I have perused the record of the trial court. It is apparent that the trial court admitted Civil case No. 181 of 2019 on 3rd May, 2019, the first respondent being the plaintiff. She was standing for the rest of the members of the group who issue with her powers of attorney. The record shows, the plaint was signed and filed before the trial court by the first respondent. The point to determine is, in which capacity did she stand to file the same. The plaint as I said, is plain. It named her Sharifa Hassani Selemani as the plaintiff. It does not at least state if she is doing so on behalf of others. The particulars of the plaint states as below;

Mnamo tarehe 27/3/2019 tulivunja Kikoba kwenye kikundi chetu, lakini Mwenyekiti na Mhazini (wadaiwa) walikuwa wanasuasua kuzigawa pesa. Hivyo nikaamua kwenda bank kuangalia salio na kukuta kuna 2,882,000/= badala ya 13,288,000/=. Hivyo kulikuwa na upungufu wa sh. 10,740,000/=. Hivyo tukaenda kwa M/kiti na kushindwa kulipa, lakini wote wawili walikili kudaiwa pesa hiyo na kikundi (tushikamane women group). Hivyo naomba mahakama itusaidie kupata haki yetu.

From the plaint one notes that the same was filed as I said on 3rd May 2019. The claims though are for the women, the plaint does not refer if she was an authorised person by that time to file the same. She did not even indicate that she was doing so on behalf of other. It is on record that on 17th June 2019 days after she had instituted the proceedings, was issued with the Powers of Attorney (exhibit G). Later in evidence, she tendered minutes that lead to her appointment to stand for them in their case (exhibit B).

Above all, the same power of Attorney is defective since it does not possess the signature of the donor of the powers. One Rehema Shabani signed just as the witness. She has signed as a witness and vice chairperson. The minutes that appointed her does not show the date but it also referred to the same case.

The powers of attorney which I have found defective was in my view not proper instrument empowering the first respondent to institute the case. But still, the same were issued after the plaint was filed. In the absence of such clear procedure of filing the case. It cannot be said that the same was properly filed. In my considered view, cases of this nature ought to be filed in representative capacity. Again, if it is assumed that she filed the same as representative suit, still she had to follow the procedure laid down before filing the same. In order to comply with the requirement of the law.

It has been held by this court that a representative suit may be filed in compliance with order 1 rule 8 of the CPC. This applies, because the law applicable in Primary Courts (GN No. 310/1964, 119/1983) is silent on the procedure of filing a representative suit. However, in the case of **Abdillah Juma vs Salum Athumani** [1986] TLR 240, Samatta, J (as he then was) held that, despite having no law providing such a procedure in the Primary Court, still the same is bound to apply the letter and spirit of order 1 R 8 of the Civil Procedure code. The court states;

Since a Primary Court can, and is bound to, exercise its civil jurisdiction in accordance with O. I r. 8 of the Civil Procedure Code, 1966, it follows that a representative action can, in law, be instituted before it.

Although persons on whose behalf a representative suit is instituted are not parties to the proceeding, it is necessary that their identities be known to the Court’.

Order. I R.8 of the Civil Procedure Code, [Cap 33 R.E 2019]. States as hereunder reproduced;

Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

In my considered view, the first respondent was not justified to file the suit on behalf of others without prior permission of the court. She was, I think, at least to file the plaint plainly indicating that she is doing so on behalf of fellow members of the group. Further, she could have attached the signed list of the other members and the amount claimed by each of the members of the group. This means, she filed the same without authority and that is not legally tenable. The powers of attorney which is the only instrument relied upon, was issued long after the case was filed in court. In as much as I sympathise with the Tushikamane women group for what was done to them, I have to say the law should be followed. That being the case, I hold that the trial was a nullity and the same is

quashed, as I hereby do. Basing on the nature of the case, I order each party to bear its costs.

AK. Rwizile
Judge
28.05. 2021

Judgement delivered in the presence of the respondents. The appellant is absent, this 28th day of May 2021

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

