

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL NO. 8 OF 2020

(Arising from decision of the District Court of Nyamagana in PC Civil Appeal No. 44 of 2020
originating from Mwanza Urban Primary Court in Civil Case No. 327 of 2019)

SARA MANJALE APPELLANT

VERSUS

MWANZA SACCOS LTD

(FREDRICK RUGAIMUKAMU).....RESPONDENT

JUDGMENT

27th April & 18th May, 2021

RUMANYIKA, J.:

The 2nd appeal is with respect to judgment and decree of Nyamagana district court (the 1st appeal court) dated 30/10/2020 which upheld decision of 28/10/2019 of Mwanza urban primary court (the trial court) with respect to claim by Mwanza SACCOS Ltd (Fredrick Rugaimukamu) of the outstanding shs. 7,392,824/= . Sara Manyale (the appellant) having had lost the war and battle.

The 4 grounds of appeal revolved around three (3) points essentially:

(a) That the respondent had no locus standi.

(b) That contrary to Regulation 38(1) (2) of the Cooperative Societies Act the suit was prematurely instituted.

(c) That the respondent wasn't privy to contract.

Whereas Mr. Masoud Mwanaupanga learned counsel appeared for the appellant, duly appointed to realize the loans Mr. Fredrick Rugaimukamu he appeared for the respondent. By way of audio teleconferencing I heard them on 27/04/2021 through mobile numbers 0757722909 and 0754089347 respectively.

Having combined grounds 1 and 3 Mr. Masoud Mwanaupanga learned counsel for the appellant in a nutshell he submitted; **(i)** that the respondent had no **locus standi** except Mwanza SACCOS Ltd who actually was privy to contract. That unlike what the learned resident magistrate wrongly held, use of the name Fredrick Rugaimukamu it was not a mere typographic error but contrary to provisions of Section 35(1) of the Cooperative Societies Act No. 6/2013 much as the body corporate had capacity to sue or in its registered name to be sued (cases of **Christian Mdimi v. Coca Cola Kwanza Bottlers Ltd**, Civil Appeal No. 112 of 2008 (CA) at Dar es Salaam (unreported) and **CRDB Bank PLC v. George Mathew Kilindu**, Civil Appeal No. 110 of 2017 (CA) at Dar es Salaam

(unreported). That the suit should have been struck out **(ii)** that the two courts below improperly recognized copy of the contract because the respondent wasn't a party to it nor was it properly tendered in evidence **(iii)** that contrary to Regulation 83(1) (2) (9) of the Cooperative Societies Regulations of 2015, the dispute therefore was prematurely instituted in the court of law as it should have been referred to the Registrar of Societies first. The proceedings therefore were liable to be nullified so that the parties may wish to institute it properly. That is all.

Mr. Fredrick Rugaimukamu submitted that the learned counsel's reference to Regulation 83(a) (2) (9) was a misconception because as opposed to administrative dispute, theirs was breach of loan agreement therefore parties were at liberty as of right to go for resolution by ordinary courts of law the appellant having had admitted the claims save for the amount. That if anything, with regard to the issue of names the learned counsel only played around procedurals and legal technicalities. The 1st appeal court having had held that use of (Fredrick Rugaimukamu) it was a mere clerical error. The appeal is liable to be dismissed with costs. The respondent's representative further contended.

The evidence on record would read as follows:-

SM1 Fredrick Rugaimukamu stated that he was director of Butulage Company Ltd under Section 76(3) of the Savings and Credit Cooperative Societies Act, 2014 duly appointed by Mwanza SACCOS Ltd to collect and recover loans in this case shs. 7,392,824/= i.e. shs. 6.0 million and interest from the appellant which should have been repaid on or by 08/11/2014 latest that despite default and demand notices served on the appellant on 26/06/2018 and, in her letter dated 01/09/2018 she admitted it and promised to pay shs. 100,000/= monthly in a number of installments, yet the appellant defaulted.

SM2 Jackson Wambura stated that since 2018 he was chair of the government subsidized Mwanza SACCOS Ltd. That having had engaged Fredrick Rugaimukamu their broker and the appellant knew all this (his testimonies as per SM1's) and in that regard the former presented a motor vehicle with Registration No. T 245 AWB Make Toyota Corola Mark II (its registration card just unceremoniously got missing and they suspected her responsible), a refrigerator and his shares as collateral, the appellant had paid four (4) installments only. That the respondent's several and repeated efforts to settle and recover the now 9 years old loan had proved futile.

SU1 Sarah Bulyehu Manjale stated that she was member No. 482 of Mwanza SACCOS Ltd and having had paid shs. 6,000,000/= in 2013 from 2017-2018 she experienced long illness therefore failed to fully repay. That the alleged shs. 7,392,824/= debt was not actual that upon receiving the notice of default she promised to pay in monthly installments but having paid them the initial shs. 100,000/= (Exhibit "D1"), to her surprise the broker served her a fresh notice of default of 25/09/2018 for shs. 5,433,064/= (Exhibits "D2" and "D3") then on 20/06/2019, but contrary to Regulation 83(i) – (ii) of the Cooperative Societies Act, straight away she was summoned to the court of Law (without reference to the Registrar of Societies) hence the prematurely suit. That she owed them shs. 5,926,000/= only and would fully repay within three (3) months had the court granted her extension of time.

SU2 James Sumuni Nyakia stated that he was a retired founder manager of Mwanza SACCOS Ltd for the period of 2012–2018. That actually the appellant owed the respondents less than the alleged shs. 7,392,824/= but for the missing essential books of accounts much as also, the suit was contrary to Regulation 83(1) of the Act prematurely instituted.

SU3 Lydia Sheltel Nyangala stated that she was ex-Clark to the respondent and, at times the acting accounts Clark that with regard to the loan, the appellant was done since as during her time su3 signed the respective ledger which showed debits and credits. That is all.

With all such undeniable material facts the pivotal issue now is not whether the appellant owed the respondent but rather amount of the outstanding loan was it shs. 5,926,000/= as admitted by the appellant or shs. 7,392,824 now claimed by the respondent! In any case, and all the time the plaintiff now the respondent had burden of proof not because the appellant had admitted part of the claims, but unlike the respondent the appellant kept no books of accounts therefore she could not have proved the negative. HE WHO ALLEGES MUST PROVE. It is very unfortunate that even where the appellant had asked for production of the respective ledger in order, according to Su3 one to establish what actually had been the trend of debits and credits, despite the trial court's order of 01/10/2019 for reasons known to them the respondent did not comply. It is trite law that unexplained party's failure to produce essential documentary evidence it entitled the court to draw adverse inference in this case that actually the appellant owed them not more than shs. 5,926,000/= only (see the case of

Aziz Abdallah v. Republic (1991) TLR 71 quoted with approval in the case of **Amiri Hassan Kadura v. Republic**, Criminal Appeal No. 271 of 2013 (CA) unreported By virtue of the provisions of Regulation 83 (1) of the Act, before they rushed to court the dispute should have been referred to the Registrar of Societies yes, but the omission could not have vitiated the proceedings under the circumstances because not only partly though from the very start the appellant admitted the claim, but also I think the provisions of the law only intended that in order to serve time and resources, parties exhaust all local remedies with a view to amicably settling disputes. I think in this case with expiry of half a decade and the evidence adduced it was evident enough that amicable settlement was next to impossible.

The issue of the respondent's locus standi needs not to detain me because even if it was ruled in favor of the appellant, that one would not have relieved her from part of the claim she admitted much as also, the latter did not sufficiently dispute that by virtue of appointment under Section 76(3) of the Savings and Credit Cooperative Societies Act, 2014 Fredrick Rugaimukamu appeared as the loan realization and recovery agent much as also, in her testimony the appellant admitted having had paid

them some installment (s). Grounds 1 and 2 dismissed. In fact, the issue of locus standi was but afterthought leave alone the respondent's privity to contract. Ground 3 of appeal also it is dismissed. Nevertheless, as said, only a claim of shs. 5,926,000/= (five million nine hundred twenty-six) was proved. The appeal is partly dismissed and partly allowed. Each party shall bear their costs. It is so ordered.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

06/05/2021

The judgment delivered under my hand and seal of the court in chambers this 18/05/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

18/05/2021