IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 256 OF 2020
(From Civil Case No. 12 of 2020 Temeke District Court at Temeke)

ST. MAURICE VICOBA GROUP A.....APPELLANT
VERSUS
FRANCIS MWAMLIMA NDAGA.....RESPONDENT

JUDGMENT

MASABO, J

St. Maurice VICOBA Group A sued the respondent before Temeke district court in Civil Case No. 12 of 2020 for recovery of Tshs 27,057,384/=. It was alleged that the respondent who was serving in the capacity of secretary of St. Maurice VICOBA Group A unlawfully misappropriated the said sum which was entrusted on him by the group. On 16/9/2020 the trial court dismissed the suit for want of proof.

Aggrieved, she filed this appeal premised on three grounds. I will reproduce the grounds verbatim: -

1. The learned magistrate did not dismiss the Appellant's suit against the respondent, but the suit was dismissed against the Appellant in favour of the Respondent. The learned resident magistrate thoroughly evaluated and scrutinized the Appellant's entire evidence on record *vis*

a vis the respondent's evidence and established that he unlawful took of the amount by the respondent herein was not proved.

2. The learned magistrate erred in law and fact by holding that in civil cases are proved on the balance of probability and on that ground, the appellant failed to prove that the respondent herein unlawful took the amount in dispute against the Appellant.
3. The learned magistrate erred in law and fact by holding that in the evidence provided by plaintiff lacking evidence, without considering the respondent's pleadings of the case to wit he admitted to have taken the amount in dispute and willing to settle the amount.

Hearing of the appeal proceeded in writing. Both parties had representation. Ms. Adelaida Bachire learned counsel appeared for the appellant whereas Mr. Andrew Miraa, learned counsel was for the respondent. Submitting in support of the appeal, Ms. Bachire consolidated the 1st and 2nd ground of appeal and submitted that the trial court erroneously dismissed the appellant's case for want of proof whereas there was sufficient proof as through paragraph 3 of his written statement of defence the respondent agreed to have taken the money and committed to pay back on 5th November, 2019. Therefore, as these correspondences were admitted as evidence in court there was no justification for the trial court to ignore them.

Further, Ms. Bachire argued that the trial court did not address the main issue which was whether the respondent borrowed the claimed amount. It proceeded to resolve a matter which was not in dispute. The appellant proved her case on the required standard in civil cases i.e proof on the balance of probabilities. Had the trial court fairly assessed the evidence of both parties, it would have made a fair decision as the appellant's evidence was sufficient to convince the trial court to decide on her favour.

In regard to the 3rd ground of appeal Ms. Bachire cited the case of **Dinkerai Ramkrishua Pandya v R** [1957] 336 (India) where it was held that save where there is an error on the face of record the appellate court cannot differ with the trial court as the trial court had the chance to hear and see the witness. The trial court ought to consider that the respondent admitted to have borrowed 27 million from the respondent and agreed to settle the amount but he only managed to deposit the sum of Tshs. 400,000/= on 5th Nov, 2019 at Equity Bank but this evidence was ignored by the trial court. She argued further that in **Damson Ndaweka v Ally Said Mtera,** Civil Appeal No. 5 of 1999 (unreported), the Court of Appeal of Tanzania held that in first appeal, the court is duty bound to analyse the evidence of both sides with the view to satisfying itself whether the finding of the trial court was justified on the evidence. Concluding her submission, Ms. Bachire submitted that the appellant proved her case to the required standard.

In reply, the respondent started by challenging the competence of the appeal. She submitted that the appeal is incompetent as the memorandum

of appeal is contrary to Order XXXIX rule (1) & (2) of the Civil Procedure Code [Cap 33 R.E. 2019] which provides that the memorandum of appeal should not contain argument or narrative and that the appellant shall not argue or be heard in support of any ground of objection not set forth in the memorandum of appeal. He proceeded further that, the last ground argued by the appellant is new and not reflected in the memorandum of appeal filed by the appellant on 16th October, 2020. Thus, the appeal has been rendered incompetent by these two anomalies and should be dismissed.

On the merits, he submitted that there is nothing to fault the trial court as it analysed the evidence rendered by both sides and found that, on the balance of probabilities, the respondent proved his case in that his evidence carried a reasonable degree of probabilities (**Miller V Minister of Pension** [1947] ALLER 372) compared to the appellant's case. He proceeded to submit that, the respondent's evidence was not controverted by the appellant and no proof was rendered as to the existence of St. Maurice VICOBA Group A or that it owned the sum of 27,057,384/- in its account. No bank statement or audit report was adduced to show the loss of the same. Exhibit P1 and P2 did not sufficiently prove the case against the respondent.

Further, it was argued that in the light of section 110 and 111 of the Evidence Act [Cap R.E. 2019], the onus of proving that the respondent took Tshs.27,057,383/= rested upon the appellant. Besides, the suit had a criminal element as it was alleged that the respondent unlawfully misappropriated the disputed money. The standard of proof required was,

therefore, higher beyond the proof required in ordinary civil cases as per **Yusuph Ramadhan Abubakar vs Republic** [1987] TLR 169 (CAT) and **Omar Mohamed v R** [1983] TLR 52 (CAT). Moreover, it was argued that the trial court is comparably the best court in analysing the credibility of witnesses (**Marco s/o Gervas v R** [2002] TLR 27). Thus, since the trial court having considered the evidence, it dismissed the appellant's case for want of proof, the appellant's ground that the case was decided on one side holds no water.

In rejoinder. Ms. Bachire reiterated her submission in chief, and submitted further that the issues determined by the trial court did not reflect the actual dispute between the parties. The decision had to come from pleadings as articulated in **Nkulabo v Kibirige** 19730 EA 102, **Peter Ng'omango v The Attorney General**, Civil Appeal No 114, (CAT), and **James Ngwagilo v The Attorney General** (2004) TLR 161. The several correspondences between the appellant and the respondent through which the respondent admitted to have taken the disputed sum from the plaintiff, and the bank pay slip showing that the respondent deposited Tshs 400,000/= in the appellant's account in fulfillment of his obligation ought to be regarded as sufficient proof of his indebtedness. The trial court erred in finding that the appellant did not prove her claims.

Having carefully read and considered the submissions from both parties and the lower court records, I found it pertinent to invite the parties to address me on the competence of the proceedings of the trial court as it appeared

from the proceedings and the judgment of the trail court that, registration of the appellant was raised in the course of hearing and it was briefly canvased in the trial court proceedings where, it was held that the appellant had no locus standi nevertheless, it proceeded to examine the remaining issues and dismissed the suit.

In his address to the court, the counsel for respondent submitted that the indeed the appellant had no locus stand as it miserably failed to prove its registration hence the assumption. The appellants' counsel did not turn even after the matter was adjourned to provide room for his appearance. One delaida Stephano, who alleged to be a member of the appellant purported to tender a registration certificate a prayer which was contested by Mr. Miraa and sustained by this court as the issue of registration certificate was raised in the course of hearing but the appellant rendered no proof hence there was no room for tendering of new evidence as that would offend the law.

It is a settled principle of law that for a person to institute a suit he/she must have a *locus standi* defined in the *Black's Law Dictionary* 8th Edition, to mean "the right to bring an action or to be heard in a given forum." Expounding this principle in **Lujuna Shubi Balonsi Snr vs Registered Trustees of CCM** [1996] TLR, 203, the court stated that,

> "Locus standi is governed by Common Law, according to which a person bringing a matter to court should be able to show that his rights or interest has been breached or interfered with."

Such right only is available to natural and legal/juridical persons such as corporations and or their recognised agents as per Order III rule 1 of the Civil Procedure Code [Cap 33 R.E 2019]. In our jurisdiction, the legal personality which the appellant purports to have vests in such entities as companies duly incorporated under the Companies Act [Cap 211 R.E 2002] and other entities conferred with legal personality by statutes under which they are established. An example of such entities are cooperative societies registered under the Cooperative Societies Act, Cap. 211 (R.E.2002). Section 2 of this Act defines a cooperative to mean a society registered under the Act and includes a primary society, secondary society, apex and the federation. A primary society, is understood as a registered society whose members are individual persons or an association of such individual persons or an association and any cooperative body other than a body registered under the Companies Act. As per section 35 of this Act, once a society is registered it becomes a body corporate by the name under which it is registered and it naturally acquires perpetual succession, a common seal power to own property, to enter into contracts. It also acquires powers to institute and defend suits and other legal proceedings. A society which is unregistered is devoid of these right and cannot purport to exercise any of such rights in its own name.

Since in this case the appellant in this case miserably failed to prove its registration/incorporation, the trial court, having found, as it correctly did in page 9 of its judgment, that the legal status of the appellant was uncertain, it ought to have stopped there by striking out the suit as it had been rendered

incompetent for being instituted by a nonexistent being. The trial court lucidly erred in proceeding to determine the suit on merit as legally, there was nothing for the court to determine.

In view of this, I invoke the revisional powers vested in this court by section 44(1) of the Magistrate Courts Act [Cap 11 RE 2019], revise the proceedings of the trial court and I accordingly quash and set them aside for being premised on an incompetent suit. For similar reasons, I strike out this appeal. As for the costs, having considered all the circumstances of the suit, I find it to be in the interest of justice that the costs be shared by each of the parties shouldering its respective costs.

DATED at DAR ES SALAAM this 17th day of December 2021

X _____

Signed by: J.L.MASABO

J.L. MASABO

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY