

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

PC CIVIL APPEAL NO. 58 OF 2021

*(Arising from Civil Appeal No. 10 of 2021 from Magu District Court originated
from Magu Primary Court in Civil Case No 26 of 2021)*

SABINA JAMES-----APPELLANT

VERSUS

MWENYEKITI KIKUNDI CHA TAMTAM

(BALBINA KIZA)-----RESPONDENT

JUDGMENT

Last Order: 14.04.2022

Judgement Date: 22.04.2022

M. MNYUKWA, J.

This is a second appeal, whereas the respondent, *Kikundi Cha Tamtam* represented by Balbina Kiza, claimed before the trial court a sum of Ths. 579,000/= against the appellant Sabina James, a claimed member of *Kikundi Cha Tamtam*. The facts of the case goes that, the respondent is a women's social organisation within Magu District known as *Kikundi*

Cha Tamtam, which collects and lends money to members who own shares in accordance with the terms agreed upon by its members. It is stated that, the organisation has 30 members. On several dates the transactions were made different to members and the appellant is also said to secure a loan of Tsh. 535,000/= with a promise to return the loaned amount as agreed. The organisation engaged in several meetings and on 31.01.2021 they were ordered by the Magu District Commissioner to summon members and make a calculation as to the loan entrusted to them (Exhibit P1) where the appellant was among of them. Also exhibit P2 was tendered which was a ledger record of the particulars of the appellant in the organisation. At the trial court, the plaintiff gave her evidence and tendered two exhibits and paraded three witnesses to prove that the appellant was a member of *Tamtam* and secured a loan.

At the trial court, the respondent denied the allegation in total and tendered exhibit which was admitted as Exhibit D1 but she did not call any witness to give evidence on her favour. At the end of the trial, the trial magistrate delivered his judgment in favour of the plaintiff and awarded the plaintiff Tsh. 535,000.00/=being a principal sum of money advanced to the defendant (the appellant in this appeal).

Aggrieved by the decision of the trial court, the defendant, Sabina James appealed against the decision of the trial court to the Magu District



Court in Civil Appeal No. 10 of 2021. After hearing the appeal, the District Court dismissed the appeal for want of merit and upheld the decision of the trial court.

Dissatisfied, the appellant appealed to this court whereas, on the petition of appeal, she advanced six grounds of appeal which are; -

- 1. That, the learned magistrate grossly erred in law and fact for upholding the decision that there was the existence of a loan agreement between the appellant and the respondent while no proof of minutes application letter for a loan ever formed part of the evidence.*
- 2. That the 1st appellate court erred in law and in fact for upholding that the plaintiff proved her case in the balance of probabilities.*
- 3. That the 1st appellate court erred in law and in fact for upholding the fact that the respondent had a locus standi to commence legal proceedings while Kikundi cha TAMTAM was not registered hence lacking the capacity to sue or being sued.*
- 4. That the 1st appellate court erred in law and in fact for failure to re-evaluate, examine and analyse the evidence concerning the exhibit tendered which alleged to be the register signed by the appellant if the said signature was her signature.*



5. That the 1st appellate court erred in law and in fact for failure to take into consideration that the appellant raised an objection when the respondent prayed to tender the exhibits (exhibits P1 and P2).

6. That the 1st appellate court erred in law and in fact for failure to rule out the preliminary objection which was raised by the respondent.

The appeal was argued orally where the appellant was served by Ms Leticia Sabas Lugakingira, learned advocate and the respondent had the service of Hidaya Haruna, learned advocate.

The appellant's learned counsel was the first to submit and prays this court to adopt the memorandum of appeal to form part of her submissions and also opted to abandon the 1st ground of appeal and argued jointly the 2nd and 4th grounds of appeal.

On the 2nd and 4th grounds of appeal, she submitted that, the District Court of Magu erred for considering that the appellant signed a loan of Tshs. 535,000/= while she did not sign and she claims that any person could have written the name of the appellant. Referring to the evidence of PW2 on page 5 of the trial court's proceedings, she insisted that PW2 testified that the appellant did not sign and therefore she maintains that the plaintiff at the trial court did not prove the case.



On the 3rd ground of appeal, she avers that the trial court erred in holding that the respondent had locus standi to commence legal proceedings against the appellant while the evidence on record is to the effect that *Kikundi cha Tamtam* was not registered hence had no the capacity to sue or being sued. It was further averred that the respondent herein who was the plaintiff in the trial court admitted that *Kikundi cha Tamtam* was not registered. Citing section 28 (1) of the Microfinance Act of 2018, the counsel submitted strongly that, all financial cooperatives are to be registered to the District Council where the Directors have power under section 14(1)(b) of the Microfinance Act. She maintains that, since *Kikundi Cha Tamtam* was not registered, it lacks locus stand under section 31(2)(9) which gives it power to sue and be sued.

On the 5th ground of appeal, she avers that it is not true that the appellant did not object when the exhibits were tendered. Referring to page 3 of the trial court proceedings, she avers that the appellant objected on the minutes dated 31.01.2021 and also objected to the books of account as reflected on page 5 of the trial court's proceedings.

On the 6th ground of appeal, she avers that the district court failed to give a ruling on the objection raised by the appellant. She avers that, the 1st appellate court hold that there was no objection and going to the trial proceedings, the records are silent.



She, therefore, prays this appeal to be allowed and the decisions of the lower courts be quashed and set aside and the costs be borne by the respondent.

Responding to the appellant's learned counsel, the counsel for respondent submitted on the 5th ground of appeal over the preliminary objection insisting that, the preliminary objection must be purely on the point of law. She claims that, the claim that the exhibit was not to be admitted for the appellant did not participate in the meeting could not qualify as a preliminary objection and it was the reason that the trial court ruled out that there was no preliminary objection raised.

On the 6th ground of appeal, she avers that the preliminary objection raised as reflected on page 2 of the ruling was overruled as it was purely based on evidence.

Coming to the 2nd and 4th grounds of appeal, she avers that, the respondent proved her case to the required standard through the tendered exhibits before the trial court and summoned witnesses to prove her case. She went on that exhibits P1 and P2 which were admitted by the trial court proved the case on the required standard. She insisted that, the appellant signed the minutes of the meeting as evidenced by exhibit P1 which shows that the debt was at a tune of Tsh. 579,000/= . She went on that the book of accounts shows how members of the *Kikundi*

borrowed money where the witness gave evidence on the modality of borrowing money. Referring to page 4 of the trial court's proceedings, she insisted that the appellant borrowed and promised to pay the loaned money with interest and that the appellant did not challenge the said evidence.

She went on that, the appellant denied being a member while at the same agreeing to be a member and that she ceased membership on 01.11.2020. She insisted that, the appellant did not deny the exhibits and her signature or alleged that she was forced to sign. She insisted that, *Kikundi cha Tamtam* was operated by women by mutual trust and the appellant was entrusted and did not honour the trust.

On the 3rd ground of appeal, he avers that the respondent had a *locus stand* to initiate the proceedings before the trial court as she bears the letter authorizing her to be a representative and the issue as to whether it was registered or not is an afterthought for the same was not raised at a trial court. She went on that, any *Kikundi* which is not registered has a *locus* to lend and collect money from members, what is not required is to charge interest and the same was not done to the appellant. She, therefore, prays for the appeal to be dismissed with costs.

Re-joining, the appellant learned counsel insisted that all the organisations dealing with money should be registered. The same goes

with *Kikundi cha Tamtam* which was charging interest need to be registered in accordance with the law. On the issue of signature, she insisted that the appellant put the signature as the person who attended the meeting.

Having gone through the appellant's memorandum of appeal, the submissions by both parties by their learned counsels, this court is placed to explore whether the case against the appellant was properly proved before the trial court as upheld by the 1st appellate court. In doing so, and being guided by the principle in the case of **Helmina Nyoni vs Yeremia Magoti**, Civil Appeal No. 61 of 2020, it was held that: -

"It is trite law that second appellate courts should be reluctant to interfere with the concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure or have occasioned a miscarriage of justice."

See also the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H. Jariwala t/a Zanzibar Hotel** [1980]

TLR 31



Taking the similar sequence of the grounds of appeal as argued by the appellant's learned counsel, on the 2nd and 4th grounds, she submitted that the appellant did not sign on the tendered exhibit and that the case before the trial court was not proved on the required standard. This allegation was strongly denied by the respondent's learned counsel who avers that the case was proved by the plaintiff at the trial court as rightly upheld by the 1st appellate court.

From the submissions by the parties, I would like to put it clear that, in civil cases the standard of proof is on the balance of probabilities, which means that the primary court will accept and reach its decision on the evidence which is pertinent, worth of belief and stronger that prove the allegation brought before it as it is provided for under section 19(2) of the Magistrate's Courts Act, Cap 11 R.E 2019.

The above requirement is in line with Regulation 6 of The Magistrates Court (Rules of Evidence in Primary Courts) Regulations, 1964 G.N No. 22 of 1964 which states that:

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other."



From the above provision of law, it is clear that the law mandates the primary court to accept such evidence of one party which is greater than the evidence of the other and ultimately declare him the winner over the other party whose weight might not be greater. (See the case of **Helmina Nyoni v Yerenia Magoti**, Civil Appeal No 61 of 2020, and the case of **Barelia Karangirangi vs Asteria Nyalwambwa** Civil Appeal No. 237 of 2017).

Going back to the records, the plaintiff witness at a trial court, SM2 who is the organisation's treasurer, testified that the appellant secured a loan on 19.04.2020 and defaulted payment. She went on that, on 06.09.2020 when they were to divide their shares among members, the appellant was to pay Tshs. 535,000/= and the appellant could not do the same. The appellant denied to have taken loan though acknowledged that she joined the organisation in April 2020, she also denied attending the organisation meetings and withdraw from *Kikundi cha Tamtam* on 01.11.2020.

From the evidence on record, I agree with the respondent's learned counsel that, the trial court rightly found that the case was proved as rightly maintained by the 1st appellate court as the evidence of the appellant SU1 testified that she joined the organisation in April 2020, and withdraw from the organisation on 01.11.2020. However, when SM1 and



SM2 testified and tendered exhibit P1 and P2 that SU1 took a loan and failed to repay, SU1 did not manage to contradict the strong evidence adduced to prove that she did not take loan.

Concerning the issue of absence of the written contract between the parties to prove that the appellant took loan, it is my firm view that based on the nature of the organisations that the parties created a social group with mutual trust and confidence among the members for the purpose of helping each other. Therefore, the parties did not enter into the formal written contract. Thus, I find this argument to be baseless and for that reason, I dismiss these grounds for being non-merituous.

On the 3rd ground of appeal, the appellant claims that the respondent had no *locus stand* to commence legal proceedings against the appellant. Citing section 28 (1) of the Microfinance Act of 2018, the counsel submitted that all financial cooperatives are to be registered to the District Council where the Directors have power to register them under section 14(1)(b) of the Act. She further maintains that, since *Kikundi Cha Tamtam* was not registered, lacks *locus stand* under section 31(2)(9) which gives it the power to sue and be sued. The submissions were denied by the respondent's learned counsel.

At this juncture, it is important to understand that *locus stand* can be simply defined *as* the right or legal capacity to bring an action or to

appear in a court. It is a right to bring an action or to be heard in a given forum. In **Lujuna Shubi Ballonzi v. Registered Trustees of Chama Cha Mapinduzi** (1996) TLR 203, Samatta, J (as he then was) had the following to say on *locus standi*:

"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. The High Court has the power to modify the applied common law so as to make it suit local conditions."

In the matter at hand, it is without a doubt that *Kikundi cha Tamtam* was not registered as testified by SM1, but going to the records, I do not subscribe to the appellant's learned counsel that the organisation was a financial institution rather a social group intended to assist the women as members of the society to curb up with the daily life. From that point, what existed between parties was purely a contractual relationship where parties agreed on the terms of performance of the contract.

Furthermore, the available record show that the chairperson of *Kikundi cha Tamtam* was authorized by the members of the organization to institute and prosecute the case on their behalf as it is evidenced in complaint form no 2 which was accompanied by the letter addressed to

the Magu Primary Court authorizing the chairperson and the secretary to prosecute case on their behalf, the minutes of the meeting dated 1st May 2021 and the list of members who attended the said meeting in which the main agenda was to appoint the representative who can institute and prosecute case on their behalf. Thus, with the above evidence available in court records, I am satisfied that the chairperson had a *locus stand*.

Additionally, it is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be the sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 quoted with authority in the case of **Simon Kichele Chacha vs Aveline M. Kilawe** Civil Appeal No. 160 Of 2018 CAT, it states: -

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of a public policy prohibiting enforcement"

With the same spirit of the principle of sanctity of contract and being mindful of the evidence of SM1, SM2 and exhibit P1 and P2, I am reluctant to accept the appellant's excuse for non-performance of the agreement which she freely entered with a sound mind.



For that reason, I am satisfied that the contract entered between the appellant and the *Kikundi cha Tamtam* had all attributes of a valid contract. Despite the denial by the appellant, she fails to prove that it was not prohibited by the public policy and that she joined the organisation without her consent and that the loan agreement was obtained by coercion, undue influence, fraud or misrepresentation in order for it to be voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2019.

It is from the above reasoning that, the law cited by the appellant learned counsel does not apply to the social group and therefore, this ground is also non-merituous.

On the 5th and 6th grounds of appeal which is entwined on the matter of procedure on the preliminary objection where the appellant claimed that the trial court failed to take into consideration that the appellant raised preliminary objection when the respondent prayed to tender exhibits and that the trial court erred to overrule the preliminary objection, the same was objected by the respondent.

Going to the records, and as a matter of principle, the preliminary objection must be purely on the point of law and if it is on fact, the same does not qualify. Going to the records, I agree with the respondent's learned counsel that, the reason given by the respondent that she did not

participate in the meeting based on facts and the trial court was right to overrule the same. The same applies to the preliminary objection raised in the first appellate court as it was rightly decided by the first appellate court in page two of its judgement that, the preliminary objection was heard together with the appeal and the same was overruled on the reason that an objection was purely based on the matter of evidence. Therefore, this grounds lack merit too.

In the final analysis, the entire appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

Right of Appeal explained to the parties.



M.MNYUKWA
22/04/2022
JUDGE

Court: Judgement delivered in the presence of the parties' counsels.

M.MNYUKWA
22/04/2022
JUDGE