IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

PC CIVIL APPEAL NO. 13 OF 2023

(Originating from Civil Appeal No. 03 of 2022 Hon. Mawole - PRM of Hai District Court, arising from Civil Case No. 04 of 2022 of Primary court of Hai at Masama, Hon. Kadendula - SRM)

GIDEON NDELIMO NATAI ..... APPELLANT

VERSUS

NDAMAELI RUMISHAELI MASSAWE ..... RESPONDENT

JUDGMENT

16/04/2024 & 24/04/2024

SIMFUKWE, J.

This is a second appeal which emanates from the decision of Hai District Court (first appellate court) in Civil Appeal No. 03 of 2022. Before Masama primary court the respondent herein successfully sued the appellant herein

claiming refund of TZS 1,500,000/= which he paid for purchasing a used freezer. The appellant appealed before the district court on the following grounds:

1. That, the trial court having considered the evidence of the respondent/plaintiff to the effect that he bought the used freezer in 2015 without stating the exact purchase date and the claim it entertaining is for breach of such contract by not delivering the said used freezer, it erred in law and fact by entertaining the suit claim which is time barred and thus wrongly entered judgment and decree in favour of the respondent based on the outdated suit. (sic)
2. The trial court erred in law and fact by entering judgment and decree against the appellant while there was no proof of existing cause of action between the appellant and the respondent regarding the sale agreement of the used freezer.
3. That the trial court erred in law and fact by not scrutinizing well and properly the evidence of the plaintiff/respondent regarding exhibit K. 1.m and K.2.m on direct proving that the plaintiff/respondent bought the used freezer from the defendant/appellant and without considering and taking into account the whole contradictory evidence on the

defendant's side and thus wrongly entering judgment and decree in favour of the respondent.

4. That, the trial court erred in law and fact by suo motto and without due regard to law and constitution of the "Kikundi cha Maziwa Nure" by direct assuming that the appellant/defendant was rightly sued in his capacity as Chairperson of the "Kikundi cha Maziwa Nure" and thereby ended up in entering contradictory judgment and decree as to whether it is the decree against the defendant/appellant or the decree against "Kikundi cha Maziwa Nure."

In its decision the first appellate court found that there was a contract between the respondent and Mradi wa Maziwa Nure, for a sale of a freezer. That the said contract was duly discharged, whereby the respondent paid the amount required and the said milk project gave him the fridge/freezer and allowed him to take it anytime when he will be ready. Thus, obstructing him to take his property which he paid for was injustice.

Dissatisfied with the decision of the first appellate court, the appellant filed the instant appeal on the following grounds:

1. That the Hon. Magistrate erred in law and fact by not taking into account that delivery of purchased used freezer was part and parcel of the purported purchase agreement; thus, subjected to the law of limitation and eventually entering wrong judgment in favour of the Respondent on the suit which is time barred.
2. That, the Honourable Appellate Magistrate erred in law and fact by stating that there was a contract tendered by the Respondent in trial court regarding purchase of used freezer between the Kikundi cha Mradi wa Maziwa Nure and the Respondent, and that its admission was not objected by the Appellant, thus wrongly entering judgment in favour of the Respondent.
3. That, the Hon. Appellate Magistrate erred in law and fact by not taking into consideration the actions done by Kikundi cha Mradi wa Maziwa Nure and Ushirika wa Maziwa Nure Ltd, as two different institutions in law, thus, going on to enter wrong judgment against the Appellant as the Chairman of Kikundi cha Maziwa Nure contrary to the evidence adduced at trial court.
4. That, the Appellate court erred in law and in fact by not scrutinizing well and properly evidence of the respondent regarding exhibit K. 1.m

and K.2.m on direct proving that the plaintiff/respondent bought the used freezer from the defendant/appellant and without considering and taking into account the whole contradictory evidence on the Appellant's side and thus wrongly entering judgment in favour of the respondent.

5. That, the Appellate court erred in law by introducing new evidence regarding the mode of delivery of the purported purchased used freezer and the occurrence of obstruction of taking the purported used freezer from the appellant while there was none of the evidence adduced during trial.
6. That, the Hon. Appellate court erred in law by not taking into account the laws administering Ushirika wa Maziwa Nure Ltd and the laws administering Kikundi cha Maziwa Nure, thus, failure to determine the non-existence of locus standi of the Respondent to sue the Appellant regarding the purported sale agreement of the used freezer.
7. That, the Hon. Chairman (sic) erred in law and fact by not scrutinizing and making critical analysis to the evidence as testified by the Appellant's and Respondent's witnesses in his (sic) judgment thus reaching to a wrong decision.

The appellant prayed that the appeal be allowed with costs and the decisions of the two courts below be set aside.

The appellant appeared in person while Mr. Elisante Kimaro learned counsel appeared for the respondent. The appellant prayed to argue the appeal by way of written submission. His prayer was granted.

In his submission in support of his appeal, the appellant summarized his grounds of appeal into two issues: Whether the respondent sued the wrong party and whether the appellate court glossed over the issue of evidence instead of making an analysis.

On the issue whether the respondent sued the wrong party; the appellant narrated the gist of the matter. That, there were two entities, that is ***Mradi wa Maziwa Nure*** and ***Ushirika wa Maziwa Nure***. The first entity changed its name to the second entity. That, the respondent had entered into contract with the first entity, Mradi wa Maziwa Nure and bought a used freezer for Tshs 1,500,000/=. It was agreed that the said amount be deposited in the account of ECLOF Tanzania so as to clear the debt indebted by ***Mradi wa Maziwa Nure*** to that institution. Thereafter, ***Mradi wa***

Maziwa Nure changed to ***Ushirika wa Maziwa Nure*** with the appellant as their new chairperson.

The appellant argued that ***Mradi wa Maziwa Nure*** and later ***Ushirika wa Maziwa Nure*** being a registered entity and corporate body with perpetual succession, common seal, power to own property, enter into contract and to institute and defend suits and other legal proceedings as provided under **section 35 (1) of the Cooperative Society Act, 2013**. He submitted that, by denying the respondent picking up the fridge, the appellant was just executing his duties on behalf of the Cooperative. That, judgment would be executed against the Cooperative society as the legal entity. Therefore, the respondent sued the wrong party.

On the second ground whether the appellate court glossed over the issue of evidence instead of making an analysis; the appellant submitted that the respondent testified before the trial court that he bought the freezer from ***Mradi wa Maziwa Nure*** in 2015 for Tshs 1,500,000/=. Contesting the claim, the appellant herein, testified that the said freezer was not sold as per reports made in 2015 to 2017. That, the contract does not indicate when the contract was made. Also, there were no minutes from the alleged meeting that authorized the sale of the freezer. Furthermore, who made the said

contract as the respondent did not tender the receipt from ***Mradi wa Maziwa*** acknowledging payment for the said freezer.

The appellant submitted further that, DW3 testified that the freezer was never sold. DW5 testified that the freezer was owned by the Cooperative society as per reports made in 2019 (exhibit K 4 U). He was of the view that the first appellate court did not analyze evidence as adduced but just simply concluded the case. Hence arriving at an erroneous decision.

In his reply, on the outset the respondent faulted the appellant for amending his grounds of appeal without leave of the court. That, by doing so, the appellant abandoned his raised grounds of appeal. He submitted that the raised new grounds were never part of the grounds of appeal at the first appellate court which concerned the appellant being sued in his personal capacity and not as chairman of ***Mradi wa Maziwa Nure***.

The respondent contended that this court lacks jurisdiction to try the new grounds as it was held in the case of **Abdul Athuman vs Republic [2004] TLR 151** and **Samwel Sawe vs Republic, Criminal Appeal No. 135 of 2004** (unreported). In **Samwel Sawe** (supra), it was held that:

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of ***ABDUL ATHUMAN VS. R [2004] TLR 151*** *the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

Moreover, the respondent explained the word gloss over, meaning to avoid considering something, as embracing a mistake is quite different from non-analyzing of the tendered documents and or evidence. He stated that, in the 1st appellate court the ground of appeal was based on analyzing evidence but in the 2nd ground of appeal the issue of glossing over evidence came in and this by itself is a new thing as it was never raised in the first appellate court. Thus, it goes without saying that, the raised new grounds were not at all raised at the first appellate court. He prayed that the new grounds should be struck out with costs.

The respondent prayed that this appeal be dismissed with costs in his favour.

Based on the complaint of the respondent that the appellant amended his grounds of appeal without leave of the court, before I proceed to determine the appeal, I have examined the so-called new grounds of appeal. With due respect to the learned counsel of the respondent the appellant did not amend his grounds of appeal. The grounds of appeal were summarized into two grounds/issues which as a matter of practice is allowed and very common. For clarity, the first issue which concerns suing a wrong party, tallies with the sixth ground of appeal while the second issue which is in respect of glossing over evidence falls under the 2nd, 4th and 7th grounds of appeal.

Having clarified the issue of amendment of grounds of appeal, in consideration to the grounds of appeal, the records of the two courts below and submissions of both parties, the issue for determination is ***whether this appeal has merit.***

On the issue of suing a wrong party, the appellant was of the view that the respondent should have sued ***Ushirika wa Maziwa Nure*** formerly known as ***Mradi wa Maziwa Nure*** as a registered entity. He submitted that, under **section 35(1) of the Cooperative Society Act, 2013**, ***Ushirika wa Maziwa Nure*** is a corporate body with powers to sue or be sued on its own name. That, the appellant was just executing his duties on behalf of the

cooperative society as the legal entity against which the judgment will be executed.

In his reply the learned counsel for the respondent insisted that the ground was new and that it was not part of the grounds of appeal which were raised before the first appellate court. I concur with the respondent that it is not allowed in law to raise grounds which were not part of the first appeal or trial. I had a glance at the grounds of appeal before the first appellate court and found that the 2nd and 4th grounds of appeal were in respect of locus standi of the appellant. Hence, the same is not new ground.

Back to the question whether it was right for the respondent to sue the appellant in his personal capacity; on the outset there is no dispute that the respondent purchased the used freezer from **Ushirika wa Maziwa Nure** formerly known as **Mradi wa Maziwa Nure**. Both entities were registered under the **Cooperative Societies Act** (supra). **Section 35(1) of the Cooperative Societies Act** provides that:

> *"35.- (1) The registration of a society* ***shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to***

own property, to enter into contracts, to institute and defend suits and other legal proceedings*, to do all things necessary for the purposes laid down in its by-laws."* Emphasis supplied

In our case, according to the wording of the above quoted provision, it is clear that the respondent had no cause of action against the appellant in his personal capacity. Meaning that he sued the wrong party. He should have sued the Cooperative Society - **Ushirika wa Maziwa Nure**, formerly known as **Mradi wa Maziwa Nure** as a corporate body. Hence the first issue has merit.

In the case of **M/S Mkurugenzi Nowu Eng. V. Godfrey M. Mpezya**, Civil Appeal No. 188 of 2018 [2021] TZCA, at page 19, it was observed that:

"Therefore, the act of the respondent suing a wrong party had affected the entire trial as it goes to the root of the matter." Emphasis added

Likewise, in the case at hand, by suing the appellant in his personal capacity, the proceedings before the trial court and the first appellate court were rendered a nullity

On the 2nd issue whether the appellate court glossed over the issue of evidence instead of making an analysis; **first,** evidence on record indicates that the two courts below suffered a misdirection in evaluation of evidence. **Second,** both courts granted reliefs which were not prayed for. The respondent had prayed for refund of Tshs 1,500,000/= which he paid for the purchase of the freezer plus damages. Evidence tendered in support of the cooperative society was that no meeting was conducted to bless the sale of the used freezer. Contrary to the reliefs sought and evidence of both sides, the trial court and the first appellate court ordered that the used freezer be handed over to the respondent. That was a grave error. All that emanated from misapprehension of the adduced evidence on record. Thus, it is true that the first appellate court glossed over the issue of evidence.

I could have re-evaluated evidence on record as a remedy to cure the errors of the two courts below and come up with my own conclusion. However, due to the fact that the respondent sued the wrong party, there is no way I can condone the above noted shortcomings.

In the upshot, I hereby nullify the proceedings of the two courts below, quash the decisions of both courts and set aside the orders of the trial court

and the first appellate court. The respondent may institute his claim afresh against a proper party pursuant to the law. Appeal allowed with costs.

It is so ordered.

Dated and delivered at Moshi this 24th day of April 2024.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

24/04/2024