

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 28187 OF 2023

(Arising from civil appeal number 06 of 2023 in Sengerema district court and in civil case number 01 of 2021 before Kasenyi Primary court)

BETWEEN

AMINA KHAMIS..... 1ST APPELLANT
WINFRIDA DAMAS.....2ND APPELLANT
JANETH CHARLES.....3RD APPELLANT
PILI TULULONZA.....4TH APPELLANT
KULWA MATHIAS5TH APPELLANT
HELANA BULEMELA..... 6TH APPELLANT
MWAMVUA MASUDI..... 7TH APPELLANT

VERSUS

KIKUNDI CHA KAPU LA MAMA CHA

KATUNGURU (W) SENGEREMA RESPONDENT

JUDGMENT

30th & 30th May, 2024

A. MATUMA, J.

The appellants herein were leaders of the respondent group, **Kikundi cha kapu la mama cha Katunguru (W) Sengerema** in various positions.



They agreed with other members of the group to start bricks project. They were laying bricks and selling them.


Unfortunately, things went wrong as members of the group (respondent) accused their leader now the appellants for embezzlement of the project money leading to the fall of the project in question.

They demanded meetings but in vain. They went to several local authorities to complain but again in vain and finally were advised to institute their complaints in court as their group is a registered entity.

Such members held a meeting on and resolved that the matter be filed in court. They again appointed Arodiya Matage, Jesca Silvester and Anna Kanuti to represent them on behalf of the group to institute the case against their leaders (appellants).

The respondent through such representations instituted a suit in the primary court of Kasenyi within Sengerema District claiming against the appellants a total of **Tshs. 5,234,000/=**.

After a full trial, the trial court held that the respondent had proved the claim to only **Tshs. 3,484,000/=** and ordered each of the appellants herein to pay **Tshs. 497,714.285**.



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The appellants became aggrieved of such verdict and thus appealed to the District Court but their appeal was unsuccessful hence this second appeal with a total of five grounds which shall be dealt herein below one after another.

At the hearing of this appeal, Arodiya Matage, Jesca Silvester, and Anna Kanuti represented the respondent while the appellants were jointly represented by advocate Inhard Mushongi.

The first ground of appeal is that; ***the trial primary court and the first appellate court erred in law and facts by relying on exhibits which were wrongly admitted.***

The learned counsel submitting on this ground, argued that the exhibits at the trial court were improperly tendered. He pointed out that they were tendered cumulatively, the appellants were not given opportunity to object the admissibility of such exhibits and that the records does not show whether the trial court admitted such exhibits or not. He argued that those problems affected the rights of the appellants to be heard as it was held in the case of ***Anthony M. Masanga versus Penina (Mama Mgesi) and another, Civil Appeal no. 118 of 2014*** in which the court of appeal discouraged the exhibits to be tendered together.

I asked the learned advocate to explain whether the complaints in this ground were brought to the first appellate court for determination. He stated that it was not. He however argued that such being a point of law it can be raised at any stage including at this second appellate stage.

The respondent through Arodiya Matage on her part argued that the Appellants were given opportunity to object the admissibility of such exhibits but did not object acknowledging that they were genuine documents of the group.

It is plainly true that this ground is brought for the first time at this 2nd appellate stage. It was not raised in the first appellate court. The law is settled that the appellate court shall only look on matters which were raised in the court below it and were decided. Thus, for instance, in the case of ***Elisa Mosses Msaki V. Yesaya Ngateu Matee (1990), TLR 90*** the court of appeal held that new matters which were not at issue during the trial nor were raised in the first appellate court cannot be delt by a further appellate court. Just to quote, the court of appeal held;

"The court of appeal will only look into matters which came up in the lower court and were decided; not on

matters which were not raised nor decided by either the trial court or the High court on appeal'

That being the principle set out applies as well to this court. Even though, the appellants were given opportunity to object admissibility of such exhibits as rightly argued by Arodiya Matage as against the averments of Mr. Inhard Mushongi learned advocate. When the respondent's exhibits were about to be tendered in evidence at pages 11 and 12 of the trial court proceedings, the trial court invited the appellant to raise any objection against the intended admissibility. They all replied;

"Nyaraka hizo zote ni halali tunazitambua"

They then counter signed such statement. Therefore, the admissibility of such exhibits was not at issue during the trial nor it was raised in the first appeal. The complaints are subjecting the two courts below to blames on matters which were not brought to their respective attention. I therefore dismiss this ground of appeal.

The second ground reads; ***That, both the trial court and the district court erred in law and in facts by failing to analyse the evidence present on record hence reaching to unfair and unjust decision.***

Submitting on this ground Mr Inhered Mushongi learned advocate argued that the respondent's evidence had weaknesses including the improper admissibility of documents and therefore had it been evaluated well the reached decision could not have been reached. He invited this court to re-evaluate the evidence and come out with its own judgment.

The respondent on her part argued that they had enough evidence and the two lower courts properly analysed the evidence and reached to a just decision.

On my part, I think this ground of complaint is devoid of any merits. The respondent's evidence through her witnesses revealed that each member of the group contributed Tsh.10,000/=, they made fundraising through which they got Tshs. 1,848,000/=, 30 bags of cement. All these incomes ended in the hands of the appellants who were leaders. They then laid bricks and sold them as a project but at all times the leaders were escaping to convene the meeting as required by their Constitution.

When members suspected loss and lack of cooperation from their leaders, they resolved that the project be brought to an end by selling the project properties and divide the proceeds among them. Some of the properties were sold at Tshs. 684,000/= but the distribution of the proceeds was not well settled.

They had a plot valued at Tshs. 1,500,000/= and some other valuable properties all of which were in the custody of the appellants. The appellants who were leaders of the respondent group instead of accounting for the properties of the group (respondent) each jumped a distant far. Thus, for example, the 1st Appellant Amina Khamis at pages 13 -14 of the trial court proceedings testified that she had withdrawn herself from the group and did not know the welfare of the group properties;

*"Mimi nikiwa nimejitoa waliobaki kama viongozi
ni Mary na Hawa Rashid. Walipogawana hata
sikuwepo walifanya wao wenyewe"*

The 2nd Appellant Winfrida Damas also at page 15 stated that;

"Waliuza sasa mimi sikujua nilisikia wamegawana"

From these quotations, it is obvious that these leaders did not discharge their duties to safeguard the interests of the group. They did not along with other appellants account for the properties of the group and that is why the trial court held on page 4 that;

*"Hivyo Mahakama hii kwa Pamoja baada ya
uchambuzi huo, imeona kwamba kwa kuwa wao*

wadaiwa ndio viongozi wa kikundi na mradi na wameshindwa kabisa kuthibitisha hesabu kamili za mapato, matumizi na hasara zilizopatikana kwenye mradi huo waliokuwa wakiusimamia, hivyo Mahakama hii kwa Pamoja imeamua kuyakubali maelezo ya upande wa mdai....”

This finding was upheld by the first appellate court and I have no good reason to depart from it. It was expected that the appellants who were leaders of the group could cooperate during trial by accounting for the properties of the group. Instead, each gave evidence purporting to exonerate herself from the group without stating the fate of the properties which died into their hands. Under the circumstances, the two courts below properly evaluated the evidence on record and reached to a fair and just decision. I therefore dismiss the second ground of appeal.

In the 3rd ground of appeal, the appellants laments; ***That, both the trial court and the first appellate court erred in law and in fact by failure to nullify the judgement which was entered without the opinion of the honourable assessors.***

Submitting in this ground, the learned advocate for the appellants argued that the primary court judgement was illegal for lack of the opinion of

assessors which is contrary to section 7 (1) of the Magistrates Courts Act read together with rule 3 (1) (2) and (3) of the Magistrates Court (Primary Courts Judgments) Rules, GN no. 2 of 1988. He argued that such law requires the primary court to sit with not less than two assessors whose opinion must be indicated in the judgment. He cited the case of the Court of Appeal that of ***Agnes Severine Versus Musa Mdoe (1989) TLR 164*** to arguing that it held that the opinion of assessors must be shown in the judgment.

The Respondent responded that the assessors were dully involved throughout the case. The District court when delt with this ground held that the records of the trial court show that the assessors were dully involved throughout the trial and the trial verdict. I find the same. At page 25 of the trial court proceedings, the court recorded the opinion of the assessors. The records clearly read,

"Maoni ya washauri wa Mahakama. Mshauri (1)

Wadai wanayo haki ya kushinda madai hayo yote.

Mshauri No.1 ----Sgd:

Mshauri (2) Nami naungana na maoni yote

ya mshauri wa kwanza wa Mahakama hii.

Mshauri No.2-----Sgd:

Thereafter the trial magistrate composed the judgment taking into account the opinion of assessors and held at page 4;

"Hivyo Mahakama hii kwa Pamoja baada ya uchambuzi huo, imeona kwamba....."

The terms; **"kwa Pamoja"** mean the trial magistrate and court assessors. The two court assessors signed the judgment to own it. I therefore find no merits in the complaints that assessors were not involved. It seems the learned advocate was inviting the court to determine this matter on technical basis as against substantive justice. I accordingly dismiss this ground as right done in the first appellate court.

In the fourth ground of appeal, the appellants aver that; ***That, both the trial court and the first appellate court erred in law and in facts by relying on the evidence from books of accounts which were prepared contrary to the law.***

Mr. Mushongi in arguing this ground submitted that it was wrong for the lower courts to rely on the exercise books which the trial court itself doubted. When this court required him to show the specific page of the trial court judgement where such books were relied on, he submitted that at page 3 the trial court relied on such books.

The respondent maintained the authenticity of the books.

Frankly speaking, this ground of complaints is misconceived. The trial court did not rely in those books which it found useless as it held at page 4;

"Ukirejea kielelezo 'E' (Madaftari ya hesabu za mradi) ni "onyo" kabisa, hakuna kinachoeleweka hususani kwenye daftari la mhasibu mpya, afadhali kidogo mhasibu wa mwanzo"

Nevertheless, these books were prepared and kept by the appellants. The respondent took them to make the calculation of the income and expenditure and it is from these books the claims were made to the tune stated herein above but the trial court by finding that such books were not accurate refused to grant the total claim of Tshs. 5,234,000/= and awarded only Tshs. 3,484,000/= which were proved without relying to such books. The amount awarded was the project capital of Tshs. 4,000,000/= minus Tshs.1,500,000/= which was used to buy a plot for the project, Tshs. 684,000/= which was the proceeds of sale of some of the group properties and Tshs. 300,000/= as costs.

This awarded amount was not due to the weight of the records in the alleged books. I accordingly dismiss this ground of appeal.

The last ground of appeal is that; ***Both the trial and the first appellate court erred in law and in facts by failure to hold that the respondent representatives have no locus to represent the respondent in court.***

Arguing for this ground, Mr. Mushongi learned advocate submitted that the respondent's representatives alleged that they were appointed through minutes of the meeting but such minutes were not tendered in evidence as they are not among the tendered exhibits.

Responding on this ground Arodiya Matage argued that they presented the minutes at the time of instituting the suit but again the Constitution of the Respondent group imposes duty to each member to be active in participating to all welfare of the group. She referred this court to paragraph 4 of article 3 of their Constitution which requires each member of the group; ***"Awe mwenye busara, uvumilivu na aridhie na kuwajibika ipasavyo katika shughuli zote za kikundi"***.

On this I find that the group constitution does not stipulate the manner of its legal representations when the need arises. In the instant matter,

the three representatives of the Respondent were elected and appointed in a meeting of twenty-six members. They were instructed to commence this case and they complied. The minutes of such appointment as rightly argued by Arodiya Matage were part of the pleadings filed in court. They were not evidence to be tendered as exhibits. The Appellants should have raised any concern against such representatives if at all they suspected the locus of these representatives.

The appellants were leaders of the group who could take actions for the group but they are the one accused by its members after they deserted the group. In that respect, the deserted members have legal rights to seek remedy in court in the exercise of their constitutional right as quoted supra under article 3 paragraph 4 of the Group Constitution.

I accordingly dismiss this ground of appeal and that makes the whole appeal fully determined against the appellants. I therefore dismiss this appeal in its entirety with costs.

It is so ordered.



A. Matuma
Judge

30/05/2024

Court: Judgment delivered in the presence of Amina Khamis and Kulwa Mathias for the Appellants and in the presence of Arodiya Matage, Jesca Silvester and Anna Kanuti for the Respondent. Right of further appeal explained.



A. Matuma

Judge

30/05/2024