IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

DC CIVIL APPEAL NO. 20 OF 2020

(Originating from the decision of the District Court of Dodoma in Civil Case No. 15 of 2020)

THE REGISTEERED TRUSTEES OF

NOOR MASJID DODOMA.....APPELLANT

VERSUS

JAFARY MANYEMBA & 11 OTHERS.....RESPONDENTS

JUDGEMENT

02/11/2021 & 08/11/2021

KAGOMBA, J

In this appeal, the Court is called upon to determine whether or not the District Court of Dodoma erred in holding that it has no jurisdiction to determine Civil Case No. 15 of 2020 where The Registered Trustees of Noor Masjid Dodoma (the "appellant") sued Jafary Manyemba & 11 others (the "defendants"). The Court is also called upon to determine whether or not the appellant's claims in Civil Case No. 15 of 2020, aforesaid, were supposed to be dealt with by Baraza Kuu la Waislam Tanzania (BAKWATA) as a body clothed with powers to deal with the said dispute.

A brief background of this matter needs to be told. The appellant who is a body corporate incorporated under the **TRUSTEES INCORPORATION ACT [Cap 318 RE 2002],** (the "Act") having legal capacity to sue and being sued in its own name, with a Certificate of Registration No. 1214 issued on 22/4/1994, sued the defendants, who are natural persons, for what was described in the plaint as "tortious acts of unlawful interference with the rightful day to day activities of the Appellant at her legally authorized working place, namely Noor Masjid, Plot No. 42, Block 5, Madukani Area, Barabara ya Tisa (9) within Dodoma City and the consequent acts of defamation that arose therefrom".

The appellant, (then "Plaintiff") had further elaborated in her plaint her claims against the defendants. She stated that on 6/4/2020 at around 7:30 pm after evening prayer, without any justification whatsoever, the defendants being accompanied by armed Police Officers, (who were not made party to this suit), entered the Plaintiff's (now "appellants") working place, disruputed the activities of the day, ousted from the office the appellant's incumbent leaders alleging that they are terrorists and appointed leaders of their choice in lieu of the ousted leaders to run the day to day activities. Such acts of the defendants, according to the appellant, were defamatory in nature as the appellant was recognized by the Government through the Office of the Administration General and had never engaged in terrorism acts as alleged.

The appellant therefore prayed the District Court to enter judgment and decree against the defendants jointly and severally for the following orders:

(i) That, the acts of the defendants are illegal as such null and void.

(ii) That, the defendants be restrained permanently from interfering with the activities of the appellant and her authorized officers in any way.

The appellant further prayed for general damages, interest thereon and costs of the suit.

The defendants, on their side, filed a Written Statement of Defence (WSD) Preceded by a notice raising therein Preliminary objection on the following points:-

1. That, the Plaint was bad in law for lack of cause of action against the defendants.
2. That, the Plaint was bad in law for lack of *locus standi* to the Plaintiff.
3. That, the Plaint is bad in law for being an abuse of the due process of the law hence lack of jurisdiction to the Honorable District Court.
4. That, the Plaint was bad in law for bearing an incurably defective verification clause.
5. That, the Plaint was bad in law for being frivolous, vexatious and with ill motive.

The defendants went on traversing the contents of the appellant's Plaint by mainly disputing vigorously the contents therein.

The District Court directed the parties to make written submissions, having ordered the matter to proceed that way. Both parties obliged

accordingly. However, the court never had time to consider the written submissions. Instead the Court was pre-occupied by the question whether it had jurisdiction to determine the matter and for that reason it called advocates of both parties to address it on that pertinent issue.

According to the proceedings of the District Court, the ruling on the Preliminary objection was postponed at least four times before the Court required the learned advocates to address it on jurisdiction issue. Then the Court instead of issuing an anticipated ruling, gave a judgment dismissing the suit for lack of jurisdiction.

The main ground for holding that the Court had no jurisdiction, according to the District Court judgment, is that Section 17(2) of the Act read together with Article 30 (10) of the BAKWATA Constitution of 2018, gives powers to BAKWATA to resolve the dispute between the parties. According to the District Court, since the dispute involved disruption of appellant's daily activities and ousting of leadership, it's BAKWATA that is the recognized authority to resolve such disputes and the appellant who is a registered board of trustees cannot come to court without first exhausting the dispute settlement mechanism under the Act. The District Court held that Article 63 (2) of BAKWATA Constitution empowers the **"Baraza la Ulamaa"** or the Ulama Council to determine all such disputes which have rulings directly under the **Qur – aani and Sunna** as well as other matters under Islamic Sharia Law.

On the day of hearing of the Appeal, Mr. Ayoub Sudai, learned Advocate represented the appellant while Mr. Wilson Robert, learned Advocate, appeared for the defendants.

In his submission to this Court, Mr. Sudai first prayed to abandon the third ground of appeal which was to the effect that the Court erred in law in dismissing the suit instead of strucking it out. He also prayed to amend the grounds of appeal by replacing the world "tribunal" in the first ground of appeal with the word "Court" and the prayer was granted by this Court. Thus, the two grounds of appeal are:-

(1) The Court erred in fact and law in holding that the District Court of Dodoma has no jurisdiction to entertain the suit.

(2) The trial Court erred in fact and law in making a finding that the appellant's claim was supposed to be dealt up with BAKWATA which is a body empowered to deal with the same.

Mr. Sudai, proceeded to argue the appeal by mainly faulting the underlying reason for the judgment of the trial Court. He argued that the trial Court judgment centred on a wrong concept that the Court had no jurisdiction because there is another body, namely BAKWATA, which is capable of resolving such a dispute and there is a requirement under Section 17 of the Act for a prior notice to be issued to the Administrator General and BAKWATA. He argued that the law so applied by the trial Court does not give that interpretation, neither does it provides for resolution of disputes in religious organizations. Mr. Sudai argued that the cited provision of Section 17 of the Act does not provide any procedure on how disputes should be

handled from initial stage, rather it provides guidance on monitoring of meetings of bodies corporates and organizations.

It was Mr. Sudai's main argument that section 17 (2) of the cited Act, which mentions religious bodies confines itself to change of names of trustees and it subject such changes to the supreme organs of the respective body corporates according to their constitutions or charters. He argued emphatically that section 17 (2) of the Act does not provide for settlement of disputes at all, as such it was misapplied by the trial Court in deciding that the dispute should have commenced at BAKWATA and the office of the Administrator General.

Mr. Sudai further faulted the holding of the trial Court that Article 30 (10) of Constitution of BAKWATA, 2018 gives BAKWATA an opportunity to resolve the dispute. He argued that the cited Article 30 deals with powers of the Ward leadership in BAKWATA's hierarchy and how disputes or matters pertaining to such leadership shall be determined. He equally faulted the application of Article 63 (2) of BAKWATA Constitution in holding that it provides for power of the Ulama council to resolve the dispute in question.

On powers of Ulama Council, Mr. Sudai conceded that Article 63 (2) truly provides for power to the council but such provision deals with disciplinary issues based on religious matters and not the type of claim lodged by the appellant at the trial Court. It was his views that the application of Article 63 (2) of BAKWATA Constitution, 2018 was misdirection by the trial Court.

Regarding the holding of the trial Court that BAKWATA is clothed with the powers to determine such disputes, Mr. Sudai submitted that it was not true. He argued that even the context of incorporation of BAKWATA itself was not to deal with disputes of civil nature, which are under the jurisdiction of the civil courts, but to deal with religious matters. He submitted further that BAKWATA was not meant to be part of the dispute settlement system whereby one can only go to court on appeal or reference therefrom. He argued further that both Article 30 (10) and 63 (2) of BAKWATA Constitution do not provide that BAKWATA is an organ of first instance in civil dispute settlement. He thus prayed the Court to allow the appeal and to quash the impugned judgment of the District Court.

Mr. Wilson Robert, replying for the respondents, prayed the Court to put on record that the issue of jurisdiction was not raised by the court *suo mottu* as submitted by Mr. Sudai, rather it was raised by the respondents' advocate in a notice of preliminary objection filed in the trial Court.

Regarding the two grounds of appeal as submitted by Mr. Sudai, Mr. Robert submitted that it was true the District Court had no jurisdiction, as it held, because the matter before it constituted criminal elements, as there were criminal allegation against the leaders of the Mosque.

Mr. Robert further submitted that the trial Court considered the provision of Section 17 (2) of the Act. He argued that the cited provision is relevant because the dispute in the trial Court was on leadership of the mosque and the Institution.

The respondents' advocate further argued that, since the dispute is about leadership, BAKWATA being the supreme organization for Muslims has powers to resolve such a dispute. He reiterated that the trial court properly ruled that it had no jurisdiction to determine the such dispute.

To cement on the powers of BAKWATA, Mr. Robert argued that Article 63 (2) of BAKWATA Constitution 2018 gives BAKWATA's Ulama Council powers to determine not only matters of religion and "sunna" but "any other legal issue". He thus discounted the argument raised by Mr. Sudai that the Ulama Council deals with disciplinary and religious issues only.

Mr. Robert applied his earlier submission to address the second ground of Appeal. He argued that section 17 (2) of the Act, gives powers to BAKWATA as the supreme body of Islamic religious Institutions to resolve such disputes. He argued that in this case, the dispute resolution ought to have started at BAKWATA. He concluded therefore that, due to those legal requirements and the nature of dispute, the trial Court had no jurisdiction to entertain the suit as it correctly decided.

Rejoining, Mr. Sudai argued that the issue of criminality element in the dispute is not in the judgment of the District Court but in the submission of the parties. He emphatically argued that the Court had never mentioned criminality issue in its ruling as a bar to its jurisdiction.

Mr. Sudai further argued that Section 17(2) of the Act does not focus on dispute settlement, rather it focuses on monitoring function on change of names of trustees. In clarifying his point, Mr. Sudai rejoined that the cited

provision of section 17(2) of the Act requires that where there are changes of trustees, there shall be a meeting which requires someone to monitor it, a reason why the law requires a supreme authority to be there and not for settlement of disputes such as the appellant's case.

On Article 63(2) of BAKWATA Constitution, where it was submitted by the respondents' advocate that a dispute ought to be resolved at institutional level first before being filed in courts of law, Mr. Sudai rejoined that in case of legal dispute the *Ulama* Council does not have jurisdiction except on religious and disciplinary matters.

Mr. Sudai reiterated his submission in chief regarding the second ground of appeal. He invited the Court to note that the appellant is a registered body with religious trustees who run daily activities of the mosque and that when there is interference with execution of its legitimate daily activities there is no other place to run to except a court of law. He concluded by praying the appeal to be allowed accordingly.

Having gone through the pleadings and the rival submissions, I am of considered view that the main issue for determination in this Appeal is whether the trial court had no jurisdiction to entertain the suit filed before it by the appellant, in view of the provisions of section 17(2) of the Act and Articles 30 (10) and 63 (2) of the Constitution of BAKWATA, as decided by the trial Court.

Before embarking in addressing the main issue in this case, I would like to state that this matter is sensitive. It is embedded with electrons that can easily ignate hard feelings and discontents among the parties' supporters. For this reason, I shall try to focus on the stated issue without unnecessary meandering, lest I be caught up in doldrum.

Jurisdiction of courts, the District Courts of Dodoma inclusive, is provided for by statutes. Section 40 (1) of the **Magistrate Courts Act [Cap 11 R.E 2019]** provides for original jurisdiction of the District Court. There is no dispute regarding this provision of the law. Other instances of jurisdiction of the District Court in relation to application of the doctrine of **Res judicata** is provided for under section 7 (2) of the **Civil Procedure Code, [Cap 33 RE 2019].** Since there is no argument about these provisions of the law, I find no need to reproduce anyone of them. However, I should state here that since jurisdiction is conferred on courts by statutes, its ouster should also be based on statutes.

The District Court in this matter held that since the appellant is a body corporate incorporated under the Act, the appellant, by virtue of the provision of section 17 of the Act, was required to first give a chance to the Administration General and BAKWATA to resolve the dispute, the appellant being an incorporated religious organization. The trial Court in so holding meant to say that, for non compliance with the provision of section 17 (2) of the Act and Articles 30(10) and 63 (2) of BAKWATA Constitution, its jurisdiction to determine the suit was oustered. Let it be said here, too, that the reason for ouster of jurisdiction according to the trial court's judgment was not criminality elements pleaded by the appellant but the allegation that

procedure for lodging the suit by the appellant was not observed. Section 17 of the Act bears the heading titled "Monitoring meetings of body corporates and organizations". It is reproduced as follows:-

"17 Monitoring meetings of body corporates and organizations

(1) No changes of the names of a person who is or who were trustee or trustees of a body corporate or organization incorporated under this Act shall be authorized by the Registrar – General unless he is satisfied that:

a) There were held a lawful meeting of the body corporate or organization for the purpose of electing a person as trustee of such a body corporate or organization.

b) The meeting electing new leaders as trustees or any person to fill any vacancy was monitored by any Government authorities.

(2) ***In the case of religious bodies corporate or organization, they shall each be monitored by their respective relevant supreme authority in Tanzania in accordance with their statutes, charter or instrument of that body corporate or organization".*** *[Emphasis mine]*

As correctly submitted by Mr. Sudai, the quoted provision of the law is not a dispute settlement provision *per se*. It has its own context which is change of names of trustees and meetings to that effect. It is my considered view that the role of supreme authority, such as BAKWATA, in terms of sub section (2) of section 17 of the Act is to monitor the process of change of names of trustees. In other words, the role of such supreme authority is

therefore to see to it that changes are executed in accordance with the constitutions of the religious bodies corporate or organization making the change. In this case, section 17 (2) of the Act would apply if the appellant was holding a meeting for election of trustees whereby the role of BAKWATA would be to monitor the observance of the appellant's internal process of changing of trustees according to the appellant's Constitution, or Charter. This is all what section 17 (2) of the Act provides. To appreciate this interpretation, one may wish to look at the context of the Act, whereby section 16 provides for nomination of trustees, filling of vacancies and returns of trustees. It is from the provision of section 16, section 17 connects to provide for procedure and requirement for monitoring meetings of bodies corporate and organization like the appellant when they elect their trustees. The provision of section 17 does not cover any Post – election disputes which have a shape and contect of the case filed by the Appellant in the District Court.

Guided by the said contextual interpretation of the provision of section 17 of the Act, it is therefore my considered view that section 17(2) of the Act does not ouster the jurisdiction of the trial court to entertain the suit which was filed before it by the appellant. As I stated earlier, since the jurisdiction of the trial court has been duly provided by statute, expressly, its ouster should equally be provided by statute either expressly, or by necessary implication. There is no such explicit or implicit ouster of jurisdiction of the trial court in the provision of section 17 (2) which was referred in the impugned judgment, as a bar to its exercise of jurisdiction.

Regarding the argument that the dispute ought to have been first resolved under the BAKWATA Constitution, particularly Article 63(2), I think the issue is whether the dispute is religious or not. I am blessed to have at my disposal a solid guidance on how to approach this matter in the Ruling of my learned colleague Hon. Masabo, J, in **REV. PETER MAKALA & OTHERS V REV. JACOB MAMEO OLE PAULO & OTHERS, Civil Case No. 195 of 2019 [2020] TZHC 2526 (25 August 2020), at** www.tanzlii.org.tz. In this case the issues in contention were the election of Bishop who is a church official and breach of church constitution. The learned Judge found that the matters in contention were squarely church affairs. For that reason, he ruled that the Plaintiff ought to exhaust remedies for settlement of dispute provided under the Evangelical Lutheran Church of Tanzania (ELCT) Constitution.Before arriving to this finding, the learned Judge traversed previous decisions of this Court and Courts abroad. In a Canadian Court decision in **SYNDICAT NORTH CREST V AMSELEM 2004 SCC 47 [2004]** whose excerpt was quoted by the learned Judge in REV. PETER MAKALA (Supra), the Canadian Court was determining the issue of interface between religious dispute and jurisdiction of ordinary courts like in our situation, and had this to say:

> *".....the state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious doctrine, unjustifiably entangle the court in the affair of religion".*

Based on the above quotation, Hon. Masabo, J correctly guided himself, and I fully subscribe to his guidance, as follows:

> *"When confronted with a dispute of this nature, civil courts usually consider whether the matter is purely religion or not. It is crucial to examine the pleadings carefully because most often, disputes of this nature tend to have a mix of religious and temporal matters. Where the dispute is religious, mechanisms established within the constitution have always been considered as best suited to avoid any entanglement of the court into religion. In contrast,* ***if the matter involves breach of rights and threats of public order the court will always intervene"*** [Emphasis mine]

Reading the pleadings filed by the appellant in the trial court, it is to be found that the gist of the appellant's claim against the respondents was "tortious acts of unlawful interference with the day-to-day activities of the appellant's work place". Details of such unlawful acts and their consequences were pleaded too. These details are: The respondents in the company of Police Officers entered the appellant's work place, disrupted day to day activities, ousted from office the appellant's leaders on allegation that they are terrorists and appointed leaders of their choice in lieu of the ousted leaders to run the day-to-day activities of the appellant. It is for such reasons the appellant prayed the trial court to order that the acts of the respondents were illegal and were thus null and void. Again, it is for the stated reasons the appellant further prayed the trial court to issue an order restraining permanently the respondents from interfering with the activities

of the appellant and her authorized officers. Such prayer could not, by any stretch of imagination, be dealt by BAKWATA, rather by a court of law.

The law requires courts to determine matters according to facts pleaded and evidence adduced. Records have not stated if the respondents are affiliated to BAKWATA. Nowhere in the pleadings the trial court was informed exactly who these respondents are, in terms of their relationship with the appellant. As such, it is dangerous and improper for the Court to assume that the respondents are members of the appellant or BAKWATA so as to suggest to the parties to resolve their dispute through Article 63 (2) of the BAKWATA Constitution. The trial court could only be in a position to know who these respondents are, if it were informed in the pleadings of their status *vis a vis* the appellant.

In my perusal of the pleadings, particularly the respondents' Written Statement of Defence (WSD), I could only find the Notice of Preliminary Objection, as aforesaid, and denials of almost all the claims raised by the appellant. Since the issue of jurisdiction was determined by the trial court before hearing of the suit, the proposition by the trial court, that the dispute ought to be first resolved through dispute settlement mechanism under article 63 (2) of BAKWATA Constitution, is not legally backed by facts as pleaded.

This Court had an opportunity to consider religious disputes where parties did not exhaust internal dispute settlement mechanism and always held that, where such mechanism existed and was bypassed unjustifiably, the court could not exercise its jurisdiction. This was the decision in **MR.**

LOTH OILEVO & 2 OTHERS V. THE REGISTERED TRUSTEES OF THE ANGLICAN CHURCH OF TANZANIA AND ANOTHER, a decision of this Court by Hon. Massengi, J who held that the plaintiffs were duty bound to exhaust the internal remedy before knocking the doors of the Court. The fact of the matter in Loth's case, which is different from the fact in the case at hand, is that both the plaintiffs and the defendants were the subjects of the same church whose constitution established a "House of Bishops" as a dispute resolution mechanism for matters concerning the church. In the case at hand, as I have said, it has not been pleaded that the respondents are members of the appellant or both parties are affiliated to BAKWATA. Under such circumstances, I find that the trial court erred in fact and in law in making a finding that the appellant's claims ought to be dealt up with BAKWATA.

In the upshot, I find both grounds of appeal meritorious. Accordingly, the appeal is allowed. As a consequence, the judgment of the District Court is quashed and set aside with no order to costs. The District Court to proceed determining the suit.

It is ordered accordingly.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE

8/11/2021