

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[LAND DIVISION]
AT ARUSHA**

LAND APPEAL NO. 67 OF 2019

*(Appeal from the decision of the District Land and Housing for Manyara at Babati,
Application No. 35 of 2019)*

BABATI SACCOS LTD 1st APPELLANT

TANFIL CONSULTANT (E.A) LTD 2nd APPELLANT

Versus

REGINALD SANKA RESPONDENT

JUDGMENT

5th October & 14th December, 2020

Masara, J.

Reginald Sanka, the Respondent herein, sued the Appellants before the District Land and Housing Tribunal for Manyara (the trial Tribunal) claiming that the Appellants had unlawfully trespassed and intended to sell by public auction his house located at Plot No. BTC/MSK/SW/80 (suit premise) together with other properties, including cattle. The intended sale of the suit premise aimed at recovering a loan that the Respondent was advanced by the 1st Appellant. The 2nd Appellant was impleaded as the agent of the 1st Appellant who was instructed to attach and sell the suit house and other properties of the Respondent. In their joint Written Statement of Defence at the trial, the Appellants raised three points of Preliminary Objection; to wit, that the Tribunal lacked jurisdiction to entertain the application as its jurisdiction is ousted by the law; that the application was barred by the principle of *res judicata* and that the whole application was defective and incompetent in law.

At the hearing of the Preliminary Objections, the trial Tribunal chairman overruled the second and third points of objections. On the first point of objection, the trial Tribunal did not agree with the Appellants that the Tribunal had no jurisdiction to entertain the suit as per Regulation 83(1) of the Cooperative Societies Regulations, 2015 (G.N 272 2015). The trial Tribunal dismissed the preliminary objection on the ground that the suit premise was not a collateral to secure the loan. The Appellants were aggrieved by the trial Tribunal's decision resulting into this appeal on the following grounds:

- 1. That, the Chairman of the District Land and Housing Tribunal erred in law and fact for failure to properly interpret the law and wrongly ordered hearing of the Application No. 35 of 2019 while the Tribunal has no jurisdiction;*
- 2. That, the chairman of the District Land and Housing Tribunal erred in law and fact to reject/dismiss the objection as res judicata while it was properly raised and indeed the application is res judicata to the previous litigated application; and*
- 3. That, the chairman of the District Land and Housing Tribunal erred in law to depart from the decision of the High Court and for his failure to comply with the directives and orders of the High Court.*

The Appellants therefore pray that the appeal be allowed, the ruling of the Tribunal be quashed and set aside and this Court declares that the trial Tribunal is incompetent to hear and determine Application No. 35 of 2019.

At the hearing of this appeal, the Appellants were represented by Mr. Samwel Welwel, learned advocate while the Respondent had the services of Mr. Paschal Peter, learned advocate. The appeal was argued *viva voce*.

Submitting in support of the appeal, Mr. Welwel contended that the trial Tribunal chairman did not correctly interpret the law as the District Land and Housing Tribunal had no jurisdiction as per Regulation 83(1) of the Cooperative Societies Regulations, 2015 (GN 272 of 2015). He based his assertion on the fact that the Respondent's application, specifically in paragraph 6(a)(ii)(iii)(iv) and (v) was to the effect that there was a loan agreement between him and the first Appellant. The Respondent stated that his cause of action arose due to the first Appellant's intention to sell his house. The learned advocate contended that matters relating to loan and disposal of mortgaged properties fall under "business of the society" as the main objective of a cooperative society is saving and lending to its members.

Mr. Welwel contended further that the Respondent stated expressly that he is a member of the 1st Appellant according to paragraph 6(a)(ii) of the application form. He therefore contended that the Respondent is bound by the stated regulation 83(1), and the remedy available to him is to refer the matter for amicable settlement through negotiation or reconciliation. According to Mr. Welwel, the procedure is provided under Regulation 33(2) and (3) of the Cooperative Societies Regulations. He fortified that annexures form part of the pleadings, and that the application was supported by annexures including the loan agreement showing that the 1st Appellant was a cooperative society. He added that Regulation 83(1) is couched in mandatory terms and its application is mandatory as per section 53 of the Interpretation of Laws Act, Cap. 1.

Submitting on the second and third grounds of appeal combined, Mr. Welwel submitted that the trial Tribunal failed to comply with the directives of this Court in ***Reginald Sanka Vs. Babati Saving Credit Cooperative Society and Another***, Land Case No. 20 of 2014 (unreported) whereby Moshi, J. held that Land Tribunals had no jurisdiction over disputes relating to contracts. He added that, after that decision, instead of filing the dispute in normal courts, the Respondent went again to the trial Tribunal which was declared to have no jurisdiction. Since the decision of the High Court is valid as there is no appeal preferred against it, it is binding upon the trial Tribunal. In Mr. Welwel's view, it was inappropriate for the trial Tribunal to retry the matter as there must be finality to litigations and decisions of superior courts need to be respected. He concluded by praying that the appeal be allowed and the decision of the DLHT be overruled with costs.

Contesting the appeal, Mr. Peter contended that what was submitted in the trial Tribunal is purely a land dispute according to paragraph 6(a)(viii) of the Application which is pending before the Tribunal. He argued that the house in question was not part of the loan collaterals. The loan collateral were two plots specified in the loan agreement. Regulation 83(1), according to Mr. Peter, is inapplicable as what was done by the Appellants amounts to trespass. He fortified that there are no contractual issues before the trial Tribunal but only trespass to land, thus the trial Tribunal has jurisdiction thereof.

On the second and third grounds, Mr. Peter argued that what was before the High Court involved different parties and a different subject matter. The doctrine of *res judicata* was raised but it is not purely a point of law as it required evidence.

On a short rejoinder, Mr. Welwel reiterated that there is no dispute that the Respondent is a member only that he has a cause of action other than contractual relationship. He conceded that he is in agreement with the trial Tribunal that the issue of *res judicata* requires proof by evidence but parties are the same contrary to what the advocate for the Respondent's argument. As for the subject matter, Mr. Welwel argued that it cannot be ascertained at this stage.

I have dispassionately gone through the memorandum of appeal; the trial tribunal records and the rival arguments of the advocates for the parties. The issue for determination in this Appeal is whether the decision of the trial Tribunal to dismiss the preliminary objections is justified.

The law is settled that disputes in the cooperative societies are governed by the Cooperative Societies Act and the Regulations made thereunder. Regulation 83(1) of Cooperative Societies Regulations, 2015 (GN No. 272/2015) and Regulation 130(1) of the Savings and Credit Cooperative Societies Regulation (GN 115/2015) are specific on the dispute settlement mechanisms between the society and its members. Regulation 130(1) of GN

115/2015 which is *in pari materia* with Regulation 83(1) of GN 272/2015 provides:

"130. -(1) Any dispute concerning the business of SACCOS between the members of the SACCOS or persons claiming through them or between a member or persons claiming and the Board or any officer, or between one SACCOS and another shall be settled amicably through negotiation or reconciliation."

According to the above provision, it is clear that the dispute concerning the business of Cooperative Societies involving its members has to be settled through negotiation or reconciliation within the said SACCOS itself. It is undisputed fact that the first Appellant is a Cooperative Society, in the sense that it is a SACCOS. In paragraph 6(ii) of the Application form, the Respondent admitted that he is a member of the first Appellant. The first Appellant being a SACCOS and the Respondent being a member thereto; their dispute is no exception to the above position.

In ***Asha Iddi Vs. Babati SACCOS Ltd and Another***, Civil Appeal No. 30 of 2019 (unreported), a case founded on similar circumstances, I noted as follows:

"From the wording of Regulation 83(1), a dispute has to first concern the business of the Cooperative Society to qualify thereof. The business of cooperative societies is savings and credit facilitation to their members. If the person is not a member of the society, he may also qualify where such person claims on behalf of a member or the board of the cooperative societies or when business transactions are undertaken between cooperative societies. In those circumstances, a dispute thereof will be referred to reconciliation or negotiation. It is the opinion of this court that the Regulation excludes all other incidents, which, invariably, have to be dealt with in a normal suit."

The question that should be resolved here is whether the Appellants' attempt to sell the Respondent's house falls within the business of the Society. According to Mr. Welwel, the transaction falls within the business of the 1st Appellant because the Respondent is a member of the 1st Appellant and it is a contractual relationship. Mr. Peter's contention is that the suit filed in the trial Tribunal does not concern the contract between the Respondent and the first Appellant, rather it is on trespass to his house by the 2nd Appellant.

The facts that can be elucidated from the parties pleading are that: there is the loan agreement between the 1st Appellant and the Respondent dated 23/05/2018 in which the 1st Appellant advanced a loan of Tshs 10,000,000/= to the Respondent. In that agreement, the Respondent pledged as collateral two plots; namely, Number 1020 Block 'M' and 471 Block 'M', Maisaka Ward, Babati District within Manyara Region. It appears that after the Respondent defaulted, the 1st Appellant resorted to attach the Respondent's house which was not pledged as security. This is what made the Respondent to open a suit at the trial Tribunal. The issue is whether the act of attaching the Respondent's house which had not been pledged as security falls in the category of disputes mentioned in Regulation 83(1) of Cooperative Societies Regulations, 2015 thus curtailing the jurisdiction of the Tribunal.

It is not apparent from the facts presented why the 1st Appellant opted to attach the suit house in lieu of the securities originally pledged by the Respondent. I, like the trial Tribunal Chairman, am of the view that the attachment of the said house cannot *ipso facto* be taken to be within the

business of a cooperative society as such act may require evidence to be condoned. Considering that matters relating to land falls within the jurisdiction of land Tribunals, the trial Tribunal was correct to decide that it had jurisdiction to determine the matter presented before it. I therefore resolve the issue in the affirmative.

Before concluding this matter, I have gone through the records presented and the decision in Land Appeal No. 20 of 2014 in which Moshi J. was of the view that the matter before her fell within the provisions of Regulation 83(1) of Cooperative Societies Regulations, 2015. As to whether the case is *res judicata* I am not prepared to hold so given the insufficiency of information before me. Moreover, Mr. Welwel was also of the view that the case could not be said to be *res judicata* in absence of evidence to that effect. Also, from the application it is stated that the cause of action arose in 2018 while in the former case it occurred in 2013.

From what I have endeavoured to discuss above, it is the finding of this Court that the appeal herein is devoid of merits. It is dismissed accordingly. I direct that the suit proceeds on merits before the trial Tribunal. Costs to abide with the events.

It is so ordered




Y. B. Masara
JUDGE

14th December, 2020.