

TANZANIA / JUDGMENT

milcah kalondu mrema vs tib development bank limited another1 2023 tzca 17982 15 december 2023

COURT
TZCADECIDED
15 December 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: MWARIJA, J.A.. MAIGE. J.A.
And MASOUD. J.A.^ CIVIL APPEAL NO. 513 OF 2020 DR. MILCAH KALONDU
MREMAAPPELLANT VERSUS TIB DEVELOPMENT BANK
LIMITED..... 1s tRESPONDENT ARUSHA BLOOMS COMPANY
LIMITED 2nd RESPONDENT (Appeal from the decision of the High Court of
Tanzania at Arusha) f Maqhimbi. J.) dated 18th day of May, 2015 in Land Case No. 70 of 2014
JUDGMENT OF THE COURT 13th & 15th December, 2023 MAIGE, 3.A.: On 30th September, 2004,
the second respondent procured a loan from the first appellant and pledged her Farm No. 140/1
with CT No. 4437 as security thereof. Subsequently, CT No. 4437 was partitioned to form Farm No.
140/1/2 with CT No. 42056. The two farms shall for the purpose of this judgment be referred to as
"the suit properties". There were other forms of security which may not be relevant in this appeal.
Believing that he has interest on the suit properties, the appellant entered, on 31st July, 2014,
caveats in land registry against the suit properties. Aggrieved, the first respondent instituted a
suit at the High Court of Tanzania at Arusha (the trial court), claiming for, among others, removal
of the caveats from the register. In response, the appellant filed a written statement of defence
wherein he raised a counter claim against the first respondent along with the second respondent
questioning the legality of the mortgage of the suit properties. The first respondent doubted, by
way of preliminary objections, among others, whether the appellant had locus standi to pursue
the counterclaim. The trial court sustained the point of preliminary objections and dismissed the
counter claim. Unhappy with the decision, the appellant has filed the instant appeal. He is
faulting the trial judge in treating the issue of locus standi as a point of preliminary objection and
in holding that the appellant had no locus standi to pursue the counterclaim. At the hearing of
the appeal, Mr. John Materu, learned advocate appeared for the appellant whereas the first
respondent was represented by Mr. Daniel Nyakiha, Ms. Grina Aden and Ms. Glorian Issanya, all
learned State Attorneys. Both the counsel for the appellant and first respondent had, before the
date of hearing, filed the relevant written submissions which, during hearing, they fully adopted
to read as part of their oral arguments, of course, with some clarifications which have been duly
considered. On her part, the second respondent, despite being duly served, did not appear.

Neither did she file any written submissions in reply. As a result, the appeal proceeded in her absence. From the submissions, it would appear to us, the issue for our consideration is whether the trial court was right in dismissing the appellant's counterclaim, without trial, on account that the appellant did not have locus standi. Both parties are in agreement on the principle of law propounded in the famous case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors* [1969] 1 EA 696 that preliminary objections are points of law which are argued on assumption that all the facts pleaded by the other side are correct. The complaint of the appellant in the first ground is that the trial judge determined the point basing on the facts which were contentious. On this, Mr. Materu submitted in effect that, in as much as it was express in the pleadings that the appellant has shareholding interest in the second respondent and her claim against the respondents being that the suit properties were fraudulently mortgaged to the first respondent without the mandate of the second respondent, the determination of whether the appellant has the necessary locus standi required evidence. He cemented his contention with the decision in *Musa Masango v. Era Musigire and Others* [1966] 1 EA 390 (HCU) and *Antony Leonard Msanze and Another v. Juliana Elias Msanze and Others*, Civil Appeal No. 76 of 2012 (unreported). For the first respondent, it was submitted that the trial judge's determination of the issue of locus standi was based on undisputed facts in the 3 counterclaim that the appellant has no suable interest on the subject matter of the counterclaim. Being a shareholder, he further submitted, could not entitle the appellant to litigate on behalf of the second respondent in the absence of sanction from the board of directors. To substantiate his contention, the counsel cited the case of *Foss v. Harbottle* (1843) 2 Hare 461, 67 ER 189 in support of the proposition that an individual shareholder cannot sue for wrongs done to a company. It is a cardinal principle of law according to the case of *Foss v. Harbottle* (supra) that, in a suit for a wrong done to a company or for recovery of monies or damages alleged to be due to the company, the proper plaintiff should be the company itself. This rule, we agree with Mr. Materu, admits some exceptions. One of such exceptions is where the acts complained of are of fraudulent character or beyond the powers of the company and, the individual shareholder has no means to procure the suit to be instituted. In which case, an individual shareholder can, on his own name, institute the suit. This position was stated in the case of *Burland and Others v. Earle and Others* [1902] A.C. 83. In the said case, the respondents as the shareholders to the American Bank Note company, instituted a suit against the first appellant as one of the directors and the company for declaration that that certain investments of the company's fund in the sole name of the first appellant were illegal. It was submitted for the appellants in the said case that, in the absence of conduct amounting to fraud or oppression, the court of first instance had no right or duty of interference. In resolving the issue, the Privy Council as the second appellate court, having reviewed the authority in *Foss v. Harbottle* (supra) stated as follows: "It is an elementary principle of law relating to Joint Stock Company that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is dear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-settled cases of *Foss v. Harbottle* (1) and *Mozley*

- v. Alston (2), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of shares in the company, and will not permit an action to be brought in the name of the company." As to the actions which can be brought under the said exception, the Court stated: "The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company." The above position was judicially recognized by the Court of Appeal for East Africa in the case of Musa Masango (supra) which was relied upon by the counsel for the appellant where it was stated: "To the general rule that in order to redress a wrong done to a company or to recover moneys or damages alleged to be done to the company, action should prima facie be brought by the company itself, there are, of course, certain exceptions. Some of these exceptions were conceded by counsel for the defendants. One of such exceptions was dealt with in Burland v. Earle (7), above referred to, in which the principle was stated that, although a company must sue to redress a wrong done to it, if a majority of its shares are controlled by those against whom the relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are either fraudulent or ultra vires." In the case at hand, the appellant representing herself as the shareholder and former director in the second respondent's company raised a counterclaim against the first respondent along with second respondent questioning the legality of the creation of the mortgage on the suit properties. The factual allegations constituting her cause of action was pleaded in paragraphs 5 and 6 of the counterclaim in the following words: "5. That the second defendant unlawfully terminated the first defendant's appointment as director of the second 6 defendant and appointed Mr, Felix Christopher Mrema and Joseph Giovinazzo to be its directors. The appointment of the said Directors was not made in a properly constituted meetings of the Company as per the detects of the law.
6. That after the appointment referred in paragraph 5 above the two directors of the second defendant namely Felix Christopher Mrema and Eric Sikujua Ngimario did fraudulently and without authority from the members of the second defendant company mortgaged the second defendant's farm No. 40/1 to the plaintiff to secure loans as indicated in official search reports annexed hereto and marked CL2." The above facts, in our reading, prima facie establish an action within the exception in the case of Burland v. Earle (supra) as above discussed. Therefore, if we go by the principle in Mukisa Biscuits (supra), we have no hesitation to say that, the trial court would not, if its decision was premised on the presumption that the above stated facts were correct, held, at that stage that, the appellant has no locus standi to raise the counterclaim. Such question could not, as correctly submitted for the appellant, be ascertained without trial. That was the position in the case of Antony Leonard Msanze (supra), where, like here, the interest of the first appellant in the suit though expressly pleaded, was doubted by way of preliminary objections and the Court observed: "It seems to us that with the claim manifested in their Plaint that they are legal administrators of the estate of a deceased person, the High Court should not have

concluded at that preliminary stage without further evidence that the appellants had no cause of action and locus standi in the Land Case No. 26 of 2010." For the above reasons, therefore, this appeal has merit and it is hereby allowed with costs. Consequently, we quash and set aside the ruling of the trial court delivered on 18th day of May, 2015 and direct that the record be remitted to the trial court so that it may proceed with the counterclaim in accordance with the available procedure. DATED at ARUSHA this 14th day of December, 2023. A. G. MWARIJA JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgment delivered this 15th day of December, 2023 in the presence of Mr. Victor Jonas Bernard holding brief for Mr. John Materu, learned counsel for the Appellant and Mr. Leyani Mbise, learned State Attorney for the 1st respondent and in the absence of 2n^TS5pondent>, is hereby certified as a true

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/306695/source_file/milcah-kalondu-mrema-vs-tib-development-bank-limited-another1-2023-tzca-17982-15-december-2023.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/dr-milcah-kalondu-mrema-locusstandi-tzca-2023--6a3ea52c3b1caa9129825e43>

Prepared on 14 October 2026 · Esheria