IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A And SEHEL, J.A.)

CIVIL APPEAL NO. 129 OF 2015

THE NATIONAL BANK OF COMMERCE LIMITED.....APPELLANT

VERSUS

NATIONAL CHICKS CORPORATION LIMITED
ISSACK BUGALI MWAMASIKA
HAROLD ISSACK MWAMASIKA
ATUGANILE ISSACK MWAMASIKA
INNOCENT ISSACK MWAMASIKA **.....RESPONDENTS**

(Appeal from the ruling and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Nyangarika, J.)

dated the 5th day of November, 2014
in
Commercial Case No. 11 of 2014

JUDGMENT OF THE COURT

22nd June & 23rd September, 2019

LILA, J.A.:

This appeal emanates from the ruling on points of law raised by the respondents against the suit which was preferred by the appellant under summary procedure. In that ruling, the High Court (Commercial Division) sustained the objections on jurisdiction and want of default notice

consequent upon which he dismissed the suit. That decision aggrieved the appellant hence the present appeal.

The appellant's quest to impugn the High Court decision is founded upon a two point memorandum of appeal. The grounds of complaints are that:-

1. *The learned trial Judge erred in law in holding that the High Court of Tanzania (Commercial Division) does not have jurisdiction to hear and determine the matter.*
2. *The learned Judge erred in law in holding that the suit was premature for want of notice of default.*

For appreciation of the essence of the appeal before us, we find it desirable to outline the salient features of the case. Way back in the year 2014, the appellant instituted a summary suit under Order XXXV of the Civil Procedure Act, Cap. 33 R.E. 2002 (The CPC) claiming for payment of the sum of Tanzania Shillings one billion four hundred thirty five million six hundred thirty thousand seven hundred forty two thirty cents (TZS. 1,435,630,742.30) being the outstanding amount on account of the

Overdraft Facility and the sum of Tanzania Shillings nine hundred eighty eight Million eight hundred seventy seven thousand one hundred thirteen (Tzs. 988,877,113.00) being an outstanding balance for a loan facility advanced by the plaintiff to the 1st Respondent (then 1st Defendant). It also claimed for interest on the outstanding amount at a contractual rate of 20% per annum from 26/8/2013 to the date of judgment and costs of the suit. As an alternative, in the event the respondents failed to pay the claimed sums of money, the appellant prayed for an order appointing Mr. Sadock Magai as, first, a receiver manager with powers to sell the mortgaged properties to wit CT No. 7963, Plot No. 1028, Block 'G' Boko area in Dar es Salaam City and CT No. 7484-MBYLR, Plot No. 777, located in Rungwe district, Mbewe and Ndaga, Mbeya Region and, secondly, as Receiver Manger over the assets charged under the debenture. The appellant also prayed for payment of outstanding amount not satisfied by the sale of the mortgaged assets, costs and other reliefs the Honourable court might deem just. A credit facility agreement was entered between the appellant and the 1st respondent, loan agreements were also entered between the appellant and the 2nd, 3rd, 4th and 5th respondents which were supported by legal mortgages over the said properties and a debenture over the 1st respondent's fixed and floating assets.

The respondents successfully sought and obtained leave of the Court to defend the suit. Consequently, they lodged a joint written statement of defence accompanied with a notice of preliminary objection comprising of five grounds. It is couched thus:

"(a) The suit is not maintainable under order XXXV as summary suit and the plaint must be rejected by this Honourable court under order VII(a)(b) of the Civil Procedure Code, Cap. 33 R. E. 2002.

(b) That the suit, having been endorsed as summary suit under Order XXXV of the Civil Procedure Code Cap. 33 R. E. 2002 cannot lawfully proceed to be tried as an ordinary suit.

(c) That the 1st, 3rd, 4th and 5th defendants, not being mortgagors, cannot be sued under Order XXXV of the Civil Procedure Code, Cap. 33 R. E. 2002.

(d) That Honourable Court has no jurisdiction to try this mortgage suit as a commercial case.

(e) That the suit against the 2nd defendant is incompetent and bad in law for being premature for want of notice of default."

The respondents, on the basis of the above flaws, prayed that the suit be rejected under Order VII(a) as against all the defendants. There was a further prayer, which we think was made in the alternative, that the suit be struck out as against the 1st, 3rd. 4th and 5th defendants with costs and certification of costs for three counsel from each of the three firms.

In his ruling, the presiding judge (Nyangarika J. as he then was) found the preliminary points of objection under grounds (a), (b) and (c) unmerited and overruled them. The appellant has not appealed against that finding.

In respect of ground (d) of objection which is on the jurisdiction of High Court (Commercial Division) (Henceforth the Commercial Court) to entertain the matter, the record bears out that the learned Judge considered the submissions, various decisions of the High Court on the issue as well as the parties' choice of the court in the guarantee agreement and he was of the view that the Commercial Court was not the parties' priority as against the High court (Land Division) in resolving their dispute. He accordingly held that because there is a Land Division of the High Court

then the Commercial Court lacked jurisdiction. That finding aggrieved the respondents hence the present ground one (1) of appeal on that issue.

As regards the objection on the need to issue a notice of default before instituting a suit in court, the learned Judge was of the view that since it was not in dispute that the respondents were not served with the notice of default as the same was returned unclaimed (undelivered) and despite the amendment to the Land Act in 2004 vide Act No. 2 of 2004 and also since the appellant had opted to institute an action in court, a notice of default to the respondents prior to instituting the claim (suit) was a condition *sine qua non*. In the absence of it, he went on to hold, it meant that there was no lawful demand by the appellant and the moneys were yet to become payable. According to him, the suit was thereby defeated for want of cause of action. In sum, he found merit in the objections on jurisdiction and default notice. He thus proceeded to dismiss the suit with costs to the respondents.

At loggerheads before us when the appeal was called on for hearing, were Mr. Gaspar Nyika and Mr. Mpaya Kamara, both learned counsel, who represented the appellant and the respondents, respectively.

The counsel for the parties adopted their respective written submissions they had earlier on filed without more save for Mr. Kamara

who sought leave of the Court to submit a copy of the Court's decision in the case of **Backlays Bank D. C. O. v. Gulu Millers Limited** [1959] E. A. 540 which he had cited in the written submissions without annexing the same or citing it in the list of authorities lodged in Court. That copy was received without objection from Mr. Nyika.

In his submissions on ground one (1) of appeal on the issue of jurisdiction, Mr. Nyika contended that in terms of Rule 2 of the High Court (Commercial Division) Procedure Rules of 2012, if a dispute between the parties arose out of a contractual relationship relating to business, restructuring or payment of commercial debt such a dispute is considered to be a commercial case. Therefore, he argued, since the appellant's claim was for repayment of outstanding amount that arose from an overdraft facility and a term loan advanced to the 1st respondent and secured by mortgage and a guarantee by the other respondents, then the cause of action is commercial by nature hence it was proper to institute it in the High Court (Commercial Division) because it fits squarely within paragraphs (c)(d) and (e) of Rule 2 of the Commercial Court Rules.

Distinguishing the mandate of the High Court (Commercial Division) and the High Court (Land Division), Mr. Nyika argued that, following the amendment of the Land Disputes Courts Act by the Written Laws

(Miscellaneous Amendments) Act No. 2 of 2010 by deleting the definition of the High Court (Land Division) and substituting it with the High Court, the exclusivity the High Court (Land Division) enjoyed in adjudicating land cases ceased and the High Court generally enjoyed that mandate. As such, he added, it was improper for the learned Judge to hold that the High Court (Commercial Division) had no jurisdiction.

Mr. Nyika also faulted the judge for relying on clause 28 of Article XX of the contract of guarantee on the ground that parties to a contract cannot exclude the jurisdiction of the High Court because jurisdiction is a creature of statute. In bolstering his assertion he cited to us the Court's decision in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Limited (IPTL)** [2000] TLR 324.

In another approach, Mr. Nyika was insistent that even the above clause in the contract of guarantee specifically provided that the dispute would be referred to the Land Court if there exists one. Since the High Court, the High Court (Commercial Division) inclusive, are vested with powers to entertain land matters, then the latter had powers to try the matter if one is to hold that it was a land dispute. By holding otherwise, the Judge was in error, Mr. Nyika submitted. He concluded by insisting that the

dispute arose from a commercial transaction hence the High Court (Commercial Division) had jurisdiction to deal with it.

Submitting in respect of the notice of default which is ground two (2) of appeal, Mr. Nyika, after quoting in full the provisions of section 125 of the Land Act Cap. 113 R. E. 2002 prior to being amended by the Land (Amendment) Act, Act No. 2 of 2004 and sections 126 and 127 after the amendment, submitted that it mandatorily imposed upon the mortgagee the requirement of issuing a notice of default to the mortgagor before exercising the right to sue but after the amendment the right to sue is no longer available to the mortgagee which meant even the requirement to serve a default notice under section 127 does not exist. He added that the appellant did not exercise the rights under the present section 126 hence the requirement of notice of default under section 127 does not apply. To cement his assertion he referred us to the unreported case of **Stanbic Bank Tanzania Limited vs. Tuckman Mines and Minerals Tanzania Limited**, Commercial Case No. 11 of 2005 (unreported) which he had earlier on depended before the High Court. He submitted, therefore, that the learned Judge was in error to hold that the suit was premature for want of notice of default. In the end he urged the Court to uphold the

appeal with costs and quash and set aside the decision of the High Court (Commercial Division).

On his part, Mr. Kamara fully supported the decision by the learned Judge. He contended that Act No. 2 of 2004 did not oust the exclusive jurisdiction on land matters of the High Court (Land Division) but extended the avenue to the High Court and that the High Court (Commercial Division) does not enjoy that kind of jurisdiction to deal with land matters (disputes) falling within the exclusive preserve of the courts to which the Land Disputes Courts Act extends. As a justification, he argued that there is no register for land cases at the High Court (Commercial Division). He added that under Clause 28 of the mortgage deed, the parties chose the Land Division to be their court of preference where it existed and the appellants did not plead that it was not there. He was of the view that the extension to adjudicate land disputes covered only the High Court where the registers for land cases are maintained.

In respect of the argument that the suit was based on commercial transaction, Mr. Kamara made reference to prayers d(i)(iii) and (iv) in the suit and argued that the case was characterized and framed as a summary suit on the basis of the mortgage hence terming it commercial was not proper.

Arguing in respect of the second ground on default notice, Mr. Kamara agreed with the learned Judge's finding after seeking inspiration from the holding in the Kenyan case of **Barclays Bank DCO vs Gulu Millers** [1959] 1 EA 540. He further submitted that according to Clause 7(e) of the loan agreement the loan was supposed to be paid in 42 months after a grace period of six (6) months hence the borrower had a total of forty eight (48) months which was to end not earlier than 14/9/2011. But, he submitted, the suit was filed on 11/2/2014 before the expiry of the repayment period hence the borrower cannot be said to have defaulted payment. He stressed that he suit was prematurely filed and without notice of default. He argued further that apart from general law, even Clause 23 of the credit facility letter provided that the overdraft facility is payable on demand hence consistent with Clause 10 of the Mortgage deed between the 2nd respondent and the appellant. He added that incidences of defaults are stated under Clause 13 of the Credit Facility Letter; hence it was incumbent upon the appellant to issue a notice of default. He ultimately urged the Court to dismiss the appeal with costs.

We shall begin our discussion by first making an observation in respect of the first ground of appeal. We share the undisputed assertion by counsel for the parties that the appellant advanced a credit facility to the

1st respondent and the same was secured by legal mortgages over the properties above indicated and guaranteed by the 2nd, 3rd and 4th respondents and debenture over the 1st respondent's fixed and floating assets. It is also clear to us that the nub of counsel grievance is on whether or not the High Court (Commercial Division) has jurisdiction to adjudicate the matter.

In resolving the above issue, we think we should start by discussing general mandate of the High Court. It needs no overemphasis that the High Court and its mandate are a creature of the Constitution of the United Republic of Tanzania, 1977 as amended (the Constitution). It is established under Article 108 of the Constitution. That Article stipulates that:-

> *"108.-(1)* ***There shall be a High Court of the United Republic (to be referred to in short as "the High Court") the jurisdiction of which shall be specified in this Constitution or any other law.***
>
> *Provided that the provisions of this sub-article shall apply without prejudice to the jurisdiction of the Court of*

Appeal of Tanzania as provided for in this Constitution or in any other law." (Emphasis added)

More so, section 5 of the Judicature and Application of Laws Act, Cap. 358 R. E. 2002 (The JALA), provides that:-

> ***"Subject to any written law to the contrary**, a judge of the High Court may exercise all or any part of the jurisdiction of, and all or any powers and authorities conferred on the High Court." (Emphasis added)*

It is manifest that the High Court is one in this country and it derives its jurisdiction or mandate from either the Constitution or any law to that effect. It is also absolutely clear that it has unlimited jurisdiction and judges of the High Court are mandated to exercise all or any part of the powers conferred on the High Court.

With the aforesaid fundamental legal position in mind, we can now proceed to determine the issue before us that is, whether the presiding judge was correct to hold that the Commercial Court had no jurisdiction to adjudicate on the matter.

In our considered view, narration of the historical background of each of the two divisions – The High Court (Land Division) and the High Court

(Commercial Division) with particular concentration on their respective establishments and prescribed mandate will be of great help in determining that crucial issue.

The existence of the Land Division of the High Court is a result of the enactment by the Parliament of the Land Act, and the Village Land Act, Cap 13 R. E. 2002 in 1999 which took, under sections 167 and 62 respectively, cognizance of the hierarchy of courts vested with jurisdiction to determine land disputes. Those Acts named such courts as being the Court of Appeal, the High Court, the District Land and Housing Tribunal, the Ward Tribunal and the Village Land Council. The same is the case with the Land Disputes Courts Act, Cap 216 R. E. 2002 which, essentially, established the dispute settlement machinery. Section 3(1) and (2) of it, initially, stated thus:

> *"(1) Subject to section 167 of the Land Act, and section 62 of the Village Land act, every dispute or complaint concerning land shall be instituted in the court having jurisdiction to determine land disputes in a given area.*
>
> *(2) The Courts of jurisdiction under subsection (1) include:*

(a) the Village Land Council;

(b) the Ward Tribunal;

(c) the District Land and Housing Tribunal;

(d) the High Court (Land Division);

(e) the Court of Appeal."

Both sections 167 of the Land Act and 62 of the Village Land Act simply talked of "the Land Division of the High Court established in accordance with law for the time being in force for establishing court divisions." Consequent upon the enactment of the Land Act and the Village Land Act, in the year 2001, the Honourable Chief Justice of Tanzania, exercising his powers conferred upon him under section 4 of the JALA and the High Court Registries Rules, 1984 which empowered him to make Rules for regulating the practice and procedure of the High Court and all other courts established in Tanzania, through the High Court Registries (Amendment) Rules, 2001, Government Notice No. 63 of 2001, he established a Land Division of the High Court within the registry at Dar es salaam and designated all other High Court registries as sub-registries of the Land Court. In 2010, the Parliament through Written Laws (Miscellaneous Amendments) Act No. 2 of 2010, amended the Land Act, The Village Land Act and the Land Disputes Courts Act by deleting the

words "Land Division" following which amendment the entire High Court enjoyed jurisdiction over land matters as a Land Court.

At least two things are noteworthy here. **One**, that Act No. 2 of 2010 did not disestablish the High Court (Land Division) because that Act did not misapply Government Notice No. 63 of 2001 which established the High Court (Land Division) as was rightly commented by our brother Mziray, JA. in his presentation paper at the induction course for newly appointed Judges of the High Court of Tanzania at the Institute of Judicial Administration – Lushoto titled **"Fundamental issues in the Land Dispute Settlement mechanism." Two**, that Act did not also expressly exclude the High Court (Commercial Division) from the entire High Court. Instead, that Act vested the High Court with powers to adjudicate land matters and the High Court (Commercial Division) being part of it was not an exception. That is to say, nothing in that Act precluded the High Court (Commercial Division) from enjoying jurisdiction over land matters.

On the other hand, the High Court (Commercial Division) was established by the High Court Registries (Amendment) Rules, 1999 and later in terms of Rule 5A of the High Court Registries (Amendment) Rules 1999 (G.N. No. 141 of 18/6/1999). Rule 2 of the latter Rules provided for

the nature of cases that court would hear and determine which stated thus:-

"2. "Commercial Case" means a civil case involving a matter considered to be of commercial significance including but not limited to:-

(a) The formation of a business or commercial organization;

(b) The governance of a business or commercial organization;

(c) The contractual relationship of business or commercial organization with other bodies or persons outside;

(d) The liability of a commercial or business organization or its officials arising out of that person's commercial or business activities;

(e) The restructuring or payment of commercial debts by or to business or commercial organization or person;

(f) The winding up of a commercial or business organization or person;

(g) The enforcement of commercial arbitration awards;

(h) The enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a treaty or

mutual arrangement to which the United Republic is a signatory and which forms part of the law of the United Republic;

(i) Admiralty proceedings; and

(j) Arbitration proceedings."

According to the High Court (Commercial Division) Procedure Rules, 2012, G.N. No. 250 of 13/07/2012 (the Rules) the establishment of the Commercial Court is made under rule 5(1) and its jurisdiction is provided under sub-rule (2) of Rule 5 which states:-

> *"(2) The Court shall have and* ***exercise original jurisdiction in a commercial case i****n which the value of the claim shall be at least one hundred million shillings in* ***case of proceedings for recovery of possession of immovable property*** *and at least seventy million shillings in proceedings where subject matter is capable of being estimated at a money value"*
>
> (Emphasis added)

As rightly submitted by Mr. Nyika, Rule 3 (not 2 as he suggested) of the Rules categorized the nature of cases which are of a commercial significance hence subject of its jurisdiction. In fact, it maintained the same

list as was provided under Rule 2 of G.N. No. 141 of 1999. Of crucial importance, it maintained that the list is not exhaustive (not limited to that list).

We have also seriously examined Rule 5(1) of the Rules which states that:

> *"5(1). There shall be a Commercial Division of the High Court of Tanzania vested with both original and appellate jurisdiction over commercial cases."*

We find nothing express or implied in the above Rule to the effect that the High Court (Commercial Division) is a distinct and independent court from the High Court. That, in our view, means that it is equally part of the High Court. It enjoys and exercises the jurisdiction and mandate as stipulated by the Constitution and the Judges presiding over cases thereat, like any other Judges of the High Court, exercise the powers as stipulated in the JALA. However, as that court is designated to hear cases of a commercial nature only, then the judges thereat try those cases only because other categories of cases are not registered (lodged or filed) there.

In view of the above, one may be prompted to ask an obvious question whether the High Court (Commercial Division) has jurisdiction to

adjudicate on matters other than commercial matters. It is obvious that as part of the High Court it has jurisdiction because its substantive mandate is provided by the Constitution. Besides, we are also fortified in this finding by the Court's finding in the case of **Morogoro Hunting Safaris vs. Halima Mohamed Mamuya**, Civil Appeal No.117 of 2011 (Unreported). In that case, Halima Mohamed Mamuya instituted a suit in the High Court (Commercial Division) against Morogoro Hunting Safaris Limited (the Company), praying for a declaration that she was a *bona fide* shareholder and director in that company by virtue of the provisions of the Memorandum and Articles of Association; payment by the appellant company a sum of TZS. 124,312,000/= as special damages; and a further sum of TZS. 200,000,000/= as general damages, among other reliefs. After trial, the High Court found among others, that the letter which was written by the appellant company to the Ministry of Natural Resources and Tourism was defamatory, consequent to which it awarded the respondent TZS. 50 million thereof. Dissatisfied the Company appealed to the Court and among the grounds was:-

> *"7. That the learned trial judge erred in law and in fact by adjudicating on the issue of defamation while knowing that the Honourable court, being a Commercial Court, has no jurisdiction to adjudicate on defamation matters."*

After we had appreciated that the procedure followed in establishing the Commercial Division of the High Court is as above explained and the fact that it was designated to deal with the proceedings of commercial nature as are stipulated under Rule 3 of those Rules, we observed that:-

> *"Our careful reading of Rule 3 of those Rules entices us to agree with Mr. Ngeleshi that the High Court Registry Rules (HCRR) did not take away the powers of a single judge to adjudicate on matters falling within the jurisdiction of the Commercial Division of the High Court, but were merely intended to streamline the administrative functions of that court, especially the timely disposal of cases, for reasons we are about to assign...*
>
> *Secondly, while we think that a* ***judge cannot normally rely on the general jurisdiction under Article 108 (2) of the Constitution to assert jurisdiction when faced with the issues whether or not he has the requisite jurisdiction to hear and determine a particular matter before him***

because there are normally specific other laws granting jurisdiction to that effect; we nevertheless find that a single judge of the High Court may exercise jurisdiction to hear and determine a claim not strictly of commercial significance where it may be interwoven with matters which are of commercial significance under powers conferred on such a judge under section 5 of the JALO*. As already pointed out, the list provided under Rule 3 of the High Court Registry Rules in respect of the kind of claims which may be heard and determined by a judge in the High Court (Commercial Division) is not exhaustive. Section 5 of the JALO provides that:-*

> *"Subject to any written law to the contrary, a judge of the High Court may exercise all or any part of the jurisdiction of, and all or any powers and authorities conferred on the High Court."*

We also agree with Mr. Ngeleshi that ***were we to agree with Mr. Nyamgaluli that Rule 5A of the HCRR took away the jurisdiction of a judge of Commercial Division, then such Rule, being a subsidiary legislation, would be inconsistent with the provisions of section 5 of the JALO, therefore void in terms of section 36 (1) of the Interpretation of Laws Act, Cap 1, Revised Edition, 2002****. That section provides that:-*

> *"(1) Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act and subsidiary legislation shall be void to the extent of any such inconsistency."*

In view of what we have stated herein, we find and hold that the learned trial judge had jurisdiction to hear and determine a claim ***touching on defamation****."*

(Emphasis added)

It is plain that while the High Court is a creature of the Constitution, the registries and divisions of it are a creature of Rules and the provisions of the Rules cannot override the provisions of the Constitution. That said, we have found ourselves constrained to differ with Mr. Kamara's forceful submission that the Commercial Court has no jurisdiction to adjudicate land matters.

We now turn to consider the merits of the appeal on the issue of jurisdiction. It is obvious that the learned Judge was driven by the parties' choice in the contract of guarantee of the court to adjudicate their dispute to hold that the Commercial Court had no jurisdiction to adjudicate the dispute. That is evident from what he said after narrating what other Judges said on the issue of jurisdictions of the Land and Commercial Divisions of the High Court:-

> *"Having revisited these decisions, I shall now decide on the issue of jurisdiction raised. In this particular case, upon reading the clauses 28 and 29 of the mortgage documents cited earlier on, which mortgage documents were pleaded in the plaint, it is abundantly and clearly stipulated under these clauses in the mortgage documents that where the LAND DIVISION OF THE*

HIGH COURT is established or is in existence or is in operation at a place where the cause of action arose that court will take precedence or priority in resolving any dispute between the parties other than this court...

Therefore other courts shall have no jurisdiction over the dispute unless the chosen court have declined jurisdiction. In our case, the mortgage documents had specified, in advance, the forum in which disputes shall be litigated and the law to be applied, an almost in dispensable pre-condition to achievement of orderness (sic) and predictability essential to any contract.

I can, thus, comfortable (sic) conclude that this court has no precedence in determining dispute in this matter. In other words, its jurisdiction on this matter has no first priority. This court has no LAND REGISTRY OF THE LAND DIVISION OF THE HIGH COURT .."

Our examination of the above excerpt from the learned Judge's decision, we have found ourselves constrained to differ with the counsel of the parties in what seems to be their forceful view that the judge held that

the Commercial Court had no jurisdiction to entertain the dispute due to want of legal mandate. That is not the true reflection of the judge's finding. Our understanding is that, basing on the parties' choice of the court to adjudicate any dispute arising from the guarantee agreement, the Commercial Court was not the parties' preference against the Land Division of the High Court hence the former court had no "jurisdiction". That being the case and contextually read, it seems to us that the learned judge misapplied the word "jurisdiction". There seems the learned Judge misapplied the word "jurisdiction" in lieu of preference. The words preference and jurisdiction bear different meanings and are two distinct matters. Parties to a dispute may prefer their dispute be determined by a certain court but they cannot vest that court with the jurisdiction it legally does not have or vice versa. Preference has something to do with the parties' choice but jurisdiction, as we have stated above, is a creature of either the Constitution or law.

The above notwithstanding and with profound respect, the judge's approach as reflected in the above excerpt on the issue of jurisdiction was erroneous. The Judge never discussed and determined the legal mandate of each of the two Divisions of the High Court. That was a crucial issue which called for his determination. After summarizing what other Judges

had said on the issue he did not give his position on the matter. Instead, he resorted to considering the parties' agreement. As a reminder, we wish to reiterate our view that jurisdiction is a creature of statute and parties cannot agree otherwise. That is the Court's observation in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Limited (IPTL)** (Supra) which was rightly cited by Mr. Nyika that:-

> *"it is a trite principle of law that parties cannot by agreement or otherwise confer jurisdiction upon the court"*

Without losing sight, we find ourselves obliged to insist that designation by the Chief Justice as a specialized Court for adjudicating certain matters, in our view, does not abrogate that Division's general mandate as stipulated by the Constitution and JALA as part of the High Court. Establishment of a Registry or a Division is quite distinct from establishment of a court. We are alive of the recent amendment of the JALA by Written Laws (miscellaneous Amendments) Act, No. 3 of 2016 which now empowers the Chief Justice in consultation with the President, by Order published in the Gazette, to establish such number of divisions of the High Court. It also empowers the Chief Justice to establish registries

and it also takes care of the divisions and registries established prior to coming into operation of that Act to be deemed to have been established in accordance of it. It provides thus:-

> "18. The principal Act is amended by adding immediately after section 4 the following new section:-
>
> *4A. –(1) The Chief Justice may, after consultation with the president, by Order published in the Gazette,* ***establish such number of divisions of the High Court as may be required for the purpose of facilitating the discharge of judicial functions in respect of specific matters as may be determined by the Chief Justice.***
>
> *(2) The division established under subsection (1) shall, notwithstanding any other written law, exercise jurisdiction over such judicial functions as may be prescribed in the establishing Order.*
>
> *(3) The Chief Justice may by order published in the Gazette, establish such number of registries or sub-registries of the High court as may be required.*

(4) For avoidance of doubt, ***any division or registry or sub-registry which was established by Chief justice prior to the coming into operation of the provisions of this section shall be deemed to have been established in accordance with the provisions of this section."***

(5) The Chief justice may, by Order published in the Gazette, make rules prescribing practice and procedure of the division established under this section or of such other matters as may be required."(Emphasis added)

It is vivid that even with that amendment; the constitutional mandates of the divisions of the High Court as part of the High Court have not been affected. In addition, it is also clear that **the purpose of establishing divisions or registries is to facilitate the administration and dipensation of judicial functions**. They are meant to enhance expeditious and proper administration and management of certain categories of cases. We note therefore that establishment of registries of the High Court in the Regions which we administratively refer them as High Court Zones or a Division of the High Court dealing with a certain category or categories or classes of cases or disputes is founded on

the spirit of expediency. That is, the need to expedite adjudication of certain categories of cases. In that regard we subscribe ourselves to the relevant part of the observation made by Honourable Kileo, J. (As she then was) in the case of **Michael Mwailupe vs. CRDB Bank Limited and Others**, Land Case No. 7 of 2003 (HC) (unreported)] cited by the judge in the ruling subject of this appeal that:-

> *"It must be possible that a matter may sometimes consist of both commercial and land elements.* ***Since one of the main reasons behind the establishment of the two specialized Divisions – i.e the Commercial Court and the Land Division of the High Court was to expedite dispute settlement,*** *I consider that the interest of justice would be best served if the law would make provisions of an option for a party who has a matter comprising of both commercial and land elements to either file it in the Land Division of the High Court or the Commercial Division of the High Court."* (Emphasis added)

We think the Judge, though was not so express, had in mind the policy statement in the Land Policy that there was need to streamline the

arrangements in land administration and land dispute adjudication after having observed that the courts of law, in existence then, though ideal machinery but were paralyzed by the heavy workload of other disputes which resulted in the delayed resolution of land disputes. No doubt, commercial disputes resolution was hampered with the identical situation. And, there is no doubt that practice of establishing registries and Divisions has worked out very well in attaining the purpose for which they are established and thereby facilitating the discharge of judicial functions as envisaged in the Rules.

In the end, it is our view that a reading of the constitution, the JALA and the Rules which establish the two Divisions of the High Court as we have amply demonstrated above, dispel the doubt that both Divisions of the High Court have jurisdiction to adjudicate the matter. And since the matter had already been lodged in the High Court (Commercial Division) the matter should proceed to hearing in that court.

However, we wish to advise the responsible authority, that there should be placed a mechanism which will ensure that litigants are appropriately advised to lodge in other registries matters not specifically assigned to a particular Division so as to ensure that the purpose for which the Divisions are established is not paralyzed. In the event a case not of

the division's specialization is instituted in any of the divisions, the parties should not be thrown out as was the case herein in the pretext of lack of jurisdiction. Instead, the parties should either be advised to withdraw and file the same in another court competent to try it; otherwise, such a case should be heard to its conclusion.

The above notwithstanding, we have seriously examined the pleading and nature of the claims in the suit and we are satisfied that the dispute arose from the appellant's claim, as rightly submitted by Mr. Nyika, for repayment of the alleged outstanding amount that arose from the overdraft facility advanced by the appellant to the 1st respondent. So, the underlying claim is based on the loan agreement between the two. The claim arose from the loan agreement which created a contractual relationship relating to business between them. The cause of action arose from a commercial contract. That claim falls squarely in the purview of the area of specialization of the High Court (Commercial Division) as stipulated in item (iii) of Rule 2 of the High Court (Commercial Division Procedure) Rules, 2012. The 2nd, 3rd and 4th respondents were impleaded as guarantors to the payment of the loan. Their liability comes to picture due to the alleged 1st respondent's default in repaying the loan and interests thereon otherwise the appellant have no direct claims against them and

their mortgaged landed properties as security. Neither is the appellant's claims based on their rights over their mortgaged properties. There is, therefore, no mortgagor–mortgagee relationship between the appellant and the four respondents and the cause of action did not, therefore, accrue from the mortgage transaction as Mr. Kamara sought to convince us. The mortgaged properties are a subject of the case because they were used as security. And, therefore, they are liable to be sold so as to repay the loan and interest in case the appellant's claims are proven against the 1st respondent without resort to a civil action. For the sake of convenience, that is observing the specialization of the Divisions of the High Court, and considering that the underlying contract being of commercial nature and the claim being payment of loaned amount and interest thereon, therefore, the matter was rightly instituted in the Commercial Division of the High Court. In this we wish to take cognizance of the persuasive observation by Ngwala, J. save for the use of the word "jurisdiction" in the case of **Britania Biscuits Limited vs. National Bank of Commerce Limited and Three Others**, Land Case No. 4 of 2011[HC] (unreported) cited in the Judge's ruling at page 182 of the record that:-

> *"It must be understood that any litigation whose cause of action accrued from mortgage transaction or a*

*commercial contract, regardless of its aftermath to the landed property/real property is not necessarily a land matter that falls within the **jurisdiction** of the Land Division of the High Court. It is a result of commercial transaction and it has to be dealt with by the Commercial Division of the High Court not the Land Division unless the transaction is conveyance..."*

An identical observation was made by Mziray, J. (as he then was) in a case with almost identical facts; the case of **Exim Bank (T) Limited vs. Agro Impex (T) Limited and Two Others**, Land Appeal No. 29 of 2008, (HC) (Unreported). Again, save for the use of the word "jurisdiction" we agree with him that:-

"On the plaint filed it clearly shows that the plaintiff is claiming a total of Tshs. 1,215,598,942.00 being the outstanding amount due and owing to the plaintiff arising from an overdraft facility extended by the plaintiff to the first defendant. The claim therefore against the defendant is founded on a credit facility. On the part of the second and third defendants the cause of action is founded on a contract of guarantee. There is

no doubt that the suit is purely founded on contract. On looking at the prayers you find that none is related to land. The mere fact that the second and third defendants have put some security for the loan does not turn the suit to be a land dispute. Additionally, in my view, suing on an overdraft facility per se does not turn the suit to a land dispute and give the court the necessary jurisdiction."

The learned judge went on to state:-

*"**This suit wouid have been a land matter if the plaintiff had pleaded to enforce mortgage terms** as per the sections 128, 129, 1330 and 132 of the Land Act, by taking possession of the mortgaged property, selling the same, appointing a receiver and leasing the mortgaged land. Short of that, as to what is pleaded in the plaint, it will remain to be a suit based on contract on which this court lacks **jurisdiction** to try it."*
(Emphasis added)

Definitely, save for the use of the word "jurisdiction" no better words can be used to explain the distinction between a land matter and a

commercial matter for the purpose of categorizing them and determining the appropriate Division of the High Court specialized on a particular claim.

Having done with the first ground, we now turn to the second ground which concerns the issuance of a default notice before suing. We think this issue need not detain us much. It can be discerned from the ruling of the High Court that there was a discussion as to whether the notice issued by the appellant was a proper one and whether it was dully served to the respondent. That is evident at pages 189 and 190 of the record which are pages 27 and 28 of the ruling where the learned judge stated that:-

> *"The defendant's counsels, also while making reference to the case of NATIONAL BANK OF COMMERCE VERSUS WALTER T. CZURN [1998] TLR 380 [CA], submitted that when looking for a cause of action,* ***the plaintiff has pleaded itself that the notice was returned unclaimed*** *and therefore it means that the 2nd defendant, the mortgagor, was not served with the notice...*
>
> ***The counsel then went on to attack the notice purportedly served by the plaintiff that it was not***

a legal notice in terms of SECTION 127(2) OF THE LAND ACT *and finally invited me to once again reject the plaint with costs."* (Emphasis added)

At least two things are clear from the above emboldened part of the excerpt of the ruling of the High Court. **One**, it seems that the notice was issued by the appellant to the respondent. Then the issue was whether the same reached the respondent and if it didn't what is the effect. This needed evidence by either side so as to enable the court to fairly and sufficiently determine it. **Two**, the sufficiency of the notice was in question. Whether it complied with the law or not was a matter for the court to decide. Evidence was required in both cases. These are crucial issues calling for proof. There was no such evidence. It is, even, not surprising that there was doubt as to whether the issue of notice of default qualified to be a point of law (See page 189 of the record). More so, Mr. Kamara submitted that the suit was prematurely lodged on account of the date of repayment of the debt being still yet. These are matters the court cannot determine without resort to search for facts (evidence). It is inevitable that evidence is required for the court to sufficiently and fairly resolve those doubts and issues. In terms of the decision in the often cited case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors**

Ltd [1969] EA 696, that point does not qualify to be a point of law. Parties should lead evidence on those issues before the court makes its decision. The scanty facts availed to the High Court in the course of hearing the points of preliminary points of objection were insufficient to make the court arrive at a fair decision. The finding on that point is hereby set aside.

All said, the appeal is allowed. The High Court's order sustaining the two points of objection is quashed and set aside. Similarly, the order dismissing the suit is also quashed and set aside. We order that the record be immediately returned to the High Court (Commercial Division) for it to proceed with the hearing of the matter according to law from where it had ended. We order further that the matter be heard by another judge. Each party shall bear its own costs.

DATED at **DAR ES SALAAM** this 18th day of September, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of September, 2019 in the presence of Mr. Laurian Magaka, counsel for the Appellant, Mr. Hussein Sokoni, learned counsel holding brief for Mr. Mpaya Kamara counsel for the Respondents, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL