IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)

CIVIL APPEAL NO. 48 OF 2016

JOMO KENYATTA TRADERS LIMITED .....1ST APPELLANT
MOI KASHIGO KIVARIA .....2ND APPELLANT
MICHAEL KIMWAGA .....3RD APPELLANT
WILLIAM GEOFREY KIMWAGA .....4TH APPELLANT
MONICA KIMWAGA .....5TH APPELLANT
MWANAIDI SALUM BUSHIR.....6TH APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mwambegele, J.)

dated 29th day of October, 2015
in
Commercial Case No. 64 of 2015

JUDGMENT OF THE COURT

25th March & 20th April, 2020

MWANDAMBO, J.A.:

The High Court (Commercial Division) sitting at Dar es Salaam, entered a summary judgment in favour of the respondent against the appellants sued jointly and severally in the sum of TZS 1,032,610,099.21 plus interest and costs. Aggrieved, the appellants have preferred this appeal against the whole of the judgment and

decree.

The suit before the trial court emanated from facts which are not complicated to tell. The material facts can be narrated as follows: National Bank of Commerce Limited, the respondent, entered into agreements for Multi Option Facility Commercial Terms and Term Loan Commercial Terms with Jomo Kenyatta Traders Limited, the first appellant on 2nd October 2012. The two sets of documents which were for all intents and purposes agreements for provision of credit facilities enabled the 1st appellant to access an overdraft facility of TZS 200, 000,000. 00, a term loan in the sum of TZS 700, 000,000.00 and a letter of credit facility for USD 250,000 all towards supplementing its working capital requirements. To secure the facilities, the respondent accepted several securities in different forms namely; two legal mortgages for unspecified amounts from Michael Kimwaga, second appellant over a landed property on farm No. 2553, CT No. 4299, Kibamba area in Kinondoni District and Monica Kimwaga, fifth appellant, over a property on farm No. 2555 CT No. 42497 also in Kibamba area, Kinondoni District. In addition, the 1st appellant executed a debenture over all of its properties and assets.

Furthermore, Moi Kashingo Kivaria (2nd appellant), executed a deed of guarantee (annex NBC 2(c)) to secure the first appellant's indebtedness with the respondent.

As the first appellant defaulted repayment of the facilities in accordance with the terms agreed, the respondent demanded payment but in vain. By reason of the default, the respondent issued notices of default to the third and fifth appellants who had executed legal mortgages in her favour. Despite the notices of default, none of them heeded thereto. Consequently, the respondent instituted a suit against the appellants under summary procedure regulated by Order XXXV of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC) for a number of reliefs namely:

(a) *payment of the sum of TZS 1,032,610,099.21 being the total outstanding amount on account of the Multi Option facility Commercial Terms and the term loan commercial Terms granted on the 1st defendant as at December 31st, 2014.*

(b) *interest on the above at contractual rate from December 31st, 2014 to the date of judgment.*

(c) interest on the decretal amount at the rate of 7% from the date of judgment to the date until full payment.

(d) cost of the suit to be borne by the defendants.

In the alternative and upon failure by the defendants to pay the amount in (a) above, the respondent prayed for other reliefs. The relevant ones to this appeal are (e) and (f) as under:

(e) appointment of Mr. Saddock Magai a receiver Manager with powers to sell the mortgaged properties to wit; property title No. 85051 on plot No. 1197 Block 'C' Mtoni kijichi area, Temeke Municipality, Dar es Salaam, property title No. 42499 on farm No. 2553 Kibamba area, Kinondoni Municipality, Dar es Salaam and property title No. 42497 on farm No. 255 Kibamba area, Kinondoni Municipality, Dar es Salaam.

(f) appointment of Mr. Saddock Magai as a Receiver Manager over the assets charged under the debenture.

Considering that the suit was filed under summary procedure,

the appellants had no automatic right to appear and defend unless the trial court granted them leave to appear and defend upon application in accordance with Order XXXV Rule 3 (1) of the CPC. The appellants' application for leave to appear and defend hit a snag, for the trial court found it incompetent and struck it out. Although the striking out of the application did not bar the filing of a fresh one, there is no evidence of such attempts being made. There being no leave to appear and defend, the High Court (Mwambegele, J- as he then was) entered a summary judgment against the appellants. The material part of the decree extracted from the summary judgment is reproduced for easy reference:

> *"**THIS COURT DOTH HEREBY DECREE THAT***
>
> *Judgment [entered] for the plaintiff as prayed with costs as follows:*
>
> *(a) payment of the sum of TZS 1,032,610,099.21 being the total outstanding amount on account of the Mult Option facility Commercial Terms and the Term loan Commercial Terms granted to the 1st defendant as at December 31st , 2014,*

(b) interest on the above at contractual rate from December 31st, 2014 to the date of judgment.

(c) interest on the decretal amount at the rate of 7% from the date of judgment to the date of until full payment.

(d) cost of the suit to be borne by the defendants."

Not amused, the appellants appealed against the whole of the judgment on three grounds of appeal namely:

(i) That the trial Honourable Judge erred in law and facts to give a judgment and decree which did not conclusively determine the right of the parties to the case.

(ii) That the trial Honourable Judge erred in law and facts in entering summary judgment without requiring the respondent to prove the case giving evidence, in the circumstances of the case.

(iii) That the trial Honourable Judge erred in law and facts in giving summary judgment as the plaint did not fall under summary suit.

In terms of Rule 106 (1) of the Tanzania Court of Appeal Rules, G.N No. 368 of 2009 as amended by G.N No. 344 of 2019 (the Rules)and seized the moment to introduce two additional grounds in pursuance of Rule 106 (3) (b) (ii) of the Rules. The additional grounds raises two issues namely; the trial court's jurisdiction to try a suit founded on enforcement of mortgage and the propriety of the trial court striking out the appellants' application for leave to appear and defend.

At the hearing of the appeal, Mr. Mohamed Mkali, learned advocate appeared for the appellant whilst Mr. Makarious Tairo, also learned advocate, did alike for the respondent having taken over from IMMMA advocates who had acted for the respondent throughout and filed written submissions in reply. Since the appellants have raised a jurisdictional issue in the written submissions, the practice of the Court compels us to determine it ahead of other grounds. We shall accordingly proceed with that issue and revert to the rest of the grounds should the ground be determined against the appellants.

The essence of the appellants' complaint in the additional ground

argued as ground four is that the High Court acted without jurisdiction in so far as the suit involved enforcement of mortgages by way of appointment of a receiver with power to sell the mortgaged properties contrary to the dictates if the provisions of section 167 (1) (a), (b), (c), (d) and (e) of the Land Act, [Cap 113 R. E 2002]. The learned advocate argued that the alternative reliefs in the plaint by way of an order for the appointment of a receiver manager for the sale of the mortgaged properties and order for vacant possession fall under the lender's remedies under section 126 of Cap. 113 and clearly outside the jurisdiction of the Commercial Division of the High Court. To reinforce his argument the learned advocate referred to several decided cases namely; **Anatoly J. Mushi v. Joachim Mwingira,** Land Case No. 239 of 2004**, Olam Tanzania Limited & 3 Others v. Selemani S. Selemani & 4 Others,** Consolidated Civil Revisions No. 2,3,4,5 &6 of 2010 and **Exim Bank (T) Limited v. Agro Impex (T) Limited & 2 Others,** Land Case No. 29 of 2008 (all unreported). On the basis of those decisions, the learned advocate urged the Court to hold that it was not within the competence of the Commercial Court to deal with a land case in which the respondent wanted to exercise its

remedies upon default. By upon default we take it that the learned advocate had in mind default by the borrower and /or mortgagors.

The learned advocate for the respondent submits in reply that the ground is misconceived because the appellants' complaint is anchored on the alternative reliefs which the High Court held that were to be pursued under the relevant circumstances and avenue according to the law. This is so, the learned advocate argued, the alternative reliefs were not entertained and that is why they are not part of the decree. In his oral submission, Mr. Tairo argued that in any case, the Commercial Court had jurisdiction to deal with a claim founded on enforcement of a mortgage on the authority of the Court's decision in **National Bank of Commerce Limited v. National Chicks Corporation Limited & Others,** Civil Appeal No. 129 of 2005 (unreported).

Having examined the submissions for and against this ground, we have no difficulty in dismissing it for being untenable. First and foremost, Mr. Mkali has no quarrel with the jurisdiction of the Commercial Court on the reliefs granted in relation to the power of

the High Court to enter summary judgment for the recovery of secured debt in accordance with Order XXXV rule 2(2)(a) of the CPC. Secondly, the challenge on jurisdiction is anchored on a wrong premise because the suit was not primarily for foreclosure, sale, delivery of possession falling under Order XXXV rule 2(2)(b) of the CPC dealing with suits relating to mortgages of immovable property rather, recovery of the debt secured by a mortgage.

It is plain from the summary judgment that the High Court did not entertain the alternative reliefs because it was alive to the fact that they were outside its jurisdiction. In our view, that explains why the learned Judge made the statement to the effect the respondent was at liberty to pursue the alternative reliefs under the relevant circumstances and avenue according to law. By the phrase under relevant circumstances and avenue according to law, the High Court must have meant that an avenue other than the Commercial Court and; by the phrase according to the law, the learned Judge had in mind the law regulating enforcement of mortgages. In the circumstances, the cases cited by the learned advocate are distinguishable to the facts in the instant appeal because those cases

only stated the legal position regarding jurisdiction of the High Court as a Land Court on cases involving land in terms of section 167(1) of Cap 113. The instant appeal involves a case instituted under summary procedure for the recovery of a debt from the borrower (first appellant jointly and severally with guarantors and mortgagors) secured by mortgage independent of the alternative reliefs. As for the case of **National Bank of Commerce Limited** case (supra) alluded to by Mr. Tairo, we do not think we should delve into a discussion on its application to the instant appeal because, first and foremost, the case was cited in the course of oral submissions in reply and so we had no benefit of learned arguments from Counsel and secondly, any such discussion will not change our decision in this ground.

In the event, ground four lacks merit and is hereby dismissed. We shall now turn our attention to ground one.

The gravamen of the appellant's complaint in ground one is that the decree are problematic for failure to conclusively determine the rights of the parties. The substance of the submissions by the learned advocate for the appellant both written and oral was that the

alternative reliefs in the plaint were left out in the extracted decree despite the High Court having stated that they were to be pursued under relevant circumstances and avenue. The learned advocate criticized the trial court against that approach more so because the extracted decree does not agree with the judgment contrary to the dictates of Order XX Rule 6 (1) of the CPC. In the learned advocate's submission, the trial court failed to enter a judgment which could have conclusively determined the rights of the parties and so the decree extracted from the judgment falls short of the requirements of a valid decree in accordance with section 3 of the CPC.

To bolster his submission, Mr. Mkali referred us to our previous decision in **Oysterbay Properties Ltd & Kahama Mining Corporation Ltd v. Kinondoni Municipal Council & 4 Others**, Civil Revision No. 4 of 2011 (unreported). According to the learned advocate, the fact that the judgment shows that the reliefs in the alternative were to be pursued under relevant circumstances and avenue according to the law upon failure by the defendants to pay the outstanding amount rendered the judgment problematic, for it meant that the matter would be reopened in relation to the alternative reliefs.

The learned advocates for the respondent found nothing problematic in the judgment primarily because the alternative reliefs could not have been granted parallel with the main reliefs. That explains, the respondent's learned advocate argued, the alternative reliefs do not form part of the decree which means that the trial court did not grant them, Mr. Tairo (learned advocate for the respondent) argued that the alternative reliefs were conditional upon failure by the appellants to comply with the main reliefs. On those submissions, counsel invited the Court to dismiss the first ground for lacking in merit.

Submitting in rejoinder, the learned advocate for the appellants maintained his stance that the summary decree was not conclusive between the parties.

Having examined the written submissions and heard oral arguments for and against the first ground of appeal, we think, with respect, the decree is too clear to attract any controversy. For a start, section 3 of the CPC defines a decree as:

"a formal expression of an adjudication which so

far as the court expressing it, ***conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit.....***"[Emphasis added].

It will be clear from the above that neither the main reliefs nor the alternative reliefs were matters in controversy between the appellants and the respondent. We have no doubt Mr. Mkali is aware that it is elementary that reliefs are an outcome of the adjudication of the issues in a suit far from being issues in controversy. At any rate, a decree need not be an expression of all matters in controversy in a suit. It could be on all or any of the matters in controversy in a suit.

Assuming the reliefs were the matters in controversy in the suit before the High Court, that court had power to determine all or any of such matters. In the circumstances, we do not think that the learned advocate for the appellants is right contending, as he does, that the High Court was bound to make a determination on all reliefs both main and the alternative ones. On the contrary, we find ourselves constrained to endorse the submissions by the learned advocate for the respondent that the alternative reliefs could not have been

granted simultaneous with the main reliefs. In our view, it seems the appellant's advocate is reading too much from the statement in the summary judgment that those reliefs could be pursued under the relevant circumstances and venue according to law. That statement did not mean the trial court giving the respondent right to pursue those reliefs in the same suit. If we may take the argument a step further, the alternative reliefs were not only outside the purview of the trial court's power in a summary suit but also the respondent did not require any court order to exercise her right under the debenture and mortgage deeds. That explains the trial court's statement in the summary judgment that those reliefs could be pursued under the relevant circumstances and law in an appropriate venue. Clearly, by that statement, the trial court meant to reject those reliefs cognizant of the fact that it would have been absurd it to grant the alternative reliefs which were outside its power in a suit filed under summary procedure.

In view of the foregoing discussion, we have no lurking in concluding that **Oysterbay Properties Ltd & Kahama Mining Corporation Ltd** (supra) cited by the learned advocate for the

appellants is of no assistance to him because the facts and circumstances under which it was decided are miles apart. It is simply irrelevant to the instant appeal. With that, we see no merit in this ground which is hereby dismissed.

The complaint in ground two is that the High Court erred in entering a summary judgment without requiring the respondent to prove its case by giving evidence. The learned advocate for the appellants does not have any quarrel against trial court's power to enter summary judgment in a summary suit where the defendant fails to obtain leave to appear and defend. That notwithstanding, the learned advocate argues that since the suit before the High Court was predicated on recovery of money under mortgage, it was wrong for that court to have entered a summary judgment in so far as the respondent claimed other reliefs than just recovery of the mortgaged debt in terms of Order XXXV Rule 2(2) (a) of the CPC. This is so, the learned advocate argues, the respondent claimed other reliefs in (e) and (f) namely; appointment of a receiver manager over the mortgaged properties and sale of the said properties. According to the learned advocate, those remedies could not have been included in the

plaint because they are exercisable under section 126 (a), (b), (c) and (d) of the Land Act, [Cap. 113 R. E 2002].

Submitting in reply, the learned advocate for the respondent argues that much as the plaint contained alternative reliefs not falling within the ambit of the power under summary procedure, the High Court did not grant those reliefs as reflected in the decree. Under the circumstances, the learned advocate urged the Court to dismiss this ground as well.

It is clear from the summary judgment that the High Court was alive to the dictates of the provisions of Order XXXV Rule 2 (2) (a) of the CPC which stipulates:

> *"(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the*

plaintiff shall be entitled–

(a) where the suit is a suit, referred to in paragraph (a), (b) or (d) of rule 1 or a suit for the recovery of money under a mortgage and no other relief in respect of such mortgage is claimed, to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith;"

Relying on its decision in **CRDB Bank Limited v. John Kagimbo Lwambagaza** [2002] T.L.R 117 which discussed the import of the above provision, the High Court **entered** a summary judgment against the appellants who had not sought and obtained leave to appear and defend the suit. The material part of the judgment is reproduced for ease of reference:

"*The allegations by the plaintiff Bank in the plaint are therefore adjudged to be admitted and*

the bank entitlement to judgment. In the premises, I do hereby enter judgment for the plaintiff as prayed in the first limb of the prayers [in the] plaint with cost..." [at page 343 of the record]

The reliefs in the first limb are: payment of the outstanding amount plus contractual interest, court's interest on the decretal sum and costs. The decree extracted from the summary judgment reflects those reliefs without the alternative reliefs. Consequently, it will be clear that contrary to the contention by learned advocate for the appellants, the inclusion of the alternative reliefs in the plaint did not take away the trial court's power to enter a summary judgment on the reliefs falling under summary procedure. Apparently, the learned advocate did not cite any authority to back up the contention that the trial court was bound to order the respondent to prove its case. In our view, doing so would have been contrary to the law under Order XXXV Rule 2 (2) (a) of the CPC which enjoins the trial court to enter judgment upon the appellants' failure to obtain leave to appear and defend. There is simply no authority in support of the argument

canvassed by the learned advocate for the appellants. The respondent had no obligation to prove a case in which the law gave her right to obtain a summary judgment notwithstanding the inclusion of the alternative reliefs which fell outside the ambit of Order XXXV of the CPC. In conclusion, we find no merit in ground two and dismiss it accordingly and that takes us to a discussion on ground three.

The issue we are invited to determine in ground three is whether the respondent's suit fell under summary procedure and if not, was the trial court justified in entering a summary judgment? The learned advocate for the appellants has invited the Court to hold that the suit was an ordinary suit rather than a suit under summary procedure and so there was no authority to enter a summary judgment. In amplification, the learned advocate submits that the suit was, at best, one of breach of contract by reference to paragraphs 5, 6, 7, 8, 11, 12 and 13 of the plaint. Counsel argues that at any rate, in so far as the claim was mainly for recovery of a contractual debt secured by mortgage, the Commercial Court had no jurisdiction to adjudicate on it which was a subject of the additional ground which we have already disposed of.

The learned advocate for the respondent has submitted that the suit fell under summary procedure because it was for recovery of a debt secured by mortgage which gives right to a mortgage to institute a suit under summary procedure. Counsel referred the court to the Land (Mortgage Financing) Regulations, 2009 to reinforce his argument and particularly to counter the contention made in relation to paras 5, 6, 7, 8, 9, 11, 12 and 13 of the plaint. In his oral submissions, Mr. Tairo went a step further and submitted that the appellants had a right to set aside the summary judgment under Order XXXV Rule 4 of the CPC and so the appeal is premature before the Court. However, the learned advocate did not cite any authority to reinforce his argument that the appellants were precluded from preferring an appeal to challenge the summary judgment unless they had exhausted the remedy under the CPC.

Our starting point in determining this ground will be to examine the plaint and see whether the suit before the High Court qualified to be one under summary procedure. Para 5 sets out the genesis of the loan contractual transaction between the respondent and the first appellant whereas para 6 sets out the relevant terms and conditions

including the security for the said loans/ credit facilities. In para 7, the respondent pleaded facts in relation to execution of various documents for the loans/ credit facilities including; mortgages and guarantees. Specifically, the respondent alluded to mortgage deeds marked NBC 2 (a), 2 (b) to the plaint. Para 8 makes allegations of the breach of the multi option facility in relation to an overdraft facility whereas para 9 pleads facts on the breach by the First appellant regarding the term loan. Para 10 deals with the consequences of the breach of both the overdraft facility and the term loan resulting into an outstanding balance of TZS 934,009,248.10 as of 31st August 2015 although the respondent alleged in para 12 that the amount outstanding as of 31st December 2014 was TZS 1,032,610,099. In para 11, the respondent alleged that as a result of the first appellant's defaults in repayment of the secured facilities, she sent statutory notices to the mortgagors. Finally, para 13 asserts that:

> *"The plaintiff's claim arises out of a commercial transaction on Multi Option facility Commercial Terms and the Term Loan Commercial Terms, approved and indorsed in Dar es Salaam, the Defendants reside and/ or work for gain is in*

Dar es Salaam the amount claimed is over Tanzania Shillings Thirty Million therefore this Court has Jurisdiction to try the matter."

It seems to us to be clear from the foregoing, as submitted by Mr. Mkali, the suit was largely founded on commercial transactions between the respondent and the first appellant. In the first place, in so far as it is related to recovery of the outstanding loan amount under the relevant agreements, it fell outside the ambit of Order XXXV of the CPC. On the other hand, an examination of the plaint and the annexures thereto, it is plain that out of the five defendants (appellants) it is only the third and fifth defendants who had executed legal mortgages for unspecified amounts as shown in the relevant mortgage deeds forming part of annexure NBC (2) (a) to the plaint. That being the case, suit against the first, second, fourth and sixth appellants was not properly instituted under summary procedure thereby denying them their automatic right to appear and defend it.

There will be no doubt by now that in so far as the suit was for the recovery of mortgaged debts, the respondent could have only proceeded under summary procedure as against the third and the fifth

appellants who had executed mortgage deeds. She had no right to institute a summary suit against first, second, fourth and sixth appellants who had not executed any mortgage deeds to secure the first appellant's debts.

It is for the foregoing reasons we find ourselves inclined to agree with Mr. Mkali, learned advocate, that the suit did not fall under summary procedure having regard to the pleadings and the fact that it involved parties who did not execute any mortgage. It is quite unfortunate that the appellants did not obtain leave to appear and defend. It is equally unfortunate that the learned High Court Judge believed that the suit fell under summary procedure and proceeded to enter a summary judgment upon the appellant's failure to obtain leave to appear and defend. In so far as the power to enter a summary judgment is limited to suits falling squarely under summary procedure, there was no authority to enter a summary judgment in favour of the respondent under the circumstances. Having so held, we sustain ground three. As our decision in this ground is sufficient to dispose of the appeal, we find it superfluous to delve into the discussion on the additional remaining ground. We only need to dispose of the issue

raised by Mr. Tairo about the propriety of the appeal in view of the provisions of Order XXXV Rule 4 of the CPC.

To start with, the power to set aside a summary judgment under Order XXXV Rule 4 of the CPC is exercisable under special circumstances. We agree that had the appellants paid regard to this provisions, they could have tried to set aside the summary judgment. However, we read nothing under that rule making it mandatory for a litigant to resort to it particularly where, as it were, he is unable to demonstrate existence of special circumstances for the exercise of its discretion. At any rate, it has not been shown that the right of appeal from a summary judgment can only be exercised after the aggrieved party has exhausted the remedy under XXXV of Rule 4 of the CPC. In the upshot, we find little substance in the learned advocate's contention and reject it.

In the event, the appeal succeeds in ground three. The summary judgment entered on 29th October 2015 is hereby set aside. The High Court is directed to determine the suit as an ordinary suit according to law. As the appellants have not succeeded in all grounds, there will be

an order for half of the costs in the appeal.

Order accordingly.

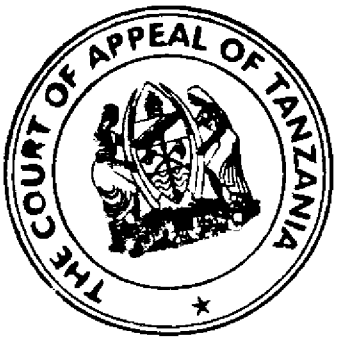
DATED at **DAR ES SALAAM** this 15th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 20th day of April, 2020 in the presence of Mr. Jerome Msemwa, counsel for the Appellant and Mr. Emmanuel Nasson, counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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