

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KIHWELO, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 278 OF 2020

FINCA TANZANIA LIMITED.....APPELLANT

VERSUS

MAZENGE INVESTMENT COMPANY LIMITEDRESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 10th day of April, 2018

in

Civil Appeal No. 61 of 2016

.....

JUDGMENT OF THE COURT

19th & 26th September, 2023

KIHWELO, J.A.:

This appeal arises from the decision of the High Court at Mwanza (the High Court) partly dismissing with costs the appellant's appeal against the decision of the Resident Magistrates' Court of Mwanza at Mwanza (the trial court). Before the High Court the appellant prayed for, among other things, that the proceedings of the trial court be nullified and the judgment as well as the decree thereof be quashed and the matter be tried *de novo*.

The facts of this case are quite simple and straightforward and the sequence of events leading to this appeal as can be gleaned from the

record are as follows: The appellant, a financial institution providing savings and loans as well as promoting financial inclusion throughout Tanzania, in August, 2014, entered into a guarantee agreement with the respondent's company director one Mr. Majogoro Ngeleja who guaranteed one Kadashi Paulo Elias (the Borrower) who secured a loan facility from the appellant to the tune of Tanzanian Shillings Six Hundred Thousand (TZS. 600,000.00).

As it were, the collateral for the said guarantee was the respondent's cosmetic and mobile shop located at Kisesa along Sumve road within Mwanza City. It was an implied term of the guarantee agreement that in the event of default by the Borrower to repay the loan facility or any instalment thereof, the appellant would be entitled and legally justified to confiscate the respondent's property in order to realize the loan.

Despite the undertaking to repay the loan within six months, the Borrower did not make good the promise something which compelled the appellant to take the necessary steps in order to realize the loan. The appellant's officials on 24.11.2014 allegedly stormed into the respondent's shop, locked it with the appellant's padlocks and thereby preventing the respondent from doing business hence resulting to the respondent's gross loss of business. Disquieted, the respondent knocked the doors of the

temple of justice by lodging a suit before the trial court in Civil Case No. 69 of 2014 (the suit) claiming, among other things, payment of Tanzanian Shillings Fifty-One Million Seven Hundred Thousand (TZS. 51,700,000.00) for lost items and cash proceeds, payment of Tanzanian Shillings Three Hundred Thousand (TZS. 300,000.00) per day from the date of closure of the shop to the date of final determination of the matter, for loss of business, punitive damages to the tune of Tanzanian Shillings Ten Million (TZS. 10,000,000.00) and general damages as the trial court may deem fit to grant.

Conversely, the appellant refuted the respondent's claims and stated that on the material date the Borrower took loan facility from the appellant to re-engineer the shop in dispute which though could not be acquired by the respondent before full payment of the loan facility and that the one who guaranteed the Borrower was one Majogoro Zephania Ngereja and not the respondent as alleged. It was the appellant's assertion that the respondent's move to lodge the suit was calculated to hinder or defraud the appellant exercise its rights of recovery of the loan under the guarantee agreement. Fundamentally, the appellant totally refuted all the respondent's claims and prayed that the suit be dismissed with costs.

The trial court framed five issues for determination: **one**, whether the defendant (now appellant) locked the Plaintiff's (now respondent) shop; **two**, who was the owner of the disputed shop at the time of issuing the guarantee; **three**, whether one Majogoro Zephania Ngeleja was the guarantor of one Paul Elias Kadashi; **four**, whether the respondent's principal officer refused to repay the said loan; and **finally**, to what reliefs are the parties entitled.

During trial, while the respondent produced four witnesses to build up its case, the appellant produced two witnesses to disprove the case against it. At the height of the trial, the court came to the conclusions that, the respondent had proved its case to the balance of probabilities as required by law and proceeded to grant the prayers as prayed with costs. Disgruntled, the appellant lodged the first appeal before the High Court seeking to reverse the decision of the trial court. Upon full determination, the High Court in its findings partly allowed the appeal with costs hence this second appeal.

The appellant presently seeks to impugn the decision of the High Court upon a memorandum of appeal which has four points of grievance which however, we will not endeavor to reproduce them at this juncture because we think this matter can be conveniently disposed of within the

circumference of the competence of the matter before the trial court in the first place.

Before us the appellant enjoyed the services of Mr. Willbard Kilenzi, learned counsel, whereas Mr. Joseph Kinango, also learned counsel, stood for the respondent. Both parties did not lodge written submissions as required by rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, (the Rules), however, in terms of rule 106 (10) (b) and rule 106 (11) of the Rules, we allowed the learned counsel to present their oral arguments in support of or in opposition to the appeal.

Apart from the grounds of grievance which the appellant raised and were argued by the learned trained minds with commendable preparedness, the court had to determine the propriety of the appeal and therefore we prompted the learned counsel to address us on whether the matter before the trial court by its nature was not a commercial case and whether the trial court had the requisite jurisdiction to entertain it.

When he took the stage to address us on the two issues we raised, Mr. Kilenzi was fairly brief. At first, he stoutly maintained that the matter before the trial court was an ordinary civil dispute and therefore, it was appropriately filed before the trial court which determined it. However, in a not surprising turn of events and upon being referred to section 2 of the

Magistrates' Courts Act, Cap 11 R.E. 2019 (the Act) on the definition of the term "commercial case", he took a different standpoint and argued that, by virtue of the definition of the term "commercial case" under section 2 of the Act, the matter before the trial court was a commercial case and given the pecuniary value of the dispute the trial court had no jurisdiction to entertain it.

Upon our further prompting as to the way forward, Mr. Kilenzi without mincing words argued that, the natural course to be taken in the circumstances of this matter is to nullify the proceedings of both the High Court and the trial court and quash both judgments and the decrees. Mr. Kilenzi curiously pressed for costs.

Mr. Kinango, for his part, was equally brief. While admittedly arguing that the matter before the trial court was a commercial case and therefore the trial court had no jurisdiction to entertain it, and that, the only remedy available is to nullify the proceedings and quash both judgments, he took the view that, each party should bear its own costs.

We have given due consideration to the common proposition by the learned trained minds and this brings us to a brief discussion on whether the matter before the trial court was a commercial case as unanimously argued by the learned counsel. The term "commercial case" is defined

under section 2 of the Act as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2004 (No. 4 of 2004). For clarity, we wish to reproduce the provisions of section 2 of the Act thus:

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

(i) the formation of a business or commercial organizations;

(ii) the governance of a business or commercial organizations;

(iii) the contractual relationship of business or commercial organizations with other bodies or persons outside it;

(iv) the liability of a commercial or business organization or its officials arising out of its commercial or business activities;

(v) the liabilities of a commercial or business person arising out of that person's commercial or business activities;

(vi) the restructuring or payment of commercial debts by or to business or commercial organization or person;

(vii) the winding up or bankruptcy of a commercial or business organization or person;

(viii) the enforcement of commercial arbitration award;

(ix) the enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement to which the United Republic is a signatory and which forms part of the law of the United Republic;

(x) admiralty proceedings; and

(xi) arbitration proceedings.”

(Emphasis added)

We have emboldened a portion of the above excerpt to point out the relevant part of the said provision in relation to the facts of the appeal before us. In the instant matter before us, the dispute arose in 2014 from a contractual arrangement between the parties that finally led to the appellant's officials allegedly storming into the respondent's shop and locked it with the appellant's padlocks and therefore leading to what is allegedly, the respondent's serious loss of business, the basis of the claims which the respondent lodged before the trial court. By any yardstick this is clearly, the liability of the appellant arising out of its business activities of

providing loans to its customers including the Borrower in line with the provisions of section 2 of the Act. The legal and logical conclusion drawn from the above is that the dispute before the trial court was a civil matter considered to be of commercial significance within the meaning ascribed under section 2 of the Act.

In our respectful opinion, the trial court erroneously treated the matter as an ordinary civil suit with no commercial significance. We, on our part, think and find considerable merit in the common proposition by the learned trained minds in that, the trial court misdirected itself as we have already hinted above.

Having resolved that the matter before the trial court fell within the sphere of a commercial case within the meaning of section 2 of the Act, the next question that follows from the above is whether the trial court had the requisite pecuniary jurisdiction to entertain it in the first place. In an attempt to answer this question, we think, it is appropriate to look at albeit, briefly, the provisions of section 40(3) of the Act which is the real pith and marrow in resolving the second question. The provision reads:

"3. Notwithstanding subsection (2), the jurisdiction of the district court shall, in relation to commercial cases, be limited:

(a)in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed fifty million shillings;

*(b)in the proceedings where the subject matter is capable of being estimated at money value, **to proceedings in which the value of the subject matter does not exceed thirty million shillings**". [Emphasis added]*

We wish to interpose here and observe that, although the provisions of section 40 (3) of the Act refer to the jurisdiction of the district court, section 41 (1) of the Act, also vests a court of resident magistrate the jurisdiction exercised by the district court in other words, a court of resident magistrate like the trial court in the instant appeal has concurrent jurisdiction with the district court.

In the instant matter the respondent filed the suit before the trial court on 04.12.2014 claiming among other things, payment of Tanzanian Shillings Fifty-One Million Seven Hundred Thousand (TZS. 51,700,000.00) for lost items and cash proceeds and payment of Tanzanian Shillings Three Hundred Thousand (TZS. 300,000.00) per day from the date of closure of the shop to the date of final determination of the matter for loss of business, punitive damages to the tune of Tanzanian Shillings Ten Million

(TZS. 10,000,000.00) which is over and above TZS. 30,000,000 the amount permissible under section 40 (3) (b) of the Act.

It is convenient to point out at this juncture that, when the respondent instituted the instant matter, the trial court lacked jurisdiction to entertain it as the value of the subject matter was beyond its pecuniary jurisdiction. There is, in this regard, a litany of authorities in this matter see, for instance **National Bank of Commerce Limited v. Maisha Mussa Uledi (Life Business Center)**, Civil Appeal No. 501 of 2022 and **Maduhu Sang'udi Investment v. Kasonzo Car Hire Company**, Civil Appeal No. 148 of 2021 (both unreported) for the proposition that before, and after the coming into force of the Written Laws (Miscellaneous Amendments) Act, 2016 (No. 3 of 2016) on 8th July, 2016, the pecuniary jurisdiction of the trial court in relation to commercial cases remained TZS. 30,000,000.00 which has since been enhanced to seventy million following the coming into force of the Written Laws (Miscellaneous Amendments) Act, 2019 (No. 4) of 20th September, 2019.

That being said and done, we invoke the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019], and hereby nullify the trial proceedings and quash the judgments and set aside decrees of the two courts below. For avoidance of doubt, we order that,

should any party desire to pursue the matter, is at liberty to file a fresh suit before a court of competent jurisdiction.

Since the issue under consideration was raised by the Court *suo motu*, we leave the parties to bear their own costs.

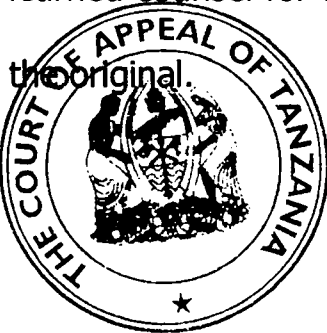
DATED at MWANZA this 25th day of September, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 26th day of September, 2023 in the presence of Ms. Tupege Anna Mwambosya holding brief for Mr. Willbard Kilenzi, learned counsel for the Appellant and Mr. Joseph Kinango, learned counsel for the Respondent, is hereby certified as a true copy of




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL