

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**THE SUB- REGISTRY OF MWANZA**  
**AT MWANZA**  
**LAND APPEAL NO. 29 OF 2023**  
*(From Mwanza District Land & Housing Tribunal Land Appl. No 549/2023)*

**ERICK MATEO MTUA..... APPELLANT**

**VERSUS**

**WILBARD KALINJUMA ..... RESPONDENT**

**JUDGEMENT**

*August 9<sup>th</sup> & 11<sup>th</sup>, 2023*

**Morris, J**

Mr. Erick Mateo Mtua, dissatisfied with the judgement of the District Land and Housing Tribunal for Mwanza (DLHT) dated 24/3/2023, has preferred this appeal. His appeal hinges on one ground that, *the case against the appellant was not proved on balance of probability.*

In brief, record reveals that, the appellant herein sued the respondent in the DLHT for vacant possession and declaration of his ownership of a house located at Plot No. 157 Block 'M', Kiseke, Mwanza (elsewhere the suit property). In his written statement of defence, the respondent herein raised a counter claim praying for, *inter alia*, payment of Tshs. 48,100,000/= and for a declaration that he is the owner of the

suit property. The appellant herein defaulted appearance. His application was, thus, dismissed for want of prosecution.

The counter claim, however, was heard on merit. The appellant herein was condemned to pay Tshs. 48,000,000/= and 30% thereon from the date the repayment of the loan fell due up to the date of judgement. In case the judgement debtor defaulted to pay the decretal sum; the suit house which was pledged as a security to the latter was to be the property of the respondent herein. Dissatisfied with such decision, the appellant escalated the dispute to this Court via this appeal.

The appeal was argued by way of written submissions. Parties were represented by advocates Silas John and Ditrick Ishabairu respectively. For the ground of appeal, it was the submission by Mr. John that the burden of proving any allegation rests on the party who asserts it. He referred to ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 (unreported). Thus, the respondent apart from producing the mortgage deed (exhibit PE1), he also was supposed to prove its official approval and registration by the responsible Ministry. He cited section 62 (2) of ***the Land Act***, Cap 113 R.E. 2019 to reinforce that such disposition must be registered. Lest, it becomes

unenforceable as stated in ***Manase C. Mayela v Biashara Saccos Limited and another***, HC Land Appeal No. 27 of 2020 (unreported).

It was further submitted that although PW1 testified that exhibit P1 was registered, DW1 and DW2 disproved that fact. He stated that the only registered mortgage was in favour of Barclays Bank in line with section 36(1) (a) of ***the Land Registration Act***, Cap. 334 R.E. 2019. Other contravened laws, according to the appellant are, regulation 3(b) of ***the Land (Disposition of the Right of Occupancy) Regulations***, 2001 GN NO. 74 of 2001; and rule 3 of ***the Land (Forms) Regulations***, 2001 GN NO. 71 of 2001. Therefore, he prayed for the mortgage to be declared invalid and inoperative in line with ***Rukia Sadiki v Gasper Ishengoma Rwebugsa and another***, HC Commercial Case No. 196 of 2002 (unreported).

In reply it was submitted by the respondent's counsel that the requirement for registration was complied with. To him, the mortgage deed was registered by the Registrar of Tittles on 22/3/2010 at 11:30 am. He relied on section 117(1) of ***the Land Act***, which provides for informal mortgages registration pursuant to section 11 of ***the Registration of Documents Act***, Cap 117 R.E. 2019. He also argued that the subject exhibit bears the requisite stamp and inscriptions; the reason which



prevented DW2 to tender any document or proof from the registrar of title to the contrary. I was referred to the case of ***Joseph Deus @Sahani and Another v Republic***, Criminal Appeal No. 564 of 2019 (unreported).

It was also submitted that failure to register the mortgage does not take away the responsibility of the borrower to pay the loan. To the respondent, the mortgage property was possessed by him since 2017 on the basis that it was a security for Tshs. 48,100,000/= advanced to the appellant. He thus challenged the appellant's move to use the shadow of non-registration to avoid repaying the loan amount. Accordingly, he recited that when one borrows money, he must pay it back in line with the cases of ***Stanbic Bank Tanzania Limited v Kiribo Limited and 2 others***, Misc. Civil Application No. 17 of 2023; ***the Private Agricultural Sector Support Trust and Another v Kilimanjaro Cooperative Bank***, Consolidated Civil Appeals No. 171 and 172 of 2019; and ***Simon Kichele Chacha v Aveline M. Kilawe***, Civil Appeal No. 160 of 2018 (all unreported). He thus prayed for the appeal to be dismissed with cost.

Nevertheless, in the course of writing the judgement, it came to my attention that the DLHT record contained a serious matter of jurisdiction. That is, I was concerned with the question whether the DLHT had

jurisdiction to determine the counter claim from which this appeal emanated. I, henceforth, invited parties to address the Court on that particular issue. The subject issue was addressed orally by Messrs. Silas John and Ditrick Ishabairu, learned advocates for respective parties.

I find it pertinent to first determine this issue prior to determining the appeal. I have a solo-base justification: the competence of this appeal is dependent upon jurisdiction of the Tribunal which determined the matter leading to these proceedings. Axiomatically, it calls for no overemphasis that a competent appeal should come from valid proceedings of a subordinate judicial or quasi-judicial body.

The above foundation having been laid; I now turn to both counsel's submissions in relation to DLHT jurisdiction. It was the submissions of Mr. John that the DLHT had no jurisdiction to determine the counter claim. He advanced three reasons. Firstly, he stated that the counter claim was not a land dispute. Secondly, the counter claim, to him, was time barred. Thirdly, he contended that prayers contained in paragraphs (c) and (d) of the counter claim could not be granted by the Trial tribunal.

Expounding the first reason, the appellant's counsel was of the view that counter claim was purely a contractual dispute. He observed that the claim by the respondent was breach of a mortgage deed. Therefore, the



pleadings contained a commercial dispute arising from a mortgage transaction. He made reference to the case of ***National Bank of Commerce v National Chicks Corporation Ltd and 4 others***, Civil Appeal No. 129 of 2015 (unreported).

Regarding the time limit, Advocate Silas submitted that the matter was by then out of time. He insisted that according to exhibit P1, the appellant was supposed to pay back the money on 31/5/2010. And the counter claim was filed on 4/7/2017. Consequently, he clinched that the subject counter claim (which is a separate suit), was filed beyond 6 statutory years. He relied on item 7 of part I of the Schedule to ***the Law of Limitation Act***, Cap 89 R.E. 2019 (elsewhere, 'the LLA'). To him, the conclusion was obvious for cause of action which was a contractual breach: the DLHT was not clothed with mandate to determine it. He reiterated the orthodox pronouncement that time limitation is a jurisdictional issue. He cited the case of ***Nile Healthcare Ltd t/a Uhuru v Filbert John Mpogolo***, Labour Revision No. 7 of 2022 (unreported) to buttress his stance.

Further, he submitted that the DLHT had no jurisdiction to grant prayers (c), (d) and (e) of the counter claim. To him, such prayers were couched in a way which would entail compelling the respondent to

transfer the mortgaged property to himself. It was his strongminded submission that the said prayers amounted to foreclosure which is outlawed under section 125 of ***the Land Act***, Cap. 113 R.E. 2019. Moreover, he contended that, the mortgagee can only possess the mortgaged property through purchase; or selling it to himself with court's leave under section 136 of ***the Land Act*** (*supra*); or buy it in a public auction. To seal it all, he submitted that mortgagee's statutory remedies are enforceable by this Court not the Tribunal. He further referred the Court to section 140 of ***Cap. 113*** R.E 2019.

On his part, Mr. Ishabairu submitted on behalf of the respondent that the DLHT had jurisdiction to entertain the counter claim. He observed that the claim was based on Exhibit P1(mortgage deed). He also argued that the subject matter of the suit was a landed property. Hence, the dispute therefrom was a land matter not the breach of contract. He also attacked the appellant's argument by stating that the prayers came from the agreement of the parties before the house was pledged as security. To him, the only way the appellant can repossess the house is through paying the loan amount back to the respondent. His insistence, thus, was that the DLHT also had jurisdiction to determine the dispute arising from



mortgage transactions. In consequence, the counter claim was timely filed because the dispute concerned land whose timeline is 12 years.

I have keenly and dispassionately considered the submissions of both parties. The Court is invited to determine whether the counter claim was suitably before the DLHT. I will take off with the issue of time limitation. To begin with, I am in agreement with the counsel for the appellant that time limitation is plexus to the jurisdiction of the court. See, for instance, *John Barnabas v Hadija Shomari*, Civil Appeal No. 195 of 2018; and *Muse Zongori Kisere v Richard Kisika Mugendi and 2 Others*, Civil Application No. 244/01 of 2019 (both unreported).

However, the counter claim by the respondent herein was not time barred. The dispute arose from a mortgage transaction, yes. But, pursuant to Item 7 of part I to the Schedule of **LLA** (cited by the appellant's counsel), time provided thereat is 6 years for the suit founded on contract **not otherwise specifically provided for**. Nevertheless, the claim by the respondent herein has its specific stipulation under item 18 of the same part of **LLA**. The timeline set is of 12 years. That is, a suit to "recover principal sum of money acquired by mortgage on land", as is the case hereof; can be filed not beyond a dozen years. Accordingly, the counter claim herein, which was filed within 7 years, was squarely





within time. Reference may also be made to ***Luhumbo Investment Limited v National Bank of Commerce Ltd and 2 Others***, HC Land Case No. 1 of 2020 (unreported).

Further, I am alive to the long-settled principle of law that the court/tribunal should satisfy itself at the earliest opportunity whether or not it has jurisdiction to determine the matter before it. [***East Coast Oil & Fats Ltd v TBS, TRA and Attorney General***, Commercial Case No. 1 of 2020; and ***Patrick William Magubo v Lilian Peter Kitari***, Civil Appeal No. 41/2019 (both unreported)].

The counter claim by the respondent emanated from mortgage deed. From the said deed, the appellant herein pledged the suit property as a security for a loan of Tshs. 48,100,000/= with interest of 30% per annum repayable within 6 months. In law, pledging the landed property as security for the loan does not turn the suit into land dispute. This position was also reaffirmed in ***Exim Bank (T) Limited v Agro Impex (T) Limited and 2 others***, HC Land Appeal No, 29 of 2008, which holding was also quoted with approval by the Court of Appeal in ***NBC v National Chicks Corporation Ltd and 4 others*** (*supra*).

Consequently, the counter claim herein emanated from contractual obligations whose major objective was to recover money secured by

mortgage of the suit property. Therefore, to me, this was not a land matter. Further, as correctly submitted for the appellant's counsel, although prayer no. (c) to (e) related to rights of the respondent herein to own the suit property; and/or the appellant to be restrained from interfering with quiet enjoyment of the same by the respondent, the same does not fall within the jurisdiction of the DLHT. Section 140 of ***the Land Act***, provides *in extenso* that;

*"140 (1) All proceedings instituted in Court in relation to the exercise by the mortgagee of powers to sell or enter in possession of the mortgaged land shall be brought in accordance with the provisions of the Civil Procedure Act, and tried by way of summary proceedings.*

*(2) Notwithstanding any other provision of this Act an action for exercise of a power of sale or for passion (sic) of a mortgaged property may be brought **in the High Court** (bolding is rendered for emphasis).*

Therefore, if the respondent herein wished to exercise his right of possession or sell of the mortgaged property, such remedial pursuit falls outside the mandate of the DLHT. An insightful account of mortgagee's remedial measures is given in ***I & M Bank (T) Limited v Mustafa's (2005) Limited & 2 Others***, HC Misc. Comm. Application No. 99 of 2021

(unreported). Further, in ***Stanley v Wide*** (1899) 2 CH 474 the Court, recounting on what is popularly signified as "*once a mortgage always a mortgage*"; held that security is redeemable on the payment of or discharge of debt or obligation, any provision to the contrary notwithstanding. For that reason, the trial tribunal lacked the requisite jurisdictional garment.

With the findings of the Court and analysis thereof, as rendered above, I am stripped of the legal justification to determine the sole ground of appeal. The reason for this approach is crystal clear: these proceedings emanate from a nullity. That is, as the DLHT lacked jurisdiction to entertain the counter claim; the tribunal's proceedings, judgement and orders therefrom were all a pack of nullity. This appeal, therefore, is struck out for want of competence.

The above verdict notwithstanding, by the power vested upon this Court by section 43 (1) (b) of ***the Land Courts Disputes Act***, Cap. 216 R.E. 2019, I hereby revise and nullify the entire proceedings and judgement of the DLHT in regard to pursuit of the counterclaim. In the interest of precision, other order(s) relating to the appellant's application at the DLHT remain unaffected. The issue which has disposed this matter of having been raised by the Court *suo motu*, each party is ordered to

shoulder own costs. It is so ordered. Right of appeal is fully explained to the parties.



**C.K.K. Morris**

**Judge**

**August 11<sup>th</sup>, 2023**

Judgement is delivered this 11<sup>th</sup> day of August 2023 in the presence of Messrs. Erick Mateo Mtua (Appellant) and Wilbard Kalinjuma (Respondent) together with their respective Advocates – Silas John and Ditrick Ishabairu.

**C.K.K. Morris**

**Judge**

**August 11<sup>th</sup>, 2023**