**IN THE COURT OF APPEAL OF TANZANIA**

**AT SUMBAWANGA.**

**(CORAM: KOROSSO, J.A., MWAMPASHI, J.A And MASOUD, J.A.)**

**CIVIL APPEAL NO. 535 OF 2021**

**MASHISHANGA SALUM MASHISHANGA.....APPELLANT**

**VERSUS**

**CRDB BANK PLC.....1ST RESPONDENT**

**KIMBEMBE AUCTION MART LTD.....2ND RESPONDENT**

**MSIPAZI FARM LTD.....3RD RESPONDENT**

**[Appeal from the Decision of the High Court of Tanzania, Land Division, at Sumbawanga]**

**(Mkeha, J.)**

**dated the 25th day of June, 2021**

**in**

**Land Case No. 03 of 2016**

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# RULING OF THE COURT

12th & 19th March, 2024

## MWAMPASHI, J.A.:

The present appeal seek to challenge the judgment and decree of the High Court of Tanzania, Land Division, at Sumbawanga (Mkeha, J.) in Civil Case No. 03 of 2016, dated 25.06.2021. Basically, the appellant's suit against the respondents before the High Court was for a declaration that the sale by public auction of his Farm No. 30 held under a Certificate of Title No. 13151 MBYLR L.O. No. 173439 located at Namteketa within the

District of Nkasi, to the 3rd respondent by the 1st and 2nd respondents, was illegal hence null and void *ab initio*. As alluded to above, the appellant lost his case, hence the instant appeal.

The brief material facts leading to the dispute between the parties and from which the instant appeal arises, are not complicated. On 03.04.2014, the appellant obtained a loan of Tshs. 400,000,000/= from the 1st respondent payable within three years, that is, up to 30.04.2017. As security for the said loan, the appellant mortgaged his Farm No. 30 held under a Certificate of Title No. 13151 MBYLR L.O. No. 173439 located at Namteketa within the District of Nkasi (the Mortgaged Property). On 19.02.2015, when by then the outstanding loan balance was Tshs. 326,033,809/=, the loan facility was restructured in the manner that the repayment period of the loan was varied and extended from 30.04.2017 to 28.02.2020. It was also agreed that, in servicing the loan, Tshs. 25,913,705/45 would be repaid by the appellant on quarterly basis. Not in dispute was the fact that the appellant defaulted to service the loan as agreed. Subsequently, acting on instructions from the 1st respondent, the 2nd respondent, by public auction, sold the Mortgaged Property to the 3rd respondent for Tshs. 165,000,000/=.

The sale of the Mortgaged Property aggrieved the appellant. He believed that the sale was faulty on the following grounds; **one,** the public auction was carried out without adherence to guiding rules and regulations including lack of the requisite notice to the appellant and other statutory bodies, **two,** that the 1st respondent had not issued a demand notice or notice of default to the appellant, **three**, that the purported sale was carried out before the expiry of repayment period, that is, 28.02.2020 and **four,** that the purported sale was a sham strategized by the respondents hence fetching the price far below the benchmark market price. He thus sued the respondents *vide* High Court Land Case No 03 of 2016 praying for the following reliefs:

1. *A declaration that the purported sale by auction of the appellant's Mortgaged Property made on 03.09.2016 was illegal hence null and void ab initial.*
2. *General damages for psychological sufferings, good will, disruption of business, tarnish of the image.*
3. *Interest of 31% on the awarded general damages from the date of the judgment to the date of payment in full.*
4. *Costs of the suit.*
5. *Any other relief as the Court deems fit to grant.*

In its judgment, the High Court found that, because it was not disputed that the appellant had defaulted in servicing the loan by repaying

the agreed instalments when they fell due, the 1st respondent was entitled to sell the Mortgaged Property. The High Court also found that the sale of the Mortgaged Property was properly conducted as it followed the required procedures and further that the appellant was not entitled to general damages as claimed by him. The appellant's suit was thus dismissed in its entirety with costs, hence the instant appeal on the following grounds:

1. *That, the trial learned Judge erred in law and fact in holding that the disputed Farm No. 30 under certificate of title No. 13151 MBYLR was advertised and thus legal without proof of requisite publicity of the public auction before sale as per the requirement of the law.*

2. *That, the trial learned Judge erred in law and fact in holding that the procedure for the auction was complied with while the respondents failed to prove that statutory notice for default was issued to the appellant before auctioning the disputed Farm No. 30 under certificate of title No. 13151 MBYLR.*

3. *That, the trial learned Judge erred in law and fact in holding that the sale by way of a public auction of the disputed Farm No. 30 under certificate of title No. 13151 MBYLR was legal while there was sufficient and cogent evidence in record that the suit farm was sold far below the benchmark market price as required in law.*

4. *That, the trial learned Judge erred in law and fact in holding that the sale by way of a public auction of the disputed Farm No. 30 under certificate of title No. 13151 MBYLR was legal while the*

*evidence on record proved that the requisite post and pre-procedures of the alleged public auction were not adhered at all.*

5. *That, the trial learned Judge erred in law and fact in holding that the appellant suffered no damages while the appellant proved on standard required to have suffered damages resulted from the acts of the respondents in this appeal.*

When the appeal came up for hearing before us, the appellant was represented by Mr. Mathias Budodi, learned counsel. On the other hand, while the 1st and 2nd respondents had the services of Mr. Baraka Mbwilo, learned counsel, Messrs. Simon Mwakolo and Respicius Didas, both learned counsel, represented the 3rd respondent.

Before the hearing could commence, Mr. Mbwilo, for the 1st and 2nd respondent, in earnest, sought and was granted leave to raise a point of law to the effect that the suit had been improperly filed before the Land Division of the High Court by the appellant and further that the Land Division of the High Court ought not to have tried the suit. Considering the nature of the point raised by Mr. Mbwilo, we directed the counsel for the parties to argue and address both the point of law raised and the grounds of appeal. We also let the counsel know that when we retire for deliberation, we will turn to the determination of the appeal based on the grounds of appeal only if the point of law raised by Mr. Mbwilo fails.

In his brief but focused arguments in support of the point raised, Mr. Mbwilo pointed out that according to clause 14 of the Loan Facility Letter which was tendered in evidence as Exhibit D1, the appellant and the 1st respondent had agreed that in case of any dispute arising from interpretation, performance or non-performance of the terms and conditions contained therein, the dispute and the parties would submit themselves to the Commercial Division of the High Court for the adjudication of the dispute. He thus argued that the appellant wrongly instituted the suit to the Land Division of the High Court and further that in terms of section 7 (1) of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC), the Land Division of the High Court ought not to have entertained it. Placing reliance on the decision of the Court in **Sunshine Furniture Co. Ltd v. Maersk (China) Shipping Co. Ltd and Nyota Tanzania Limited**, Civil Appeal No. 98 of 2016 and that of the High Court in **CRDB Bank PLC v. Chama Cha Walimu Cha Ushirika cha Akiba na Mikopo Wilaya ya Kyela & Another**, Civil Case No. 14B of 2016 (both unreported), Mr. Mbwilo urged the Court to nullify the proceedings and the judgment of the Land Division of the High Court and let the appellant refer the dispute to the Commercial Division of the High Court as per clause 14 of the Loan Facility Letter.

Mr. Mwakolo, for the 3rd respondent joined hands with Mr. Mbwilo that since the appellant and the 1st respondent had agreed to submit themselves to the Commercial Division of the High Court, they were bound to their agreement. He thus argued that the suit was not properly before the Land Division of the High Court and that the relevant proceedings and judgment should be nullified.

Though Mr. Budodi, for the appellant, had no qualms about the agreement by the appellant and the 1st respondent to submit themselves to the Commercial Division of the High Court in case of any dispute between them, under clause 14 of the Loan Facility Letter, he however, was of the view that, under that clause, the appellant was not so compelled to refer the suit to the Commercial Division of the High Court. He contended that, the Land Division of the High Court, to which the appellant referred the suit, had jurisdiction to entertain the suit pursuant to sections 13 and 14 of the CPC, regarding pecuniary, place of suing and local limit the subject matter situated. Mr. Budodi further argued that the institution of the suit to the Land Division of the High Court was also in compliance with section 167 (1) of the Land Act, Cap 133 R.E. 2019 (the Land Act) under which the High Court is, among the courts, vested with jurisdiction to adjudicate disputes concerning land. He also contended

that while the case of **CRDB Bank PLC v. Chama Cha Walimu Cha Ushirika cha Akiba na Mikopo Wilaya ya Kyela & Another** (supra) is not binding to the Court, the case of **Sunshine Furniture Co. Ltd** (supra) is irrelevant and distinguishable because it was on the issue relating to the jurisdiction of a foreign court *vis a vis* that of local courts.

Besides the above arguments, Mr. Budodi argued that should the Court find that the raised point is meritorious and that the relevant proceedings and judgment have to be nullified, each party should bear its own costs.

In his brief rejoinder, Mr. Mbwilo argued that notwithstanding the provisions of the law under sections 13 and 14 of the CPC, the crucial issue in the case at hand is that the appellant and the 1st respondent had agreed to refer their dispute to the Commercial Division of the High Court and not to the Land Division of the High Court. He insisted that the principle of the sanctity of contracts ought to have been observed. He emphasized that the case of **Sunshine Furniture Co. Ltd** (supra) is very relevant to the case at hand because it dealt with the issue of effectiveness and the binding force of the choice of forum clauses.

The only issue for our determination in regard to the point of law raised by Mr. Mbwilo in the light of clause 14 of the Loan Facility Letter

and the submissions made for and against the point raised, is whether under the circumstances of the suit by the appellant, that is, Land Case No. 3 of 2016, the suit was properly before the Land Division of the High Court or not.

As our starting point, we find it instructive to note that, as it was also the position by the counsel for the parties, the fact that the appellant and the 1st respondent had agreed to submit themselves and refer any dispute arising from the Loan Facility Letter, to the Commercial Division of the High Court, cannot be disputed at all. Clause 14 of the Loan Facility Letter (Exhibit D1) appearing at page 170 of the record of appeal is to the following effect:

> *"14.* ***DISPUTE RESOLUTION***
>
> *In case of any dispute arising from interpretation, performance or non-performance of the terms and conditions in this loan facility letter and where the amount involved is within the pecuniary jurisdiction of the High Court of Tanzania, the parties hereto irrevocably submit themselves to the Commercial Division of the High Court for adjudication of the dispute".*

It is also instructive to point out, at this stage, that, in the light of section 7 (1) of the CPC and section 16 of the Land Act, clause 14 of the

Loan Facility Letter cannot be said to have an effect of ousting the jurisdiction or barring the Land Division of the High Court to try the suit. To our view, the only issue relevant in the determination of the point raised by Mr. Mbwilo, as we have already alluded to above, is not on the the jurisdiction of the Land Division of the High Court but whether, in the presence of clause 14 of the Loan Facility Letter by which the appellant and the 1st respondent had chosen to submit themselves to the Commercial Division of the High Court for the adjudication of their disputes, the suit was properly instituted in the Land Division of the High Court. It should also be borne in mind that it is a settled principle that, the jurisdiction of the High Court or any court having been conferred by statute, is not capable of being ousted by an agreement of the parties except by statute in explicit terms. See- **Scova Engineering S.p.A & Another v. Mtibwa Sugar Estates Limited & 3 Others**, Civil Appeal No. 133 of 2017 (unreported).

We also agree with Mr. Mbwilo that pursuant to section 7 (1) under which it is provided that, subject to the CPC, the courts shall have jurisdiction to try all suits of a civil nature **excepting suits of which their cognizance is either expressly or impliedly barred,** the Land Division of the High Court ought not to have entertained the appellant's

suit because the appellant and the 1st respondent had, by clause 14 of the Loan Facility Letter, expressly chosen for the suit to be entertained by the Commercial Division of the High Court. In interpretating section 7 (1) of the CPC in the light of the choice of forum clauses, the Court, in the case of **Sunshine Furniture Co. Ltd** (supra) which we find relevant and rightly cited to us by Mr. Mbwile, observed that:

> *"Mr. Mwaiteleke argued on the 1st ground of appeal, that the learned High Court Judge misinterpreted that section of the CPC [that is, section 7 (1)]. With respect, we disagree with the learned counsel. By that provision, a court may not entertain a suit, the cognisance of which has either been expressly or impliedly barred. This includes a suit arising from a dispute which by agreement, the parties have agreed to be determined by a court of their choice, being it a local or foreign court".*

Regarding the legality and effectiveness of choice of forum clauses, the Court in **Scova Engineering S.p.A & Another** (supra) held that choice of law and forum clauses are binding and they are not contrary to public policy nor would it be a contravention of section 28 of the Law of Contact Act, Cap. 345 R.E. 2002. In cementing the above position, the Court subscribed to the commentary by **Pallock and Mulla in the**

**Indian Contract and Specific Reliefs Act,** 11th Ed, at page 454, where it is observed that:

> *"Where two or more courts have jurisdiction to try a suit, the agreement between the parties limiting the jurisdiction to one court is neither opposed to public policy nor a contravention of s. 28 of the Contract Act. So long as the parties to a contract do not oust the jurisdiction of all courts which would otherwise have jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the court and where the parties to a contact agree to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law, their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy".*

Further, and of more relevancy is that, in the same case of **Scova Engineering S.p.A & Another** (supra), the parties, under clause 1.9 of the Guarantee and Indemnity Agreement, had agreed that the Guarantee shall be governed and construed in accordance with Italian law by the Court of Rome. It happened that one of the parties instituted a suit in the Commercial Division of the High Court of Tanzania. An objection was raised that the suit was instituted in contravention of clause 1.9 of the

Guarantee and Indemnity Agreement. The Commercial Division of the High Court sustained the objection and refused to try the case. On appeal, the Court upheld the High Court decision and observed that:

> *"That agreement bound the parties and it was not open for the appellants to resort to the High Court, Commercial Division. To that extent, the High Court was right to refuse to take cognisance of the suit and rightly bound the parties to their bargain".*

The position that parties should always be bound to their bargain and further that their choice of forum should be enforced by the court is all about the sanctity of contracts. In the case of **Reliance Insurance Company (T) Ltd v. CMA CGM Societe Anoyme & Another**, Civil Appeal No. 179 of 2020 (unreported), the Court having revisited a number of cases and relevant texts, observed thus:

> *"From the cases and texts referred to, it is clear that the general rule is in favour of holding the parties to their agreement as regards choice of forum. For an exception to that rule to succeed, the Court has to be convinced by strong reasons that there are circumstances that justify such a course".*

The Court further stated that:

> *"When there is a choice of forum clause in a bill of lading, the Court has to enforce that choice made by the parties. That, however, does not mean the Court's jurisdiction has been ousted by the parties".*

In the instant case, it is common ground that the appellant and the 1st respondent had, by clause 14 of the Loan Facility Letter, agreed that in case of any dispute arising from interpretation, performance or non-performance of the terms and conditions contained in the Loan Facility Letter, they would submit themselves to the Commercial Division of the High Court for the adjudication of the dispute. That being the case and based on the position of the law as regards choice of forum as amply demonstrated above, it is clear that the appellant wrongly and improperly instituted Land Case No. 03 of 2016 in the Land Division of the High Court. As he was bound by clause 14 of the Loan Facility Letter, the appellant ought to have referred the suit to the Commercial Division of the High Court as per his agreement with the 1st respondent. The appellant was bound to his bargain. Land Case No. 03 of 2016 was thus not properly before the Land Division of the High Court which ought not to have taken cognisance of the same and adjudicated the dispute between the parties.

For the above reasons, the point of law raised by Mr. Mbwilo for the 1st and 2nd respondent is sustained and the proceedings and judgment of the Land Division of the High Court in Land Case No. 03 of 2016 are hereby nullified. The appellant may re-file his suit in the Commercial Division of the High Court as per clause 14 of the Loan Facility Letter if he so wishes. Under the circumstances of this matter, we make no order as to costs.

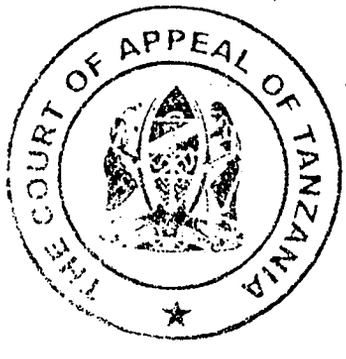
**DATED** at **SUMBAWANGA** this 19th day of March, 2024.

W. B. KOROSSO
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

B. S. MASOUD
**JUSTICE OF APPEAL**

The ruling delivered this 19th day of March, 2024 in the presence of Mr. Mathias Budodi, learned counsel for the appellant also holding brief for Mr. Respicius Didas, learned counsel for the 3rd respondent and Ms. Lucy Sigula holding brief for Mr. Baraka Mbwilo, learned counsel for the 1st and 2nd respondents, is hereby certified as a true copy of the original.




A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**