

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND CASE NO. 53 OF 2012**

GLORIA KYONJOLA.....APPLICANT/PLAINTIFF

VERSUS

AGE INVESTMENT LTD.....1<sup>ST</sup> RESPONDENT/DEFENDANT  
INTERNATIONAL COMMERCIAL BANK (T) LTD.....2<sup>ND</sup> RESPONDENT/DEFENDANT

**RULING**

**B.R. MUTUNGI, J.**

The applicant filed an application for temporary injunction which met with a preliminary objection from the second respondent which is based on the following:-

- 1) That the suit upon which the application is based is incompetent for lack of jurisdiction.
- 2) That the suit upon which the application is based is incompetent for contravening the mandatory provision of law of the pleading i.e order VII Rule 1 (f) of Civil Procedure Code Cap 33 R.E 2002.

The applicant was dully represented by Mr. Heri Louis Kayinga while second respondent enjoyed the services of Mr. Ishengoma learned counsel whereas the first respondent, was absent.

Mr. Ishengoma learned counsel asserted that, they have raised two grounds of the preliminary objection that the court cannot grant the temporary orders sought by the applicant because the suit upon which is based is incompetent and cited the **case of 136/1995 ALITA KITALI AND ANOTHER VERSUS AFRICAN JOINT AIR SERVICE**, where it was held that the court cannot issue injunctive orders on a bad suit.

It is Mr. Ishengoma's submission that in all fours the case before this court is not a land case. Under **section 167 (1) of the Land Act Cap 4 1999**, the law gives it exclusive jurisdiction to determine all matter of disputes concerning Land and the relevant provision is section 37 (1) of Land dispute courts Act Cap 216 R:E 2002 which states the courts subject to pecuniary jurisdiction which are empowered to deal with land matter is the High Court Land division. It is his

submission that any matters which do not fall within the land matters have no avenue in this court. Mr. Ishengoma further submitted that in order to know whether the court has jurisdiction or not one is to look at the facts stated and reliefs sought in the plaint. He submitted that in this case when you look at the pleadings specifically the reliefs sought they do not involve matters of land. They can be sought in other courts other than this court. The relief clause which is filed in this court (paragraph 10) the plaintiff prays for payment of US dollar 12,500/= and interest at the rate of 19% per annum the plaintiff also prays for declaration of mortgaged deed as null and void. The amount claimed according to paragraph 10 are costs of traveling from U.S.A to Tanzania by plaintiff in her attempt to rescue her matrimonial home from forced disposition. Mr. Ishengoma insisted that this court has no jurisdiction to award that relief as it is not a land issue.

In respect of declaration orders concerning mortgage, the counsel submitted that these do not give the plaintiff room to come to this court. It is not a duty of this court to separate reliefs sought by taking part of the claims which

fall under the jurisdiction of the court and leave those which do not fall in the jurisdiction of the court. The court has to decide on the whole. He proceed to refer the court to the decision of this court, **EXIM BANK TANZANIA LTD VERSUS AGRO TANZANIA LTD AND TWO OTHERS LAND CASE NO. 29/2008.**

In respect of the second ground of objection, the counsel asserted that the law requires the pleader to include in his plaint a clause which shows that the court has jurisdiction to deal with the matter. When one looks at the plaintiff's plaint which is paragraph 4 of the plaint it only states "**are within the jurisdiction of this court**".

It is the counsel's contention that this is not enough for the purpose of the provision of **Order VII Rule 1 (f) Civil Procedure Code Act R:E 2002.** To cement this point, Mr. Ishengoma referred the court to the case of **LUCAS MALLYA Versus MUKWANO INDUSTRIES LTD Commercial Case No. 60 of 2004** HC where the court held that failure to comply with the provision of **Orders VII Rule 1 (f)** is fatal and renders the suit incompetent. He further submitted that the court cited

with approval the decision of the **Court of Appeal of East Africa ASSANAND AND SONS (UGANDA) LTD, Versus EAST AFRICAN RECORDS LTD (1959) EA 360**, in that case the pleadings were similar to the pleadings in this case. The court held that it is a magical clause and so not sufficient for the purpose of the laid down provision of law.

Mr. Ishengoma proceeded to submit that in the case of **JOSHUA INTERNATIONAL LTD Versus MPORO MPOKI Civil Case No. 467 of 2002** the High Court reiterated the position stated above.

It is Mr. Ishengoma's submission that failure to do so, renders the plaint incompetent. It is not enough to simply mention that the cause of action lies within the locality of the court.

In view of what he had submitted on two points, the learned counsel contended that if the first ground of objection is sustained the court will have to dismiss the suit and if only the second objection is sustained the court will have to strike out the plaint. In these circumstance the

learned counsel submitted that Khalifa case (supra) becomes relevant this is why the court should not grant injunctive orders based on the suit that will fail anyway. He prayed the application for injunctive orders be dismissed with costs.

In reply the counsel for applicant submitted that this suit is based upon an unlawful mortgage of the matrimonial home registered under a certificate of title No. 102172 plot No. 256/1 and 257/1 and 258 block G Kunduchi Salasala. It is submitted that the plaintiff is a wife lawfully wedded to Nathanaeli Mwakapati. That the first respondent accessed a loan facility from the second respondent using the above referred matrimonial home as third party mortgage without first obtaining a written consent of the plaintiff/applicant which is unlawful. It is and this subject matter that is a landed issue. It was the counsel's contention that he does not see any reason to oust the court's jurisdiction. Therefore the first point of objection is bound to fail.

Responding on **Section 167 of the Land Act** No. 4/1999 which confers this court jurisdiction to preside over landed

matters **as well as section 37 (1) of land disputes courts** Act, the learned counsel conceded that they are relevant provisions. However the applicant's counsel Mr. Heri strongly opposed the submission by the counsel for the second respondent based on the authority of KHALFA KITATA Case, to the effect that the court cannot issue injunctive orders on a bad suit. Mr. Heri submitted that the learned counsel misdirected this court by citing that authority as it has no relevance in the case at hand. It is Mr. Heri's submission that the learned counsel for second respondent is attempting to manipulate this court by using Order VII Rule 1(f) of Civil Procedure Code Act Cap 33 R:E 2002 because in pleadings what is to be shown is merely the facts and not legal arguments.

He submitted further that paragraph 4 of the indicate clearly indicate that the whole cause of action arose within the jurisdiction of this court as required by the referred order. Seeking details in this clause is likely to make this plaint a legal argument which is contrary to rules relating to pleadings. On these grounds he submitted that the two grounds of preliminary objection are baseless.

Responding on the relief claimed, Mr. Heri submitted that if one goes through para 12 (c) will note that the plaintiff/applicant is seeking for a declaration that a mortgage deed entered between first and second respondent is null and void and the validity of mortgage cannot be separated from a land dispute and in that regard the two preliminary objection points must fail.

In rejoinder, Mr. Ishengoma maintained that what is pleaded as far as the first ground is concerned is a mere fact that the mortgage in question was executed without the consent of the plaintiff/applicant and that the mortgage is null and void.

Mr. Ishengoma further maintained that the above facts do not make it a land matter, challenging validity of the mortgage deed is challenging the contract.

In this context, the learned counsel submitted that the plaintiff/applicant is challenging the relation between the parties as far as the mortgage is concerned. It is Mr. Ishengoma's submission that the plaintiff is basically

challenging the legal effect of the mortgage which does not make it a land matter. It can be challenged in any court.

Furthermore, it is submitted that the relief sought involved payment of money which has no relation with the mortgage, and the court cannot prune the relief sought to make them fall within the jurisdiction of the court.

On second ground, the learned counsel maintained that under paragraph 4 the plaintiff/applicant has pleaded that the cause of action arose in Dar es salaam and so this court has jurisdiction. Mr. Ishengoma maintained that this is not enough in view of the Civil Procedure Code Act Cap 33 R:E 2002 provisions. It only amounts to a magical clause which is not sufficient. **Order VII Rule 1 (f)** is mandatory and it gives the court room to draw a reasonable inference that the facts alleged indicate there is jurisdiction and the defendant can have an opportunity to contravene them.

It is counsel Ishengoma's submission that in this case when one reads the plaint as a whole and its annexed

documents, it is not easy to know the value of the mortgaged house. Therefore all the facts were supposed to be stated in the jurisdiction clause but plaintiff/applicant has decided to omit these material facts. The omission is fatal and makes the plaint incurably defective.

A close scrutiny of the submissions which I must hasten to say have been well elaborated and presented by both parties, reveal straight away that the first issue is whether this court has jurisdiction to grant the prayers sought in the plaint.

On this I straight away invoke the laid down principle in determining whether the court has jurisdiction or not. ***It is trite law that a question of jurisdiction like this is to be decided by a perusal of the plaint before the issuance of summons so that a plaint that is defective may be rejected or the claim dismissed as per Order VII Rule 11 Civil procedure Code Act Cap 33 R:E 2002.*** This exposition of the law was underscored by the learned author **SARKAR in his book SARKAR LAW OF CIVIL PROCEDURE SUDIPTIO SARKAR AND V.R MANOHA 8 Edn 1992 PART I. Wadlaw Publishers**

and the same was decided by Mapigano J, in the case of **ALFONS MOHAMED CHILUMBA Versus DSM SMALL INDUSTRIES COOPERATE SOCIETY (1986) TLR 96 at 92.**

I have carefully gone through the plaint, and find specifically paragraph 12, which is enshrined with the prayers or relief sought by plaintiff. If I may quote them this is what has been sought,

Wherefore Plaintiff claims:-

- a) Payment of the sum of USD 12,500.00***
- b) Interest on the aforesaid sum at the rate of 19% per annum from the date of judgment to the date of payment.***
- c) Declaration that the above referred mortgage is null and void.***
- d) Further and/or alternative relief"***

Now let me turn to the law **Section 2 of the Land dispute Court Act Cap 216 R:E 2002** define the term Land

***"includes the surface of the earth and the earth below the surface and***

*all substances other than minerals and Petroleum forming part of or below the surface, things naturally growing on the Land buildings and other structures permanently affixed to land.*

Apart from the above provision of law, **section 37 of Land disputes Court Act Cap 216 R:E 2002** provides that **subject to the provision of this Act, the High Court (land division) shall have and exercise original jurisdiction:**

- a) In proceedings for the recovery of possession of immovable property in which the value of the property exceeds fifty million shillings*
- b) In other proceedings where the subject matter capable of being estimated at a money value in which the value of the subject matter exceeds forty million shillings.*
- c) In all proceeding under the Tanzania Investment Act, the Land Act and the Land Acquisition Act in respect of proceedings involving the Government*

- d) In all proceedings involving Public Corporations specified in the Rent Restriction (Exemption) (Specified Parastatals) orders and in such other disputes of national interests which the Minister may be notice published in the Gazette specify and*
- e) In all such other proceedings relating to land under any written law in respect of which jurisdiction is not limited to any particular court or tribunal.*

And **Section 167 of the Land Act No. 4/1999 and Section 62 Village Land Act No. 5/1999** provides the courts which have been vested with exclusive jurisdiction to hear and determine all matters of dispute, actions and proceedings concerning Land.

Having stated as above I now turn to the crucial part of the preliminary objection carrying aboard the first limb. This is the fact that this court has no jurisdiction. The applicant's prayer is based on the simple reason that there is a prayer of USD 12,500/= in the plaint as costs of the return Air Ticket and advocate fees and lastly the declaration that the mortgage in issue is Null and Void. As already pointed out I

have had to go through the pleadings to ascertain the jurisdiction.

As properly submitted by Mr. Ishengoma learned advocate what the plaintiff in her pleadings is complaining of is that the second defendant (her husband) unlawfully mortgaged their house without her consent. It follows therefore she is contesting the validity of the mortgage in issue as being Null and Void in itself. I thus find in my opinion that this is a landed matter. The provision already cited act indicate very clearly that for a suit to be termed a landed matter it must involve ownership of the land/house, breach of tenancy, enforcement of a mortgage and matters related thereto.

In order to determine this matter the court must turn to the issue of whether the mortgage can be legally enforced as there was no consent as alleged by the plaintiff. This will be going into the issue of enforcement of the mortgage. The above said one cannot oust the jurisdiction of this court in this matter basing on the prayer marked (c) In the pleadings.

From the foregoing the other prayers of USD dollars 12,500.00 and costs of this suit are others matters related to the issue of the disputed mortgage. The contested amount is part and parcel of the dispute and these arose in the course of follow up of this matter and so they are to go together

The second limb of the preliminary objection is based on the provision of the law which is, **order VII Rule (i) (f)** of the Civil Procedure Code Act Cap 33 RE: 2002. If I may make reference of that section it provides.

***“The plaintiff shall contain the following particulars:-***

- a) .....***
- b) .....***
- c) .....***
- d) .....***
- e) .....***
- f) The facts showing that the court has jurisdiction”.***

In my reading I find that what is provided for in paragraph 4 of the plaintiff are words.

***“The whole cause of action a within  
the jurisdiction of the above  
honourable court”***

There are authorities on this issue which Judge Massati, J as he then was in the case of **Lucas Mallya Vrs. Mukwano Industries Ltd Case No. 60 of 2004** quoted with approval the case of **ASSANAND AND SONS (UGANDA) Ltd Vrs. EAST AFRICAN RECORD LTD (1959) E.A. 360**, whereby Siri Kenneth O. Connor P. Delivering the unanimous decision of the court stated **“..... A more assertion that the court has jurisdiction is not enough”**.

The clause used in that case which they termed a magical clause was **“the cause of action arose at Nairobi within the jurisdiction of this honourable court”**. In the present matter the scenario is the same as we have a magical clause,

***“the whole cause of action arouse  
within the jurisdiction of the above  
honourable court”***

In all fours it does not disclose the facts showing that indeed the court has jurisdiction. It follows therefore that the plaintiff has not complied with the provisions of order VII Rule I (f) of the Civil Procedure Code Cap 33 RE: 2002 which makes this suit incompetent before the court.

I would further proceed to state that the defect found as already elaborated in my settled opinion though making the matter incompetent in this court but does not go to the root of the dispute to warrant an order of striking out. I will in the alternative and for the sake of justice order that the plaintiff makes an amendment in the plaint on the disputed paragraph. Containing the “magical clause” on jurisdiction to come into conformity with the requirements of the provision of law.

In the upshot I find that the preliminary objection succeeds only to that extent.

B.R. MUTUNGI

**JUDGE**

**17/7/2012**

Read this day of 17/7/2012 in presence of Mr. Ishengoma for  
2<sup>nd</sup> Respondent in absence of applicant dully notified.

B.R. MUTUNGI

**JUDGE**

**17/7/2012**