

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 63 OF 2016

DAMAS CHRISTOPHER CHIZA.....PLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED.....DEFENDANT

RULING

5 Apr. & 18 May 2018

DYANSOBERA, J.:

The defendant, KCB Bank Tanzania Limited has raised a preliminary objection in respect of the land case filed by the plaintiff on the following grounds:

1. That this Honourable Court has no jurisdiction (pecuniary jurisdiction) to hear and determine this suit.
2. That the plaint does not establish any cause of action known to our legal jurisprudence.

On these grounds, the defendant is praying that the plaint be struck out on account of the 1st point of preliminary objection, the plaint be rejected on account of the 2nd preliminary objection and that costs following an order to strike out/reject the suit.

In his suit, the plaintiff is claiming that he be given sometime within which to repay the balance of the loan, status quo be maintained, costs be improvised and any other relief(s) the court may deem just to grant.

The defendant's preliminary objection was argued by way of written submissions. The plaintiff is represented by Mr. James L. Ndyetabula, learned advocate while Mr. Elisa Abel Msuya, learned counsel stands for the defendant

On the first preliminary objection, learned counsel for the defendant submitted that case law is replete of authorities that what determines the pecuniary jurisdiction of the courts are special damages and not general damages. He relied on the case of **Tanzania –China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70 and **Tanzania Breweries Limited v. Anthony Nyingi**, CAT Civil Appeal No. 119 of 2014, Mwanza

(unreported) arguing that the Court of Appeal redefined the position of the law stated under section 13 of the Civil Procedure Code, Cap. 33 R.E.202 which requires all cases to be instituted in the courts of the lowest grade competent to try the suits and that the above cited cases covers situations where a party plaintiff in any particular suit sues for declaratory reliefs whose pecuniary value is not otherwise stated. Counsel for the defendant is of the view that this suit falls squarely within that ambit. On the amendment made on section 13 of the Code in 2016 by the Written Laws (Misc. Amendments) (No.2) Act No. 2 of 2016, Counsel argued that it only saves the general jurisdiction of this court to adjudicate civil actions and has never redefined the position of the law laid down in the case of **Our Lady of Usambara** and **Tanzania Breweries Co. Ltd.** this court was invited to find that the present suit ought to have been filed at the court of the lowest grade, i.e. District Land and Housing Tribunal and not the High Court.

On the second ground of preliminary objection, counsel for the defendant submitted that the cause of action means the facts which give a person a right to judicial redress or relief against another.

This court was referred to the case of **Stanbic Finance Tanzania Ltd v. Giuseppe Trapia and Chiari Malawasi** [2002] TLR p. 2017 at p. 221/222. This court was also referred to other plethora authorities on what the cause of action means and how it is disclosed. After citing various paragraphs in the plaintiff's pleadings, counsel for the defendant pointed out that it is clear from the pleaded facts that the plaintiff is a mortgagor and the defendant a mortgagee. That the plaintiff has defaulted to repay the loan secured by his mortgaged property and this caused the defendant to demand for repayment of the outstanding debt amounting to Tshs. 124, 825,353/36 and was served with a default notice. He stated that the relationship between the plaintiff and defendant is that of a mortgagor and mortgagee and that section 132 of the Land Act [Cap.113 R.E.2002] gives powers to the mortgagee to sell the mortgaged property after the expiry of 30 days following service of default notice to the mortgagor. That, therefore, the mortgagee has the right to exercise those powers. He relied on the case of **Mboje s/o Jilala v. National Bank of Commerce**, Civil Case No. 3 of 1993 maintaining that under section 11 of the Law of Contract Act [Cap. 345 R.E.2002], the mortgage is a binding contract.

Replying to the first ground of preliminary objection, counsel for the plaintiff said that under paragraph 3 of the plaint, the plaintiff is quite clear that what made him to seek intervention of this Honourable court is threat of his house being sold by the defendant due to the outstanding balance of a loan of Tshs.124, 758,285/43 which amount is neither pegged to special damages nor to general damages and that the case of **Ms Tanzania-China Friendship Textile Co. Ltd vs. Our Lady of the Usambara Sisters** is not applicable in this case since the matter before this court is not for specific or general damages but rather the outstanding balance of the loan of Tshs.124, 758,285/43. Counsel for the plaintiff contended that under section 33 (2) (a) of the Land Disputes Courts Act [Cap. 216 R.E.2002] the pecuniary jurisdiction of the District Land and Housing Tribunal in proceedings for the recovery of possession of immovable property is fifty million shillings.

Counsel for the plaintiff asserted that in view of the said clear provisions, the plaintiff was justified in instituting his case in this court.

As far as the second ground is concerned, it was submitted for the plaintiff that the plaint has disclosed the cause of action in that the plaintiff's house is under threat of being sold by the defendant due to outstanding balance of a loan of Tshs.124, 758,285/43 and that this is a substantial cause of action which attracts intervention of this Honourable court. This court was invited to find that the second ground of preliminary objection has no merit and must fail.

Section 7 (1) of the Civil Procedure Code, 1966 [Cap.33R.E.2002] provides that the High Court has jurisdiction to try all suits of a civil nature unless expressly or impliedly barred. Although section 13 of the same Code is clear that every suit shall be instituted in the court of the lowest grade competent to try it and that Court of Resident Magistrates and District Courts shall be deemed to be courts of the same grade, and notwithstanding its amendment brought about in 2016, there is no dispute that this is a land matter and the court of the lowest grade competent to try it is District Land and Housing Tribunal. As correctly submitted by learned counsel for the plaintiff, the pecuniary jurisdiction to the District Land and Housing Tribunal is stipulated under section 33

(1) (a) of the Land Disputes Courts Act [Cap.216 R.E.2002] in the following terms:

The jurisdiction conferred under subsection (1) shall be limited 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.

I am aware of the amendment of the said provisions by the Written Laws (Miscellaneous Amendments) (No.4) Act, No. 13 of 2017 which raised the pecuniary jurisdiction from fifty million shillings to three hundred shillings. But I think this suit is not covered by this amendment it having been filed on 26th July, 2016 before the said amendment.

Besides, there is no claim made which could lead to a conclusion that the pecuniary value of the claim is not within the jurisdiction of this court and as rightly submitted by counsel for the plaintiff, the circumstances of this case are different from the circumstances obtaining in the **Friendship Textile Ltd** case (supra). I am supported in this by the decision of the Court of Appeal in the case **Peter Joseph Kilibika and CRDB Bank Public**

Company Ltd v. Patrick Aloyce: Civil Appeal No. 37 of 2009 supports the position taken by counsel for the plaintiff

The first ground of preliminary objection is overruled.

Regarding the second ground of preliminary objection that the plaintiff does not disclose a cause of action, both counsel agree on the correct meaning of the term "cause of action". The issue for consideration is whether the plaintiff in this case discloses a cause of action. While counsel for the plaintiff wants this court to answer it in the positive, counsel for the defendant holds a different view. Both have advanced reasons in support of their stands. It is contended for the plaintiff that the plaintiff has disclosed the cause of action in that the plaintiff's house is under threat of being sold by the defendant due to outstanding balance of a loan of Tshs.124,758,285/43 and that this is a substantial cause of action which attracts intervention of this Honourable.

On the contrary, counsel for the defendant has maintained that the pleaded facts indicate that the plaintiff is a mortgagor and the defendant a mortgagee. That the plaintiff has defaulted to repay the loan secured by his mortgaged property and this caused the

defendant to demand for repayment of the outstanding debt amounting to Tshs. 124, 825,353/36 and served the plaintiff with a default notice. Counsel for the defendant stated that the relationship between the plaintiff and defendant is that of a mortgagor and mortgagee and that section 132 of the Land Act [Cap.113 R.E.2002] gives powers to the mortgagee to sell the mortgaged property after the expiry of 30 days following service of default notice to the mortgagor. That, therefore, the mortgagee has the right to exercise those powers. Relying on the case of **Mboje s/o Jilala v. National Bank of Commerce**, Civil Case No. 3 of 1993, he maintained that under section 11 of the Law of Contract Act [Cap. 345 R.E.2002], a mortgage is a binding contract.

Cause of action which is the main element of trial in civil cases pre-supposes denial of a right of the party claiming such right. Such right must be a legal right. Sir Joseph Sheridan C.J. in the case of **Attorney General for Kenya** (1939) EACA 18, held:

“What is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated.”

Likewise, in the case of Alifar Keya (1938) EACA 18 the Court observed:

“It must be noted that the court must look at the pleadings (plaint) while determining whether a cause of action has been made out. That the plaintiff must clearly come out as the person aggrieved by the violation of right and the defendant as the person who is liable.”

In the instant case, the pleaded facts do not show the legal rights of the plaintiff which are alleged to have violated by the defendant. The cause of action in the present case is a contract-based actions. The plaintiff is a defaulter and the defendant seeks to recover his money in accordance with the law.

That aside, when placed in juxtaposition, the averments made in the plaint, paragraph 11, in particular and paragraph 12.0 of the defendant's written statement of defence clearly spell out an admission that the plaintiff is indebted. This means that there is nothing to be held on trial. For clarity, paragraph 11 of the plaint runs as follows:

“11. that, the plaintiff is not disputing to repay the balance of the loan but needs some time to do so since the company is in the process of recovering the money from Gairo District Council which will enable the plaintiff to repay the balance of the loan upon reimbursement of his money from the company”.

It is also averred under paragraph 12.0 of the written statement of defence that:

The contents of paragraph 11 are acknowledged to the extent that the plaintiff is indebted to the defendant in the extent stated under paragraphs 6 and 8 herein above. The Defendant, however, joins issues with the plaintiff that the latter is in the process of securing money from his creditors. The plaintiff is put to strict proof.

In short, there is nothing showing that the relationship of the plaintiff and defendant considered in their context, it cannot be justified that the defendant is a breaching party of some important element in their contractual relations and such defendant's action (s) caused harm legally recognized by law.

For those reasons, uphold the second ground of preliminary objection that the plaint discloses no cause of action and reject the plaint under O. VII rule 11 (a) of the Civil Procedure Code [Cap.33 R.E.2002].



W. P. Dyansobera

JUDGE

18.5.2018

Delivered this 18th day of May, 2018 in the presence of Mr. Nyamuko Makata, learned counsel holding brief for Mr. Ndyetabula, learned advocate for the plaintiff and in the presence of Mr. Elisa Mndeme, learned counsel for the defendant.



W.P. Dyansobera

JUDGE