

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(MWANZA DISTRICT REGISTRY)

AT MWANZA

HC CIVIL APPEAL NO. 69 OF 2017

*(Arising from the decision of the Resident Magistrate Court of
Mwanza in Civil Case No. 44/2016 as per Hon. Chitepo, B.)*

CHARLES RICK MULAKI.....APPLICANT

VERSUS

WILLIAM JACKSON MAGERO.....RESPONDENT

J U D G E M E N T

BEFORE:MAIGE, J.

This appeal seeks to fault the judgment of Resident Magistrate Court of Mwanza ("the trial court") which awarded the respondent herein **TZS 10,750,000/** as compensation for breach of tenancy agreement and **TZS 2,000,000/=** as

punitive damages therefor. The main question raised is on jurisdiction of the **trial court**, though the correctness of the assessment of damages has also been criticized. The appeal was prosecuted by Mr. Silas John, learned advocate and contested by Mr. Kinango, learned advocate, who *inter alia*, questioned its maintainability on account of being preferred beyond statutory time limit.

In his brief oral submissions, Mr. Kinango contents that; since the judgment was delivered on 8.12.16 and certified on 30.3.2017, the limitation period should have started running on the date of certification and consequently, this appeal is hopelessly time barred and ought to be dismissed.

In his submissions in rebuttal, Mr. Silas relied on the exemption under section 19(1) of the Law of Limitation Act, Cap. 89 R.E. 2002 ("the LLA"). He contended that, since the appellant had, soon upon the pronouncement of the

judgment, requested for a copy of judgment for the purpose of appeal, the period within which he was awaiting for the same is automatically excluded in computing limitation time. He submitted further that, since it was not until on 7.08.2017 when he received a copy of judgment despite his prompt request for the same, the appeal was filed well within the statutory period.

In his rejoinder submissions, Mr. Kinango while agreeing on the effect of section 19(1) of the **LLA**, he was of the contention that, the limitation period started running on the date when a copy of judgment was certified by the trial magistrate. In his humble opinion, certification of a copy of judgment is a signification that it was available for collection from the date thereof. The appellant, the counsel submitted, would have but for his inaction, collected the judgment soon upon certification.

I have painstakingly followed the counsel's debate on this issue. I am preparing myself to overrule the preliminary objection. I will assign the reasons gradually as I go on. The appeal at hand arises from the decision of a court of resident magistrate on trial. It is common ground that; a copy of judgment is an essential ingredient for such an appeal. Parties are in agreement that; in terms of section 19(2) of the **LLA**, time for the purpose of appeal stops running the moment the appellant applies for a copy of the judgment. Time is computed as from when the appellant is availed with a copy of judgment.

It appears not to be in dispute that in accordance with the request letter exhibited in the affidavit, the appellant requested for a copy of the judgment immediate upon delivery of the same. According to the receipts attached in the affidavit, it is apparent that, a copy of judgment was availed

to the appellant on 7.08.2017. This appeal having been filed on 25.08.201, it was, for all intents, well within time. I cannot agree with Mr. Kinango that, a copy of judgment was ready for collection on what he calls a date of certification. In the circumstance, the preliminary objection is overruled.

The disposal of the above preliminary matter notwithstanding, this Court raised, on its own motion, another technical issue on the legality and propriety of the proceedings of the **trial court**. It transpired to the Court , as it was examining the proceedings of the **trial court** that, the disposal of the suit was not preceded by the mandatory mediation procedure. When requested to address the Court on this issue, both Counsel were of the concurrent opinion that, the omission was fatal to the judgment and proceedings of the **trial court**. It was their common opinion however that in order to avoid confusion to the **trial court** and

unnecessary prolongation of the proceedings, it would be wise for the Court to, instead of setting aside the judgment and nullifying the proceedings thereof right away, consider first the issue of jurisdiction.

There is a merit on this view. As rightly submitted by the counsel, the order for remittance of the matter to the **trial court** would only be meaningful if the **trial court** enjoyed jurisdiction to deal with the matter. Contrary to that, I agree with them, remittance of the file to the **trial court** would lead to unnecessary prolongation of the proceedings which would be avoided by resolving the jurisdictional issue. In my opinion, since the issue of jurisdiction relates to both the judgment and proceedings, this Court has power under section 44 (1) (a) and (b) of the Magistrates' Courts Act, Cap.11 R.E. 2002 ("the MCA") to, by way of revision, examine

the legality and correctness of the proceedings of the **trial court** and give directions or orders as it may deem appropriate.

So that I can remain seized with the record of the **trial court**, I will defer concluding the issue of omission to conduct mediation until I determine the issue of jurisdiction. This is in line with the decision of the Court of Appeal of Tanzania in **Chama cha Walimu Tanzania vs.the Attorney general , Civil Application No. 151/2008, CAT (Unreported)**.

There appears not any disagreement that jurisdiction to deal with land matters is exclusively vested in the land courts. The issue, it would seem, is whether the dispute at hand is a land dispute within the meaning of the Land Act, Cap.113, R.E., 2002 ("the LA"). While Mr. Silas views the dispute as a pure land dispute, Mr. Kinango considers it as a non-land dispute. In the understanding of Mr. Kinango, there

cannot be a land dispute unless there is a claim for recovery of land or interest thereon. Mr. Silas contents that a land dispute is any dispute covered by the **LA**. He has relied on the authority in **Abdul Rahim Shadhili as the Guardian of Miss Fatuma A.R. Shadhili vs. Mandhar Govind Raykar, Civil Appeal No. 296 of 2004, HC, DSM, (Unreported)**

While the phrase used to explain the exclusive jurisdiction of the land courts in section 167(1) of the **LA** is "matters concerning land", the corresponding phrase used in section 4(1) of the Land Disputes Courts Act, Cap. 216, R.E. 2002 ("the LDCA") is "any matter under the Land Act and the Village Land Act " There is a difference, in my view, between the two phrases. The phrase "matters concerning land" was defined by my Lord Mlay, J, as he then was, in **Anderson Chale vs. Abubakar Sakapara, Civil Appeal No. 121 of 2014** to mean a matter on which a right on land or interest

thereon is in dispute. I entirely subscribe to the interpretation of His Lordship.

As I understand the law, interests and rights on land may be proprietary or possessory. While possessory rights are of temporary duration, proprietary rights are of a more permanent, ultimate and residuary nature. Proprietary interest is generally speaking, a right *in rem* whereas possessory interest a right *in persona*. In my opinion therefore, the expression " matters concerning land", would only cover proceedings for protection of ownership and/ or possessory rights in land. That appears also to be the principle of law in **Abdul Rahim Shadhili as the Guardian of Miss Fatuma A.R. Shadhili vs. Mandhar Govind Raykar, supra** cited by the counsel for the appellant wherein the issue was on the legality of the transfer of title in the suit property between the parties.

The phrase "any matter under the Land Act and Village Land Act" used in section 4(1) of the **LDCA**, I agree with Mr. Silas, would be, if read in isolation, broader enough to capture all disputes arising from the rights and liabilities created under the Land Act. Nevertheless, since the provisions of section 3(1) and 4 (1) of the **LCDA** are in effect subjected to the provision of the **LA** and of course including the provision of section 167(1) thereof, it can reasonably be implied that, the intention of the legislature was that the two phrases would be used synonymously. In my view therefore, the phrase "any matter under the land" in the context, should be given narrow interpretation to mean a dispute pertaining to a right on land or interest thereon.

In **Anderson Chale vs. Abubakar Sakapara** (*supra*), the dispute involved was compensation arising from trespass on land. His Lordship was saying that since the dispute did not

pertain to a claim of right over land or interest therein, it was not a matter concerning land within the meaning of section 167(1) of the LA and 4(1) of the **LDCA**. The tests for determining whether the claim is concerning land or not, were set out by His Lordship Mziray, J, as he then was, in **Exim Bank (T) Limited v. Agro Impex (T) & Others, Land Case Appeal No. 29 of 2008**, where he remarked as follows:-

Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One, you look at the pleaded facts that may constitute a cause of action . Two, you look at the reliefs claimed and see as to whether the court has power to grant them and whether they correlate with the cause of action.

It may perhaps be worthy to reveal that, the dispute in the respective case arose from an over draft facility and a third party mortgage. Nonetheless, the Court, in consideration of the fact that there was no claim of a right over the mortgaged land or interest thereon, took the view that the

same was not a matter concerning land. If I can quote the words of His Lordship, he had the following to say, thus:-

On looking at the prayers you will find that non is related to land. The mere fact that the second and third Defendants have put some security for the loan does not turn the suit to be a land dispute. Additionally, in my view, suing on an overdraft facility per se does not turn the suit to a land dispute and give this court the necessary jurisdiction.

The dispute at hand relates to compensation for a breach of lease agreement. It is undeniable that, a lease agreement in its nature creates possessory rights to the lessee. It would ordinarily be a dispute concerning land. In the context of this case however, the respondent did not at all claim any possessory right over the leased premises. Neither did he claim any usufructuary right over the same. More so, compensation was not claimed alongside with other reliefs touching possessory or usufructuary right. It was in itself a sole claim. In the premise, though the claim has relation with the lease agreement, for the reason of the nature of the relief

sought, it cannot be said that the dispute was concerning land within the meaning of section 167(1) of the **LA**. It would conceivably amount to a land dispute, if the tenant was for instance, claiming for an injunction to restrain the landlord from evicting him from the leased premises.

For the reasons exhibited herein above and in view of the fore going discussions, I will agree with Mr. Kinango, learned advocate for the respondent that; the dispute at hand is not a land dispute within the meaning of the **LA** and the **LDCA** as claimed by the appellant or at all.

If, however, contrary to the opinion I have expressed, the dispute at the **trial court** was a land dispute within the meaning of the laws under discussion, yet I would maintain the same position on further reasons that I am going to assign.

As rightly submitted for the appellant, land courts are established under sections 167(1) of the **LA** and 62 of the Village Land Act, Cap. 114, R.E. 2002, ("the VLA"). Under the respective provisions, they have been vested with exclusive jurisdiction to deal with matters concerning land.

So that the disputes envisaged in section 167 (1) of the **LA** would be enforced, the Parliament enacted the **LDCA** as a procedural law to deal with the dispute. Sections 3(1) of the Act provide as follows:-

3(1). Subject to section 167 of the Land Act and section 62 of the Village Land Act, every dispute or complaint concerning land shall be instituted in the courts having jurisdiction to determine land dispute in a given area.

Subsection 2 thereof, reinstates the land courts established under section 167(1) of the **LA**. Section 4(1) excludes the jurisdiction of the magistrate courts to deal with land matters in the following words:-

4(1). Unless otherwise provided by the Land Act, no magistrate's courts established by the Magistrate Courts Act shall

have civil jurisdiction in any matter under the Land Act and the Village Land Act (emphasis supplied).

From its wordings, it would appear to me, section 4(1) of the **LDCA** intended to clarify the jurisdictional issues under the **LA**. As for instance, while under section 167 (1) of the **LA**, land courts are given a general exclusive jurisdiction, in the latter provision, the exclusion of the civil jurisdiction of magistrates' courts in land matters is qualified. It is not absolute if I can say. This can be implied from the clause "*unless otherwise provided for under the Land Act*".

The clause, in my view, was not made without intention. I say so because; while the exclusive jurisdiction of land courts is set out in both the **LA** and **VLA**, the scope of the exclusivity of the jurisdiction is qualified on account of there being an express provisions in the **LA** to the contrary. The omission to mention the **VLA** in the qualification of the exclusivity of the jurisdiction of the land courts, in my

humble view, was not accidental. The legislature, in my view, had it in mind that, there were some provisions in the **LA** vesting jurisdiction in the magistrates' courts to deal with some matters under the **LA**.

The clause "unless otherwise provided by the Land Act", in the respective provision signifies that; the jurisdiction of magistrates' courts to deal with land matters is not excluded in some matters unto which jurisdiction to deal with them have been expressly conferred to them by any of the provisions of the **LA**.

Perhaps, the obvious question that I have to answer; is whether there is any provision in the **LA** which expressly vest jurisdiction in magistrate courts to deal with matters arising from lease agreements. The answer to this question is certainly yes. There are express provisions in **sub-part 4** of the **LA** to that effect. It is worthy of note that; despite the

fundamental amendments of the **LA** in 2004, 2005 and 2008 by Acts Nos. **2/2004**, **11/2005** and **17/2008**, respectively, the said sub-part which is entitled "REMEDIES AND RELIEF" has survived. According to section 99 of the **LA**, the respective sub part applies to all leases and licenses with the exception of customary lease. Section 107 (1) of the Act provides as follows:-

- 107(1). An application for relief may be made to a district court-*
- (a) in a proceeding brought by the lessor for an order of termination of the lease.*
 - (b) In a proceeding brought for the purpose by any of the persons referred in subsection (2) before the lessor commences a proceeding mentioned in paragraph (a).*
- (2) An application of relief against an order of termination of a lease may be made by-*
- (a) The lessee;*
 - (b) If two or more persons are entitled to the lease as co-occupiers, by one or more of them on their own behalf;*
 - (c) A sub lessee*
 - (d) The trustee in bankruptcy of the lessee*

Under the provision of section 107(1) and (2) of the **LA**, a district court is conferred with jurisdiction to entertain an application for termination of lease for the reason of breach of the same. The above provision may not be appropriate in the instant appeal since the claim under discussion was not based on termination of a lease. No doubt, the claim under discussion would fall squarely within the purview of section 109 (1) and (2) of the Act which provide as follows;-

109(1). Where a lessee is in breach of a covenant or condition of a lease, which he is under the obligation to observe and comply with, the lessor may, instead of serving a notice of intention to terminate, commence an action against the lessee-

- (c) For damages, or*
- (d) For a decree of specific performance; or*
- (e) For an injunction; or*
- (f) To recover as a debt any arrears of rent. In a proceeding brought for the purpose by any of the persons referred in subsection (2) before the lessor commences a proceeding mentioned in paragraph (a).*

(2). Where a lessor is in breach of a covenant or condition in a lease, which he is under the obligation to observe and comply with, the lessee may-

(a) commence an action against the lessor-

(i) For damages; or

(ii) For a decree of specific performance; or

(ii) For an injunction; or

From the express provisions of section 107, 108 and 109 of the LA, I am settled, in my mind that, the exclusion of the jurisdiction of magistrates' courts in matters concerning land, does not affect the jurisdiction of district courts to deal with the claims covered by **subpart 4** of the **LA**. Since under section 41(1) of **MCA**, a court of resident magistrate possesses original jurisdiction in all civil proceedings in respect of which jurisdiction is conferred to the district court by the second schedule to the **MCA** and any other law for the time being in force, it is my firm opinion that, the **trial court**, enjoys original jurisdiction to deal with matters set out in subpart 4

of the **LA** as afore stated, including the matter under discussion.

With the above finding on the issue of jurisdiction of the **trial court**, it is now appropriate to consider the effect of the established irregularity in the proceedings of the **trial court**. I have held that the **trial court** omitted to attempt settlement of the dispute by way of mediation. Under order VIIC of the Civil Procedure Code, Cap. 33, R.E, 2002 ("the CPC"), it is trite law, mediation is a mandatory procedure in civil proceedings unless for the matters on which the procedure does not apply. The instant matter is obviously not among. The omission to conduct mediation vitiates the judgment and proceedings of the trial court. On that account therefore, I will invoke my revisionary powers under section 44(1) (b) of the **MCA** and nullify the judgment of the **trial court** and all proceedings subsequent to the first pre trial conference. The

file is hereby remitted to the **trial court** for retrial before another magistrate with further direction that the same should be placed for mediation either before the same mediator or another one. I will, in the circumstance, not give an order as to costs.

It is so ordered.

I.MAIGE
JUDGE

AT MWANZA
08/05/2018