

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 15 OF 2020

(Arising from the decision of the Resident Magistrates' Court of Dar es salaam at Kisutu in Civil Case No. 359 of 2016, dated 07/11/2019 before Hon. T.K. Simba, PRM)

ALEX MSAMA MWITA APPELLANT

VERSUS

BANK OF AFRICA TANZANIA LTD RESPONDENT

JUDGMENT

30th Sept & 30th Oct, 2020.

E. E. KAKOLAKI J

The appeal is against the decision of the Resident Magistrate Court of Dar es salaam Region at Kisutu in Civil Case No. 359 of 2019, dated 07/11/2019 which was entered in favour of the respondent. Disgruntled the appellant is before this court to register his discontentment by way of appeal equipped with four (4) grounds of appeal going thus:

- (1) That, the Resident Magistrate erred in law and fact in entertaining the matter which the court has no jurisdiction.

- (2) That, the Resident Magistrate erred in law and fact by proceeding with defence hearing and delivery of judgment prior to the determination of Application No. 9 of 2018 which was pending for determination.
- (3) That, the Resident Magistrate erred in law and fact in evaluating evidence hence reached in a wrong decision.
- (4) That the Resident Magistrate erred in law and fact for failure to order joinder of the Purchaser of the mortgaged property as a necessary party.

For those grounds the appellant invited this Court to allow the appeal and nullify and or set aside the decision of the Resident Magistrate Court for Dar es salaam Region at Kisutu with costs.

Briefly, in April 2016 the appellant approached the respondent and secured loan facility to the tune of Tshs. 160,000,000/= with an extension of overdraft of Tshs. 40,000,000/=, thus a total amount of loan of Tshs. 200,000,000/= which was payable in 24 months and 12 months respectively. The appellant secured the said loan by mortgaging his house located at Plot No. 62 Block 17, situated at Magomeni Area within the City and Region of Dar es salaam. It appears he defaulted repayment of the said loan and after several reminders the mortgagee (respondent) issued the mortgagor (appellant) with a notice of default in terms of section 127(1) of the Land Act, [Cap. 113 R.E 2002] now cited as [Cap. 113 R.E 2019] with the intention to sell the mortgaged property. Upon receipt of that notice the appellant rushed to the Resident Magistrate Court of Dar es salaam at Kisutu and instituted a suit Civil Case No. 359 of 2016 against the respondent. The

reliefs sought by the appellant against the respondent included orders for permanent injunction restraining the defendant (respondent) from privately selling or auctioning the plaintiff's landed property on suit premise, an order to allow him to pay the loan facility in a normal course, the defendant (respondent) to pay him damages in excess of Tshs. 10,000,000/= and the cost of the suit.

The defendant/respondent resisted the plaintiff/appellant's claims and in her written statement of defence raised a preliminary point of objection on the jurisdiction of the trial court submitting that, the suit was a land related matter as the notice issued was in terms of section 127 of Land Act. And that, since it was a land matter as gathered from the reliefs sought by the appellant in the plaint, the respondent argued the trial court had no jurisdiction to entertain it within the purview of section 4(1) of the Land Disputes Courts Act, [Cap. 216 R.E 2002]. The respondent's objection was overruled by the trial court in its ruling dated 06/06/2017, on the ground that parties were not at issue with the landed property as the same was an aftermath after the respondent had attempted to sell the mortgaged property for failure of the appellant to discharge his loan obligations. After a full trial the trial court found the appellant's case not proved to the required standard and consequently entered judgment in favour of the respondent. It is from that decision the appellant is before this court seeking to impugn it.

Parties agreed to argue this appeal by way of written submission. Whereas the appellant enjoyed the services of Mr. R. Mrindoko, learned advocate, the respondent hired the services of Mr. David. M. Chillo, learned advocate. Mr.

Mrindoko argued all of the grounds in seriatim and I am also prepared to consider and determine the same in the like manner. To start with the first ground of appeal, the appellant faulted the trial court for entertaining the matter it had no jurisdiction to try. He said paragraph 10 and 13 of the plaint show clearly as to where the cause of action originate. That, it is from the respondent's act of serving the appellant with the notice of sale, that is when the case was preferred to restrain her from selling the mortgaged property. Thus to him the subject matter is a land dispute which the trial court wrongly proceeded with as it does not fall with the definition of section 167 of the Land Act. He therefore called upon this court to find merit on the ground and allow the appeal.

In response to the first ground Mr. Chillo for the respondent attacked the appellant's stance of faulting the trial court's findings which he earlier supported after the respondent had raised a preliminary objection on the jurisdiction of the court to handle what she claimed to be land matter. He said the appellant cannot eat his own cake and have it at the same time by faulting the trial court to have entertained the suit without jurisdiction, terming it to be land matter. Referring the Court to the decision of this Court in the case of **Sheila Elangwa Shaidi Vs. Wilfred Moses Lukumay**, Civil Appeal No. 203 of 2018 that cited the case of **Rombo Green View Investment Ltd Vs. Cadasp Tanzania Ltd**, Land Case No. 269 of 2008 (unreported), Mr. Chillo said the court in deciding whether it has a jurisdiction to entertain the matter or not has to consider two factors. **One**, the pleaded facts that may constitute a cause of action and **two**, the relief(s)

claimed and see whether the court has power to grant them and whether they correlate with the cause of action.

Mr. Chillo went on to submit that, applying the principle enunciated in **Rombo Green View Investment Ltd** (supra) in this case, after going through the facts of the case as deposed in paragraphs 5,6,7,8,9 and 12 of the plaint and the framed issues of the court, he noted none of the issues touched land. So to him this is not a land matter. To fortify his argument he drew attention of the court to the case of **Exim Bank (T) Limited Vs. Agro Impex (T) Limited and Two Others**, Land Appeal No. 29 of 2018 that quoted with approval by the Court of Appeal in the case of **The National Bank of Commerce Limited Vs. National Chicks Corporation Limited & 4 Others**, Civil Appeal No. 129 of 2015, where the court held the claim before it to be purely founded on contract and not land dispute despite of the plaintiff suing on overdraft facility. And that the court held further that, the claim arose from the loan agreement which created a contractual relationship relating to business between them. Thus, the claim was falling squarely in purview of the area of Commercial Division.

Basing on the cases referred herein above Mr. Chillo argued, the claim by the appellant in one paragraph of the plaint that loan was secured by a mortgaged property which the respondent wanted to sale did not turn the matter to a land matter since the appellant's claims were premised on the denial of the copy of loan agreement that failed him to follow the schedule of loan repayment. Thus the prayer in his (appellant) plaint is a resultant of his allegations that he was not in breach of the loan agreement therefore the respondent should not recover the security, Mr. Chillo stressed. He

therefore submitted the Resident Magistrate Court was properly vested with jurisdiction to entertain the matter and for that matter this ground of appeal is bound to fail.

I have taken time to peruse the plaint, written statement of defence by the respondent and the proceedings and ruling of the trial court when entertaining the preliminary objection as well as considering contesting submissions of the parties which are both convincing. To start with the contention by Mr. Chillo that the appellant contested the preliminary objection raised by the respondent on the jurisdiction of the trial court during the trial, in my opinion is unfounded as the same is not supported by the court records. The trial court's proceedings of 08/03/2017 and its ruling dated 06/06/2017 uncover that fact that the matter proceeded ex-parte and in absence of the appellant. In real fact it is the respondent who ate her own cake and now wants to have it again by arguing that the trial court was seized with jurisdiction to entertain land matters contrary to what she had submitted earlier in the trial court. As such, she is estopped under the principle of estoppel to denounce her earlier submission in this case concerning the competence of the trial court to entertain the present matter when submitted that it is a land matter. My finding is fortified with the provisions of section 123 of the Evidence Act, [Cap. 6 R.E 2019] that disallow a person who through his act or declaration made another person to believe that a certain fact is true to deny that fact in further proceedings. Also prominent authors in Law of Evidence Sarkar & Manohar in their book titled **Sarkar on Evidence** Vol. 2, 14th Edition at page 1595, cemented it when defined the principle of estoppel to mean:

"A rule by which a person, in some cases, will not be allowed to plead the contrary of a fact or state of things which he has formerly asserted by words or conduct, in plain words, a person shall not be allowed to say one thing at one time and the opposite of it another time."

That notwithstanding let me proceed to determine whether the matter before the trial court was a land matter or not and if yes whether the trial magistrate erred to entertain it or not.

It is uncontroverted fact that the District Court and Resident Magistrates Court under the purview of section 167(1) of Land Act, are not seized with exclusive jurisdiction to entertain land matters, as the provision specifies the competent court. The said section 167(1) of Land Act provides:

167-(1) The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this Part, to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say-

- (a) the Court of Appeal;*
- (b) the High Court;*
- (c) The District Land and Housing Tribunal;*
- (d) Ward Tribunals;*
- (e) Village Land Council.*

Section 3 of the Land Disputes Courts Act, [Cap. 216 R.E of 2019] (LDCA) provides every dispute or complaint concerning land shall be instituted in the

Court having jurisdiction to determine land disputes in a given area as described in section 167 of Land Act, [Cap. 113 R.E 2019] and section 62 of Village Land Act, [Cap. 114 R.E 2019]. Further to that section 4 the LDCA prohibits all courts established under the Magistrates Courts Act [Cap. 11 R.E 2019] to entertain land matters save for criminal matters. The section reads:

4.-(1) Unless otherwise provided by the Land Act, no magistrates' court established by the Magistrates' Courts Act shall have civil jurisdiction in any matter under the Land Act and the Village Land Act.

(2) Magistrates' courts established under the Magistrates' Courts Act shall have and exercise jurisdiction in all proceedings of a criminal nature under the Land Act and the Village Land Act.

Now the question is what tests are to be applied to determine whether the claim is a land dispute/matter or not. To answer this pertinent query Mr. Chillo referred the court to the case of **Rombo Green View Investment Ltd** (supra), which I fully subscribe to as it refers to the applicable legal tests. To appreciate them as accepted legal tests the same were restated in the case **Exim Bank (T) Limited v. Agro Impex (T) & Others**, Land Case Appeal No. 29 of 2008, where his Lordship Mziray J (as he then was) 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.” (emphasis supplied)

Back to the issue at hand, it is in the views of Mr. Chillo that, this matter is not a land dispute considering the averments of the appellant in paragraphs 5,6,7,8,9 and 12 of the plaint and the framed issues of the court. And that, the appellant’s grievances were on the denial to be supplied with the copy of loan agreement by the respondent and not the sale of mortgaged property as even his prayers in the plaint is a resultant of his failure to repay the loan that entitled the respondent to repossession of the mortgaged property. He relied on the case of **Exim Bank (T) Limited** (supra). Mr. Mrindoko for the appellant is of the contrary view charging that appellant’s cause of action arose out of the respondent’s act of serving him with a notice to sale the mortgaged property which he has interest into. That, it is the said notice and interest on the landed property that prompted the appellant to seek remedies from the court praying for orders of restraining the respondent from selling his mortgaged property.

Applying the enunciated tests in the cases of **Rombo Green View Investment Ltd**(supra) and **Exim Bank (T) Limited** (supra) in the present matter, it is obvious to me and I agree with Mr. Mrindoko that this is a land matter. Looking at the pleaded facts in paragraphs 3, 8, 10 and 13 of the plaint there is no dispute that sale of the landed property on Plot No. 62 Block 17 Magomeni area was at issue after the respondent had issued the appellant with a notice of sale in compliance of section 127 of the Land Act intending to sale the mortgaged property. With these pleaded facts and

the fact that the respondent had direct interest on the said landed property, I find the cause of action in this matter was premised on interest over land, thus a land matter. Similarly, the prayers sought were correlating the cause of action as the appellant was seeking to restrain the respondent from selling or auctioning his landed property. To bring to light this plain fact it is imperative that I quote from the plaint the first prayer by the appellant reading thus:

"For orders of permanent injunction restraining the defendant from privately selling or auctioning the plaintiff's landed property Plot No. 62 Block 17 Magomeni Area in Dar es salaam City."

As to another test whether the trial court had powers to grant the sought orders, I am satisfied it was not clothed with any of such powers. This fact was also noted by the respondent and pleaded in her written statement of defence when challenging the jurisdiction of the trial court as pleaded in paragraph 14 the plaint. She averred in paragraph 13 of the WSD that:

*"13. That, the contents of paragraph 14 of the plaint are denied in toto. The Defendant states that the plaintiff has no cause of action against the Defendant and **the jurisdiction of this Court is disputed.**" (emphasis supplied).*

With all intents and purposes the trial court could not have granted the prayers sought without venturing into inquiry of the mortgage deed and application of the Land Act provisions generally. Having noted that it could not have proceeded without deciding on land matter, the trial court went further to skip to include in the framed issues an issue that could lead it into

determination of the appellant's major prayer of restraining the intended sale. It is from that fact I hold the trial court did not properly apply the tests laid down in the case of **Exim Bank (T) Limited** (supra) to establish whether it was seized with jurisdiction to entertain the matter. By so doing in my firm view the trial magistrate erred, hence erroneously concluded in his ruling dated 06/06/2017, that this was not a land matter, the result of which forced it to hear and determine the suit to its finality. It is from that fact I do not agree with Mr. Chillo's submission that the main grievances of the appellant were denial of the loan agreement and not the dispute over his interest on landed property. If the issue was on the copy of loan agreement which this court is not convinced with, the appellant could not have come up with a prayer for restraining sale of the mortgaged property. The case of **National Chicks Corporation Limited** (supra) relied on by Mr. Chillo to support his argument that the suit was not a landed matter is distinguishable under the circumstances of this case.

Having so found the suit was a land matter it is no doubt that the trial court had no jurisdiction to try it and I so find. Since the case proceeded to its finality then I hold the entire proceedings, ruling of 06/06/2017, judgments and orders thereto were nothing but a nullity. I therefore find the first ground meritorious. Since the same has the effect of disposing the appeal I have no reason to consider other grounds as to do so will amount to travelling through the already broken road with no hope to cross over to the other side.

In the circumstances and for the foregoing, I hold that this appeal has merit and is hereby allowed. Since the proceedings, ruling of 06/06/2017 and

judgement have been found to be a nullity, I would invoke the revisionary powers bestowed to this Court under the provisions of section 44(1)(b) of the Magistrates Court's Act, [Cap. 11 R.E 2019] which I hereby do and proceed to quash the proceedings of the trial court and set aside both ruling of 06/06/2017, judgment and orders thereto.

Finally the appellant prayed this court to allow the appeal with costs. I have carefully considered this prayer. It appears to me the appellant is the one instituted this matter in a wrong court and not the respondent. To condemn the respondent to pay costs in my opinion will not be in the interest of justice. For that reason, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of October, 2020.



E. E. KAKOLAKI

JUDGE

30/10/2020

Delivered at Dar es Salaam this 30th day of October, 2020 in the presence of Mr. David Chillo advocate for the respondent also holding brief for Ms. Rahel Salum advocate for the appellant and Ms. Lulu Masasi, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

30/10/2020