

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND CASE NO 7 OF 2020

**AMANI NURU MTIWAUZIMA (formerly
Known as NDELE MWANDOJE MBWAFU
and also AMANI UWEZA NURU)****PLAINTIFF**

VERSUS

CRDB BANK PLC Formerly

Known as CRDB BANK LIMITED.....1ST DEFENDANT

KIMBEMBE AUCTION MART LTD.....2ND DEFENDANT

S.H. AMON ENTERPRISES LTD.....3RD DEFENDANT


RULING

15/04 & 12/07/2021.

Utamiwa, J.

Before the hearing of this Land Case No.7 of 2020, the three defendants raised preliminary objections against the suit. The one raised by the third respondent (S.H. AMON ENTERPRISES LTD) was later withdrawn for being overtaken by event. What remained was thus, the preliminary objection (PO) raised by the first and second defendants (CRDB

BANK PLC, Formerly Known as CRDB BANK LIMITED and KIMBEMBE AUCTION MART LTD respectively). Their PO was raised through their joint written statement of defence. It was raised and argued through Mr. Alex Job Ginyogo, learned advocate. The PO was based on a point of law that, this court has no jurisdiction to entertain the suit at hand since clause 14 of the loan facility letter dated 21/2/2011 (subject matter of the suit) provides that, the plaintiff and the defendant irrevocably submitted themselves to the Commercial Division of the High Court of Tanzania (the High Court) for adjudication in whichever dispute between them.

It was agreed by the parties to argue the PO by written submissions and it was so ordered by this court. All the parties complied with such order.

In his written submissions in chief, the defendant's counsel argued that, it is expressly provided and agreed between the parties under clause 14 of the annexures 4 & 5 that, the parties would submit any dispute arising from their agreement such as the loan facility dated 21/02/2011 and 07/01/2015 to the jurisdiction of the Commercial Division of the High Court. Clause 14 states as follows.

"in case of any disputes arising from the interpretation, performance or non -performance of the terms and conditions contained in the 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"

The learned counsel further insisted that, this suit was instituted in the High Court, Mbeya District Registry instead of the High Court Commercial Division contrary to what the parties had agreed in their binding agreement

on the choice of the forum of adjudication of their disputes as shown above. For more clarifications, he cited the case of **Registered Trustees of the African Inland Church of Tanzania v. CRDB BANK PLC & Others, Land Case No. 5 of 2017, High Court of Tanzania (HCT), at Shinyanga**, (unreported), at page 7. He argued that, the case had held thus:

“...as a matter of general principle, where the parties have agreed to refer their dispute to a forum of their choice, the court would direct that, the parties should go before the agreed forum”

The learned counsel for the defendants further contended that, the court, at pages 8 and 11 of the above cited decision, explained as follows:

“...in my view where two or more courts have jurisdiction to try a suit, but there is an agreement between the parties limiting the jurisdiction to one court, this cannot be said to be a contravention of the law or public policy. Subsequently, clause 14 of the loan facility cannot be said to be bad in law. And for the foregoing reasons I have satisfied that, this court has no jurisdiction to entertain the suit as the parties chose the commercial court as their forum for the dispute settlement and the parties cannot depart from what they agreed upon in their contract”

This being the case, the learned counsel submitted that, though such decision cannot be used as a binding authority to this court, it can persuade it so as to avoid conflicting decisions of this same court on the same issue.

Moreover, the learned counsel submitted that, the relevant law to that issue is the Civil Procedure Code, Cap. 33 R.E 2019 (henceforth the CPC) which clearly provides under section 7(1) that:

“Subject to this Act, the courts shall have jurisdiction to try all suits of civil nature excepting suit of which their cognizance is either expressly or impliedly barred.”

He insisted that, the agreement between the parties expressly barred the trial of the suit in the normal High Court as the parties opted to submit themselves to the Commercial Division of the High Court. This court is therefore, impliedly barred to try the suit as the parties agreed not to submit themselves to any other forum even if it is vested with the jurisdiction to try the suit by statutory provisions. To cement his argument, the learned counsel underlined that, it is a cardinal principle of law that, the courts have the duty to respect and enforce what the parties had agreed in a contract and the court is only duty bound to interpret the agreement accordingly.

He also submitted that, the interpretation of the said section of the law was confirmed by the Court of Appeal of Tanzania (the CAT) in the case of **Sunshine Furniture Co. Ltd vs. Maesrk (CHINA) Shipping Co Ltd & Nyota Tanzania Limited, Civil Appeal no 98 of 2016, CAT at Dsm (unreported)** in which it was held that,

“..the clause expresses the parties’ choice of the law and choice of forum among the courts which have jurisdiction to entertain any disputes arising from the bill of lading...basically therefore the parties did not by agreement oust the jurisdiction of the courts in Tanzania. They only choose the law and the court at which their dispute arising from their shipping contract shall be determined.”

It was thus, the prayer by the learned counsel for the defendants that, this suit be struck out so that the plaintiff can institute it before the agreed forum.

In his replying submissions, the learned counsel for the plaintiff, Mr. Mutakyamirwa Philemon submitted that, the main question for the parties is whether the jurisdiction of the court can be ousted by the parties to the

agreement. He insisted that, the court's jurisdiction is set in the statute and cannot be ousted by the agreement between the parties. To cement his argument, he cited the decision of the CAT in the case of **Theodore Wend vs. Chhaganlal Jiwan and Harda Munji Trading in Partnership under Style Chhaganlal Jiwan & Company, 1 T.L.R @ 460**. In this case, he argued, it was held that, the parties were not competent in law to agree to oust the jurisdiction of the Tanzanian courts. He submitted further that, in the case of **National Bank of Commerce Limited vs. National Chicks Corporation and Others, Civil Appeal no 129 of 2015, CAT** (unreported), the CAT held that, the High Court and its mandate is the creature of the Constitution of the United Republic of Tanzania, 1977 (the Constitution), it is established under article 108.

Additionally, the plaintiff's counsel contended that, section 5 of the Judicature and Application of Laws Act, Cap. 358 R.E 2019 provides that, subject to any written law to the contrary, a judge of the High Court may exercise all or part of the jurisdiction or any power or authority conferred on the High Court. This implies that, the High Court in this country is one and it derives its mandate or jurisdiction from either the constitution or any other law. It is also absolutely clear that, it has unlimited jurisdiction and its judges are mandated to exercise all or part of the powers conferred to it.

It was also the contention by the learned counsel for the plaintiff that, there is neither express nor implied understanding that the Commercial Division of the High Court is a distinct and independent court from the High Court itself. Judges of the Commercial Division are like other judges of the High Court exercising the powers stipulated by the provisions

of law cited above. The Commercial Division is only designated to try cases of the commercial nature. Its judges can however, try other cases apart from commercial cases because, their mandate is provided under the Constitution.

The learned counsel therefore, submitted that, precedents cited by the defendants' counsel are distinguishable for the reasons shown above. Parties in the case at hand cannot thus, oust the jurisdiction of this court. The PO consequently, lacks merits and should be expunged from the court's record, according to him.

In his rejoinder submissions, the defendants' counsel reiterated the contents of his submissions in chief. He nonetheless, added that, the **Theodore case** (supra) cited by the plaintiff's counsel is inapplicable in the case at hand. This is because, the circumstances in that case actually ousted the jurisdiction of the court as opposed to the case at hand in which the parties agreed for the forum/court upon which to entertain their disputes. He added that, the **National Bank case** (supra) is also distinguishable. This follows the fact that, in that case, the CAT dealt with the issue of jurisdiction of the Commercial Court in entertaining land matters and other matters that are interwoven with commercial significance.

The defendants' counsel thus, submitted that, this District Registry of the High Court is expressly and impliedly barred to try the suit at issue in accordance with section 7 of the CPC read together with clause 14 of annexures mentioned above related to the loan facility letter between the parties. He thus, urged this court to strike out the suit.

A handwritten signature in blue ink, consisting of a large, stylized 'X' shape with a horizontal loop on the left side.

I have considered the record, the arguments by the parties and the law. The issue to be determined here is this: whether or not this court, being a District Registry of the High Court has jurisdiction to entertain the suit at hand. In my view, the circumstances of the case call for a negative answer to the issue on the following grounds: in the first place, the establishment of High Court registries and its Divisions was aimed at speeding up the adjudication of cases before the High Court and providing for an effective management of such cases. I underscored this view in the case of **Mohamed s/o Abdalla v. Republic, DC) Criminal Appeal No. 25 of 2014, HCT, at Tabora** (unreported order dated 06/04/2015) in which I observed thus, and I quote the pertinent paragraph for ease of reference:

"It is thus my view that, registries of the High Court were established for the sake of convenient and speedy administration of justice by the High Court, which includes taking its services nearer to justice seekers. This spirit is conspicuous under rule 7 (1) – (4) which permits, for good reasons of convenience, matters filed in the Main Registry in Dar es salaam to be transmitted to District Registries, or matters that should have been filed in the District Registries to be filed in the Main Registry or matters filed in one District Registry to be transferred to another District Registry."

The argument by the plaintiff's counsel that the Commercial Division of the High Court can try any case which is not of a commercial nature is thus, legally weak.

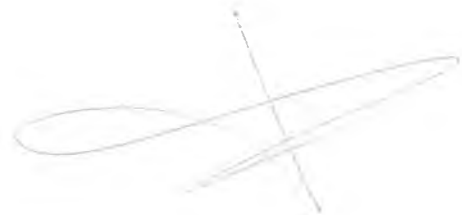
Furthermore, it is a legal duty of courts to respect and enforce what the parties had agreed in a contract. A court is duty bound to interpret the agreement accordingly: see the **Registered Trustees case** (supra). In the matter at hand, it is not disputed that the parties themselves agreed to resolve their disputes before the Commercial Division of this court. This

registry of the High Court cannot thus, entertain their disputes. Otherwise, their agreement will be rendered nugatory. I thus, agree with the respondents' counsel that, this position is supported by section 7(1) of the CPC as underscored by the CAT in the **Sunshine case** (supra).

The CAT also underscored the need for courts of this land to respect agreements by the parties which do not offend the law or public policy. It observed in the case of **Ibrahim Said Msabaha vs. Lutter Symphorian Nelson and the Attorney General, Civil Appeal No.4 of 1997, Court of Appeal of Tanzania, at Dar es Salaam** (unreported) that, parties in civil proceedings are at liberty to compromise their rights, and courts are enjoined to respect their settlements as long as they do not offend any law or public interest/policy. I do not hold a view that the agreement by the parties in the present matter to subject their disputes before the Commercial Division only, in exclusion of other courts, was against the law or any public policy as long as it has the requisite jurisdiction to entertain their disputes according to the laws of this land. In fact, parties to contracts are at liberty to chose a forum for resolving their disputes in civil matters. They cannot only do so as far as criminal matters are concerned.

It follows thus, that, since in the matter at hand, parties agreed to compromise their rights by abstaining from subjecting themselves before any other court for resolving their disputes except before the Commercial Division of this court, this court, must honour that particular term of their agreement.

Moreover, it is the duty of parties to contract, under section 37(1) of the Law of Contract Act, Cap. 345 R.E 2019 to honour the terms of their

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal stroke and a vertical line crossing it.

agreement. The provisions guide thus: the parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law. This means that, the plaintiff in the suit under consideration was duty bound to perform his part in the contract, which includes the institution of the suit in the Commercial Division of the High Court.

Owing to the above reasons, I agree with the learned counsel for the respondents that, the precedents cited by the learned counsel for the plaintiff are distinguishable from the suit at hand. The choice by the parties in this suit for the forum of resolving their disputes did not thus, amount to any ousting of the jurisdiction of this court.

I therefore, answer the issue posed above negatively that, this court, being a District Registry of the High Court has no jurisdiction to entertain the suit at hand. The PO therefore, has merits and I sustain it. I consequently strike out the suit with costs. It is so ordered.

JHK. UTAMWA

JUDGE

09/07/2021

Date: 12.07.2021

Coram: Hon. P.R. Kahyoza – DR.

Plaintiff: Present

For the Plaintiff:

1st Defendant: Absent.


2nd Defendant: Absent.

3rd Defendant: Mr. Lwitiko (Employee)

For the Defendants:

B/C: Patrick Nundwe.

Court: Ruling delivered.



P.R. Kahyoza
Deputy Registrar
12/07/2021