

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL APPEAL NO. 5 OF 2021**

**NORBETH MALIHELA GINGA ..... APPELLANT**

**VERSUS**

**CRDB BANK PLC ..... DEFENDANT**

**JUDGEMENT**

*27/10/2021, 10/12/2021*

**MWENEMPAZI, J**

The appellant is aggrieved by the decision of the District Court of Moshi (Hon. N.E. MWERINDE – SRM) delivered on the 18<sup>th</sup> February, 2021 whereby the court struck out a suit with cost on the reasons that the trial court has no jurisdiction. He has filed this appeal to challenge the said decision relying on three grounds of appeal as follows:

1. That the trial Magistrate erred both in law and fact by striking out the suit, Civil Case No. 12 of 2020 with cost after declaring that the trial court had no jurisdiction to entertain the matter.
2. That the trial Magistrate erred both in law and fact by holding that the trial court had no jurisdiction while the plaint and reliefs sought therein had both civil and land claims.

3. That, the trial Magistrate erred both in law and fact by concluding that what was in dispute is whether a house which the plaintiff put as a security at CRDB Bank is a matrimonial house.

In the trial court the appellant filed a plaint against the respondent herein stating that way back in 2014 he borrowed from the respondent Tshs. 40,000,000/= (Forty Million only) and in 2016 he borrowed Tshs. 30,000,000/= (Shillings thirty million only). The moneys were borrowed for agricultural purposes as the appellant intended to cultivate barley. The appellant however, could not service the loan due to bad weather condition. The plaintiff pledged his house as security. Unfortunately the plaint has no description of the said house. Due to default in servicing the loan, the respondent was in the process of enforcing the payment of the loan; she showed an intention to sell the mortgaged house. By virtue of paragraph 13 of the plaint it is averred that at the time the amount owed to the bank (the respondent) was Tshs. 29,478,116.67. That is according to the letter written by the defendant to the plaintiff.

The appellant in the plaint is disputing enforcement of the payment of the loan by selling the house pledged as a security. He is suggestive of the measures to be taken against the guarantor so that she pays the said loan. The defendant raised a preliminary objection that the court has no jurisdiction entertain the suit against the defendant (the respondent). The trial court, upon consideration of the grounds for and against the objection by the parties, made a decision to strike out the suit with costs. That is, the raised preliminary objection was sustained. The appellant has appealed against the decision on three grounds as will be considered hereunder.

In the first ground of appeal, the appellant is challenging the order for cost issued by the court where the court has made a finding that it has no jurisdiction. In the opinion of the appellant, the trial magistrate erred both in law and in fact by striking out the suit with cost after declaring that the trial court had no jurisdiction to entertain the matter. He has submitted that it is a principle of law that the court without jurisdiction has no power to make any decision let alone granting cost. In supporting his argument, the appellant has cited the case of **Awiniei Mtui and 3 others Versus Stanley Elpliate Kimombo, Misc. Civil Application No. 34 of 2014, High Court of Tanzania at Arusha**, where the court dismissed the application with no order as to costs. He concluded that one cannot strike out the case with cost after declaring that the court has no jurisdiction.

On the point the respondent has replied that the power to issue costs of the case is a discretionary power. Section 30 of Civil Procedure Code, Cap 33 R.E. 2019 provides that:

*" Subject to such conditions and limitations as may be prescribed and to the provisions of any law from time to time being in force, the costs of and incidental to all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary discretions for the purposes aforesaid, and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers".*

The court can and has power to issue an order for costs; as the fact that *"the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers"*

In rejoinder the appellant has argued that by presenting the plaint to the court and the same being received, the court and the plaintiff contributed to the error. He has cited the case of **Mount Meru Flowers Tanzania LTD Vs. Box Board Tanzania Limited, Civil Appeal No. 260 of 2018, CAT (Arusha)** (Unreported).

*"We think the principle that parties should not be punished for errors committed by the Court".*

I have understood the appellant that because the plaint was admitted then the court has participated in commission of an error.

On another front, the counsel for the appellant has submitted that it was wrong to strike out the case. The court was supposed to dismiss the case.

I think the submissions made by the counsel is an attempt to escape or exonerate himself from responsibility. Under normal and procedural circumstances, parties in this case entered into relationship through a contract. It was held in the case of **General Tyres East Africa LTD vs. HSBC Bank PLC, Misc. Civil Application No. 35 of 2005, High court of Tanzania at Arusha, ([ 2006] TLR 60)** THAT:

*"Banks/lenders and their customers/borrowers must fulfil and enforce their respective contractual obligations under various lending/ securities agreements entered into by the parties..."*

I have a view that since the appellant had a loan and mortgage agreement with the respondent, he ought to have filed any dispute concerning the landed property in question in the tribunal clothed with the jurisdiction to adjudicate land disputes. In striking out of the suit, the trial court exercised its jurisdiction to allow the appellant to file a suit in a proper forum and the appellant ought to have known that. Cost awarded therefore is intended to allow the respondent recover her costs which she has incurred as a result of the choices made by the plaintiff (the appellant herein). I therefore dismiss the ground of appeal.

In the second ground of appeal the appellant is complaining that it was an error to hold that the trial court has no Jurisdiction while the plaint and reliefs sought therein had both civil and land claims.

The appellant has argued that in order to determine whether the court has Jurisdiction one has to go to the plaint. The trial court satisfied itself on the Jurisdiction when it admitted the plaint. The loan which was taken is Tshs. 70,000,000/= (Seventy million only) which is within the pecuniary Jurisdiction of the court.

The security is a matrimonial house which in the opinion of the appellant, it cannot be taken to be the source of dispute. He wants this court to resolve the conflict because they filed in the District Land and Housing Tribunal and the suit was dismissed for the reasons it was a case to do with bank loans. The civil court has also dismissed the suit for lack of Jurisdiction. He has proposed a way forward by inviting this court to resolve and if possible, allow the litigant to choose as per the **National Bank of commerce Limited**

**Versus National Chicks Cooperation Limited and 4 others, Civil Appeal No. 129 of 2015 CAT (Dares salaam).**

The Respondent has submitted that the trial magistrate in coming out with her decision was guided by the principles of law by looking at the reliefs claimed whereby the suit itself was founded on land.

The appellant went to court to resume his property which was pledged as security of the loan (mortgaged) and due to default, it was about to be sold by way of public auction. The cause of action for the appellant's case in the trial court was based on land matter not civil nature as claimed by appellant. The Respondent counsel has therefore cited section 167(1) of the Land Act and section 4 of the Land Dispute Court Act, Cap 216 and argued that the dispute was supposed to be filed in the Land Court and not Civil Court as argued.

I don't think this matter has to detain me given the submissions and the pleadings in the trial court. Given the fact the appellant had mortgaged the dispute property in order to secure loan and that he is seeking for orders to restrain the respondent and her agents from selling the property by public auction; obviously the matter concerns land. I have read the record of the trial court and found the appellant, plaintiff in the trial court did not describe properly the property, I believe, to do away with the fact that the dispute is over the landed property. This is in other words enforcement of terms of the mortgage and the appellant cannot derail this court in order that the dispute is understood otherwise.

Under the circumstances I find the dispute was not civil but land matter. I dismiss the ground of appeal.

On the third ground the appellant has complained that the magistrate erred both in law and fact by concluding that what was in dispute is whether a house which the plaintiff has pledged as security to the respondent Bank is a matrimonial house.

The appellant has submitted that he took the loan and pledged his matrimonial house as a security. It is not therefore correct to say that what was in dispute is whether the house is a matrimonial house or not.

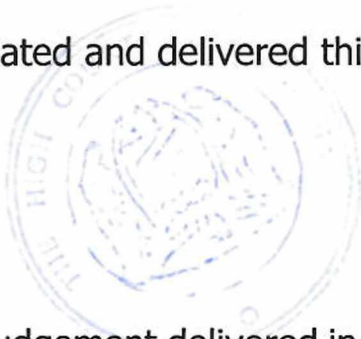
The Respondent has argued that the ground has no Justifiable reasons to convince the court to allow this appeal. In fact, he admits to have taken the loan and he has failed to pay. He just sued to seek assistance of the court to rescue his property.

I could not find the reasons behind the third ground of appeal because section 114 of the **Land Act, Cap 113 RE 2019** is very clear on the mortgage of the matrimonial house/home. According to the provisions the mortgage to be valid there must be evidence that the mortgage is assented to by the mortgagor and the spouse or spouses of the mortgagor living in that house. It is the responsibility of the mortgagor to disclosed that he has a spouse or not and upon disclosure he shall be under responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.

The ground raised by the appellant has no legs without first providing necessary evidence as required by the provisions cited herein above. I therefore dismiss the ground as well.

For the reasons stated herein above the appeal is dismissed with costs for want of merit. It is ordered accordingly.

Dated and delivered this 10<sup>th</sup> day of December, 2021.



  
**T.M. MWENEMPAZI**  
**JUDGE**

Judgement delivered in court this 10<sup>th</sup> day of December, 2021 in the presence of the appellant and Elias Shio, Relationship officer of the Respondent.

  
**T.M. MWENEMPAZI**  
**JUDGE**