

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO
CIVIL APPEAL NO. 11/03 OF 2021

(Arising from Civil Case No. 03 of 2020 in the District Court of Kilombero at Ifakara)

TPB BANK PLC..... 1ST APPELLANT
NUTMEG AUCTIONEER AND PROPERTY
MANAGER CO. LTD.....2ND APPELLANT
YAHYA ALLY NGUZO3RD APPELLANT
PROPERTY INTERNATIONAL AUCTIONEER AND
COURT BROKER4TH APPELLANT

VERSUS

KASSIM ALLY CHUMARESPONDENT

JUDGEMENT

Last Court Order on: 11/8/2022

Judgement date on: 26/8/2022

NGWEMBE, J:

This judgement arises from a consolidated appeal of civil appeal No. 11 of 2022 and Civil Appeal No. 3 of 2022 whereby both appeals arose from the trial court's judgement of Kilombero District Court. The genesis of these appeals, according to the trial court's records is a loan agreement entered between TPB Bank PLC (Bank) and Kassim Ally Chuma. It is



evident that on 26th July, 2017, the two entered into a loan transaction involving a total sum of TZS. 15 million shillings. Such loan was payable within 24 months in monthly instalment of TZS. 912,500/=. Among the conditions for the loan was deposit of collateral, which was a house located at street of Mhola – Viwanja sitini, in Kilombero District within Morogoro region together with his business of coconuts.

In the cause of business, the respondent herein/loanee religiously complied with repayment of that loan up to May, 2018. Misfortunes landed to the respondent, which ended up failing to honor his promise to repay such loan from June, 2018 until when the 1st Appellant reluctantly decided to realize its money by selling the respondent's collateral, to wit house through public auction.

The ordeal arose during and after sale of that collateral, thus when the respondent went to court forcefully, challenging both the bank, auctioneers and the purchaser. His main concern was breach of the contract by the Bank, the auction of his house and payment of general damages.

Upon closure of pleadings, parties agreed on three disputable issues for determination to wit; whether the 1st defendant has breached the contract; whether the auction of the security property was legal; whether the disposition of the plaintiff's property by the 1st and 2nd defendant to the 3rd defendant was illegal; and what reliefs are parties entitled to. In determining those issues, the plaintiff lined four (4) witnesses with several exhibits, equally, the defendants were armed with four witnesses accompanied with several exhibits.



Upon hearing all parties, the trial court was left with the statutory duty to determine the suit according to the adduced evidences, applicable laws, precedents and the prevailing circumstances. At last, the trial court held both the plaintiff and the Bank breached their loan agreement, hence nullified the auction, and ordered the two principal disputants to seat, negotiate and agree on the amount of monthly instalment payable by the respondent herein. Such holding triggered this appeal because the defendants were offended with that judgement, hence each one came in this court forcefully, armed with several grievances. The Bank and Nutmeg Auctioneers and Properties managers co. Ltd jointly filed an appeal grounded with six (6) grievances, while Yahaya Ally Nguzo appellants and Property International Auctioneer and Court Brokers filed another appeal grounded three (3) grievances. However, in the cause of this appeal, the two appeals were consolidated having nine (9) grounds of appeal.

In the consolidated appeal, each party was represented by learned advocate, while the first two appellants were represented by advocate Meiseyeki Msangi, the 3rd and 4th appellants were represented by advocate Michael Chami, the respondent was represented by Josephine Mbeni. At the end and jointly the learned advocates successfully asked this court to address on those grounds of appeal by way of written submission. Both sides have successfully complied with the scheduling order of filling their written arguments.

Briefly, the appellants jointly filed their written arguments by abandoning four grounds and proceeded to argue only three grounds namely:-



1. The trial court erred in law by adjudicating the land matter without jurisdiction;
2. The trial court erred in law and fact by stating that the public auction was illegal; and
3. The trial court erred in law and in fact by interfering the loan agreement entered between the 1st appellant and the respondent by ordering the appellant to make new repayment schedule.

In brief and without losing sight, the counsels for the appellants forcefully argued the 1st ground on jurisdiction of the trial court in respect to landed properties by citing sections 3 & 4 of the Land and disputes Court Act Cap 216 R.E. 2019. That all land matters are under the jurisdiction of District Land and Housing Tribunal or the High Court of Tanzania. Also cited section 167 (1) of the Land Act Cap 113 R.E 2018 which provide exclusive jurisdiction over land disputes settlement. Finally referred this court to the case of **Fanuel Mantriri Ng'unda Vs. Herman Mantiri Ng'unda [1975] T.L.R 155.** Concluded on this point by insisting that the court with exclusive jurisdiction was the District Land and Housing Tribunal because the whole matter was centered on public auction of the landed properties, thus the district court of Kilombero had no jurisdiction over the matter.

In turn the learned advocate for the respondent conclusively adjudged the ground as meaningless and wastage of time for lack of merits. That the trial court had jurisdiction because the whole matter arose from contract not land ownership. Proceeded to bless the trial court's decision in this point that it had jurisdiction as it did.



On the second ground in respect to legality or otherwise of the public auction. The learned advocate for the appellant stood firm that the auction of the collateral was procedural and rightly so conducted. Referred on the advertisement made at Habari Leo newspapers of 28th June, 2019. Thus, even uneducated person would read and understand where the house was located and when was auctioned. Added that there is only one Ifakara in Tanzania and the advertisement elaborated clearly on where the said house was located. Justified their argument by referring to the purchaser Yahya Ally Nguzo who testified that, he became aware after reading the advertisement after reading from Habari Leo newspaper. Likewise, the respondent had enough information and time to redeem the mortgaged property by paying the outstanding amount.

In response therein, advocate Josephine Mbena stand firm with the trial court that, the auction was illegal, that there was a sense of collusion with intent to jeopardize the interest of the respondent herein. Added that parties to the loan agreement agreed on new terms and conditions of instalment settlement of the remaining amount of money. Having so agreed, the Bank illegally, proceeded to auction the collateral despite the new terms and conditions of repayments of balance. To justify her argument, referred this court to the contradictory evidences adduced by the appellants herein during trial. That everyone had a different story on the vehicle used to advertise the alleged auction. While the Bank manager alleged, they used a bank car, the loan officer alleged to use his friend's car and the auctioneer alleged to use another vehicle. Hence concluded that the whole process was clouded by illegality and collusion.



Arguing on the last ground on error committed by the trial court in interfering with the parties' loan agreement. To buttress their argument, they referred this court to the case of **Nhombe Mbulangwa Vs. Chibayape [1967] HCD 378** that courts do not make agreements for parties, but enforce agreements which they have made. Proceeded to argue that the trial court erred in ordering the Bank to reschedule the loan repayments so that the respondent may pay the remaining debt.

Added by rightly suggesting the expected court order when found the auction was unprocedural the court ought to use section 12 (3) of the Auctioneer Act Cap 227 R.E. 2019 to nullify the auction and order compliance of law in auctioning the suit property. Buttressed this argument by referring this court to the case of **Judith Athuman Shan Vs. National Microfinance Bank PLC & Another, Land Appeal No. 5 of 2021, (H.C – Land Division)**.

In turn, the learned advocate for the respondent contradicted all arguments of the appellants in this ground by raising two convincing reasons, one the issues emanating from loan agreement can never be separated simply because it involves house so as landed property contrary to the loan agreement. Added that, parties have loan agreement and the oral agreement supplemented their written agreement. Thus, supported the trial court's reasoning and the conclusive order to agree on mode of payment of the remaining debt.

Conclude by insisting that the auction was illegal and that the respondent is ready to settle the outstanding debt as he already paid TZS. 200,000/=. Therefore, invited this appeal be dismissed.



Considering the rival arguments of learned advocates in this appeal, I was compelled to revisit and review several times the proceedings of the trial court. Consciously, the central area of concern are two issues, that is, whether there was a loan agreement, which the respondent breached? Upon breach of the loan agreement whether there was a subsequent oral agreement, which rescheduled the mode of repayment of the remaining amount of loan? Finally, whether the trial court committed an error in so deciding on the dispute?

Before answering these issues, let me highlight on matters which are not disputed by either party. First, the Bank and respondent executed a loan agreement of TZS. 15 million shillings. The contract was reduced into writing dated 26/7/2017. All necessary documentations were rightly prepared and signed by the disputants. The respondent was responsible to refund the Bank loaned money with interest of 21%.

The period of that loan agreement was 24 months commencing from the date of contract 26/7/2017, payable on monthly instalments of TZS. 912,500/=.

However, it is evident that, the respondent complied with the loan agreement for some months, but remained unpaid a total sum of TZS. 7,888, 580/ as per 30th January, 2019, constituting default on repayment of 11 instalments. Thereafter, feuds and tensions erupted between the Bank and the respondent, which ended up into attachment of the collateral (House) and auctioned it publicly. Thus, yielded struggles in the corridors of courts to date.

Another important point to note is the fact that, the respondent does not dispute to have failed to honour the terms and conditions of the loan



agreement, rather through the records I have noted that he requested the Bank to reschedule the repayment of the remaining amount of TZS. 7,888, 580/, but it seems the bank turned down that request.

Having those undisputed facts in mind, now is the consideration of grounds of appeal as rightly argued by learned counsels. The first issue is on jurisdiction of the trial court. The legal point regarding jurisdiction of the court is well developed and is settled in our jurisdiction. According to the trial court's records, this point was raised by the appellants' herein that the trial court lacked jurisdiction to entertain the suit under section 167 (1) of the Land Act Cap 113 R.E. 2019. That the tribunal seized with jurisdiction over that suit was the District Land and Housing Tribunal. However, at the end of hearing of that objection, the trial magistrate found the court had jurisdiction because the source of dispute is not land but is breach of contract. Therefore, the objection was overruled.

The same point is raised herein, as one of the grounds of appeal. Fundamentally, jurisdiction is a mother and father of the court or tribunal's mandate to admit and determine any dispute before it. Every legal terminology has been used to insist on the need of jurisdiction of the court/tribunal. Whatever decision is made by either court or tribunal without jurisdiction is equal to no decision. The superior court either on revision or appeal will definitely nullify it.

The essentials of court's jurisdiction were emphasized by the Court of Appeal in the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda & Others [1995] TLR 155(CAT)** held: -



"The question of jurisdiction of any Court is basic, it goes to the very root of the Court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts must as matter of practice on the face of it, be certain and assured of their jurisdictional position at the commencement of the trial. (p.159)."

In similar emphasis was made in the case of **Shyam Thanki & Others Vs. New Palace Hotel Ltd (1972) HCD No. 20 at p 23** the defunct East African Court of Appeal stressed that, all courts in Tanzania are creatures of statute and their jurisdiction is purely statutory.

As rightly stated in those old precedents, I would insist that the question of jurisdiction is sacrosanct that no decision will stand if the court lacked jurisdiction. In respect to this application, I have no slight doubt that the trial court was seized with appropriate jurisdiction to try the dispute herein and decide accordingly. The whole matter before the trial court was never related to land rather was purely contractual.

Maybe I need to expound a little bit on this point. Advocates should always bear in mind that, there is no clear separation between loan agreement and landed properties. Always, Bank loan, touches in anyhow, landed properties, but does not mean the contract is purely land. Rather land is touched as collateral to the loan. Raising this point on appeal is more or less wastage of time. Accordingly, I proceed to uphold the decision of the trial court on this point that it was seized with jurisdiction to entertain the dispute as it did.

The second point is on the contract itself and the alleged substituted oral agreement as pleaded by the respondent. In this point, the law is



settled that, once parties agree on a certain issue and that agreement is reduced into a writing, such document must stand as a true intention of the parties. This position is supported by section 100 of the **Evidence Act Cap 6 R.E. 2019**, as quoted hereunder to print out clear meaning of the law:-

"When the term of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provision of this Act"

This section is *in pari material* with Indian Code of Evidence, whereby **Sarkar on Evidence 15th Edition at page 1269** amplified by giving breath therein as follows:-

"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".



Applying this principle, the Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** proceeded to emphasize that: -

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute"

In similar vein, the Court of Appeal repeated in **Civil Appeal No. 22 of 2017 between Miriam E. Maro Vs. Bank of Tanzania**. I fully subscribe to that guidance of the Court of Appeal. Therefore, the privity to the loan agreement were the respondent and the Bank, which contract was reduced into writing. Whatever amendments to the written contract must equally be in writing called addendum forming part and parcel of the main contract. Principally, a written contract cannot be substituted or corrected by an oral contract. Even if the parties agreed to reschedule the amount and time of refund, such agreement or addendum ought to be reduced into writing forming part of the main contract. Failure to do so, same cannot be accepted in law.

It is undisputed fact that, the respondent had his rights and duties, thus, it is a trite principle of law of contract that, each party to a contract must fulfil certain obligations, otherwise will amount into an outright breach of contract. Section 37 (1) of the **Law of Contract Act, CAP**



345 insist that parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of the law. Since there is clear evidence that the respondent did not pay the remaining loan amount, indeed and without any slight doubt the respondent breached the terms of the loan agreement.

The question is whether the Bank defaulted to exercise its right over the mortgaged property? In the cases of **Joseph Kahungwa Vs. Agriculture Input Trust Fund, Civil Appeal No. 373 of 2019 (CAT)**, and **NBC Vs. Dar es Salaam Education and Office Stationery [1995] T.L.R 272**, the court deeply considered on the rights of the mortgagee when exercising the sale of mortgaged properties. At the end held that where a mortgagee is exercising its power of sale under a mortgage deed the court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property. This position was likewise repeated in the case of **Juma Jafa Juma Vs. Manager of Peoples Bank of Zanzibar [2004] TLR 332**.

I find difficult to agree with the respondent that the sale of the mortgaged property was clothed with collusion. Such collusion is not forth coming neither in the trial court's proceedings nor in the counsels' written arguments. As such, I am satisfied that the sale of the mortgaged property complied with all legal requirements and the trial court misdirected in interfering with the parties' terms and conditions of contract. The duty of this court is to enforce the contract agreed by the contracting parties not otherwise. In the case of **Nhombe Mbulangwa Vs. Chibaya Mbuyape (1967) HCD 378** the Court elaborated this principle exhaustively: -