

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.147 OF 2022

(Arising from the Ruling and Order in Civil Case No.122 of 2022

Kinondoni District Court, dated 16th September, 2022, Hon. K.C.

Mshongo, RM)

ALOYS RUGAZIA (T/A AFRIFA

LEGAL CONSULTANTS)APPELLANT

VERSUS

SHENAZ ISMAIL NORAY.....RESPONDENT

JUDGMENT

Date of last Order: 9/11/2022

Date of Judgment: 29/11/2022

The Appellant is aggrieved with the decision of the trial court which dismissed his suit on 16th September, 2022 henceforth filed this appeal containing four grounds of appeal, namely: -



1. *The trial learned magistrate erred in law and fact by striking out the instant case against the obvious provisions of the Arbitration Act*
2. *That the learned Magistrate erred in law and in fact by arriving into a conclusion that is inconsistent with his decision*
3. *That, the learned trial magistrate erred in law and in fact by ruling out that it had no jurisdiction to entertain the instant case*
4. *That, the trial Magistrate erred in law and fact by entertaining a preliminary objection that is different from what was raised in the notice of Preliminary Objection*

On 9th November, 2022 when the appeal came for hearing the Appellant appeared in person unrepresented while the Respondent enjoyed the legal service of Mr. Leonard Masatu, the learned counsel.


In arguing the appeal, the appellant submitted first on ground of appeal No.4 followed by grounds No.1 & 2 of appeal and lastly was ground of appeal No.3

Submitting in support of the fourth ground of appeal, the appellant argued that the notice of preliminary objection as stood filed by the Respondent before the trial court was that **the court had no jurisdiction**

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to entertain the suit wherefor the honourable tribunal shall be asked to dismiss the application with costs for being time barred.

That he was taken by surprise because what was argued and determined by the trial court is not what was before it thus in contravention of **Order VII Rule 2 of the Civil Procedure Code, [Cap 33 R.E.2019] (The CPC)**. The decision of this court in **John Mjema Vs Shamsa Salim, Land Revision No.30 of 2009 HC (Land Division) at Dar es Salaam (unreported)** at page 7 was referred to. That, the appellant's right to be heard in full sense was curtailed and to this the decision of **Astepro Investment Co. Ltd Vs Jawinga Company Limited, Civil Appeal No.8 of 2015 CAT at Dar es Salaam (unreported)** pp.17 – 17 was cited to this court. Again, he cited the decision of this court in **Car Track Distributors Ltd Vs MKB Security Company Ltd, Misc. Land Application No.567 of 2021 HC at Dar es Salaam (Unreported)** at page 2 in which it was stated that parties are bound by their own pleadings thus argued that the respondent was bound by his own preliminary objection. The appellant then asked the court to allow this ground of appeal.



The Appellant combined grounds of appeal No.1 and 2 in his submission. Arguing the grounds, the appellant submitted that since the learned trial magistrate concluded that there was a valid arbitration clause in the contract under dispute then he was supposed to be guided by **sections 12&13 together with section 4(a) both of the Arbitration Act, 2020** by staying the proceedings and refer the dispute for arbitration. That, doing otherwise was against the dictate of section 13(1) of the Arbitration Act. That, the Respondent should have applied the matter be stayed and referred for arbitration and not to raise it as an objection which is exploiting technicalities. To this, the case of **Peter Leina Assenga Vs National Housing Corporation and Another, Land Case No. 76 of 2019 High Court (Land Division) at Dar es Salaam (Unreported) p.6** was referred. That, in that decision this court interpreted section 6 of the repealed Arbitration Ordinance the section which is in *pari-materia* to section 13 of the current Arbitration Act. Also, the case of **Honda Motors Japan and Another Vs Quality Motors Ltd, Misc. Commercial Case No.25 of 2019 High (Court Commercial Division) at Dar es Salaam (Unreported) pp.9-10** was referred to. The two cited cases, according to

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the appellant submission, mandate the court to refer the matter for arbitration when arbitration clause exist in the agreement under dispute.

The Appellant submitted further that his intention of filing the suit before the trial court was to cause the respondent to co-operate in referring the matter to the arbitration as captured in his paragraph 9 of the plaint. That, courts vested with jurisdiction to facilitate the arbitration process are defined under **section 4 (a) of the Arbitration Act, 2020** in which the named courts are the District Court, the Resident Magistrate's Court and High Court. The District Land and Housing Tribunal is not among the courts mentioned a reason for him to file in the District Court. He concluded by arguing that the Arbitration Act requires the pleadings to be filed in court before an application to refer the matter for arbitration is made. To him, it was proper to file a plaint before the trial court and thereby ask the court's assistance to refer the matter for arbitration.

Concluding on these two grounds of appeal, he submitted that the respondent's preliminary objection entertained by the trial court, erroneous so, pre-empted a fruitful move to seek its assistance to refer the matter for arbitration and argued that it was against **sections 12 & 13 of the**

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Arbitration Act, 2020 read together with Order VIII Rule 24 and 35 of the CPC as amended by GN No.381 of 2019

As to the last ground of appeal, which is ground No.3 of appeal in his filed memorandum of appeal, the appellant submitted that not all land related cases are exclusively to be determined by land courts, this suit in particular. He argued that his claim was not of land interest or possessory right as held by the trial court in the impugned decision, paragraph 2 of page 2 in particular. That his claim was limited to that of damages caused against his business and expenses incurred out of the Respondent's notice of intention to terminate and not to renew the agreement. That such claim does not amount to interest in land. He cited for reference the case of **Anderson Chale Vs Abubakari Sakapara, Civil Appeal No.121 of 2004 CAT at Dar es Salaam (Unreported)** at page 18 last paragraph. To him this caselaw reflect **section 107 of the Land Act [Cap 113 R.E.2019]** in that the issue of termination of lease, one may seek relief from the district court and section 108 of the Act lists the reliefs the court may grant, and to him that is exactly what he did by filing his suit in the district court. The decision of this court in **Charles Rick Mulaki Vs William Jackson Mageru, Civil Appeal No.36 of 2021 High Court at**

Mwanza (Unreported) at pp.11 – 12 was referred to. That the facts in this decision are similar to his dismissed suit before the trial court.

Having so submitted the appellant prayed the court to allow his appeal by quashing and setting aside the trial court decision and his suit be restored.

Responding to the Appellant's submission advanced in support of the grounds of appeal the counsel for the Respondent submitted as follows: -

As to the appellant's ground No.4 of appeal to which the Appellant started his submission, Mr. Leonard, the learned advocate for the Respondent argued that despite those discrepancies in the notice of preliminary objection, the Appellant was afforded the right to be heard before the trial court arrived to the impugned decision and what was argued is the issue of jurisdiction of the court. He prayed the ground be dismissed

As to the 1st and 2nd grounds of appeal, Mr. Leonard submitted that in the impugned trial court decision there is nowhere the Arbitration Act is mentioned. The issue that was before it was that of whether it had jurisdiction to entertain the Appellant's suit and both parties were given the



right to be heard before determining the said jurisdiction issue. That, the jurisdiction was on two issues, the suit to be arising out of lease agreement and the basis of claim in the said suit was that of possessory right hence it was land dispute determinable by land courts established under **section 167(1) and (2) of the Land Act [Cap 113 of 2019]** read together with **section 3(1) of the Land Disputes Court Act, [Cap 216 R.E. 2019]** which provides for the right forum to refer land disputes.

The learned counsel arguing further on the cited section 12; 13 and 4(a) of the Arbitration Act, 2020 submitted that the trial court did not base its decision on those provisions of the law when it struck out the appellant's suit, therefore they are irrelevant here. Mr. Leonard added that the duty to refer the matter to arbitration is not of the court but the expression of willingness by the parties. He then referred this court to the case of **Dominion Oil and Gas Ltd Vs Logistics (T) Ltd, Civil Appeal No.132 of 2008 CAT at DSM (Unreported)** at p. 15 in which it was held that willingness to go for arbitration must be justified by the parties. That since the willingness was not justified by the appellant then the trial court had no duty to stay the proceedings to refer the matter for arbitration. That, the cited case of **Peter Leina (supra)** at pp.9 – 10 in which it was stated the

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parties have to exhaust what is contained in the arbitration clause are the steps which the trial court did in striking out the appellant's suit. No proof that the appellant wanted the matter to be referred for arbitration per the guideline in **Domision Case (supra)**. He rested his argument that the trial court can not be faulted for striking out the appellant's suit.

As to the last ground of appeal, which is ground No.3 in the filed grounds of appeal, Mr. Leonard reiterated that the issue of the appellant's suit being land dispute and existence of arbitration clause existed adding that it is trite law that jurisdiction issue can be raised at any time. That, out of the facts pleaded by the Appellant in his plaint the two issues existed. Mr. Laurent then cited to this court the case of **Sharaji Vs Treasurer Registrar, Ministry of Finance [2005] 1 EA 273** referred at page 10 in **Honda Motors Japan and Another Vs Quality Motors Ltd, Misc. Commercial Cause No. 25 of 2029 High Court (Commercial Division) at Dar es Salaam (unreported)**

In the end, the counsel for the respondent prayed to the court the appellant's appeal be dismissed for want of merit

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Having heard the rival submissions for and against the appeal and having critically gone through the grounds of appeal together with the trial court records it is now my time to determine the appeal. I will determine the grounds of appeal in the manner the appellant argued them beginning with the fourth ground.

The said fourth ground of appeal reads thus: ***"That, the trial Magistrate erred in law and fact by entertaining a preliminary objection that is different from what was raised in the notice of Preliminary Objection"***.

Under this ground of appeal, it is the appellant's submission that he was denied the right to be heard in that the notice of preliminary objection filed in court was different from what was argued and decided by the trial court.

I have gone through the trial court record. According to the record, this ground of appeal is on an issue which was never raised and canvassed before it when the objection leading to the striking out of the Appellant's suit was being heard. Under the circumstances, there is no gainsaying that it disqualifies to be ground of an appeal which could be raised before this court. In my view, appealing simply means challenging in a higher court what was decided by the lower court on a particular findings by the said lower court on which a party is aggrieved with. Such a findings to which a

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party is aggrieved with is what can constitute the ground of appeal. As the purported ground of appeal speaks by itself, it is a ground the purpose of which is to find out whether the raised preliminary objection should be argued or not. Should it have been raised before the trial court then its outcome could have been a fit ground of appeal to test whether such findings is worthwhile or not. In **Remigious Muganga Vs Barrick Bulyanhulu Gold Mine, Civil Appeal No.47 of 2017 CAT at Mwanza (Unreported)** at page 13 the Court of Appeal of Tanzania had this to state: -

*"It is a settled principle that a matter **which did not arise in the lower court cannot** be entertained by this Court on appeal. In the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported), for example, the Court stated as follows:*

***"It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal"**. End of quote*

The Court of appeal went on to conclude at page 13 thus: -

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*"On the basis of the foregoing reasons, there is no gainsaying that **the ground of appeal raises a new matter which cannot be entertained by the Court.**" End of quote*

Guided by the above decision of the Court of Appeal of Tanzania, I find this ground of appeal to be misconceived as it is on an issue which was not raised and determined by the lower court.

In my further considered view, the appellant's cited **Order VIII Rule 2 of the Civil Procedure Code [Cap,33 R.E.2019]** and the decision of the court of appeal in **Astepro Investment Co. Ltd Vs Jawinga Company Limited, Civil Appeal No.8 of 2015 CAT at Dar es Salaam (unreported)** and **Car truck Distributors Ltd Vs MKB Security Company Ltd, Misc. Land Application No. 567 of 2021 High Court (Commercial Division) at Dar es Salaam (Unreported)** are authorities cited out of misconceived ground of appeal as such they serves no any useful purpose

Henceforth, guided by the **Remigious Muganga** case (**supra**), I dismiss the fourth ground of appeal for want of merit



Coming to the 1st and 2nd grounds of appeal which were argued all together by the appellant. These two grounds are to the effect that ***"the trial learned magistrate erred in law and fact by striking out the instant case against the obvious provisions of the Arbitration Act"*** and ***"that the learned Magistrate erred in law and in fact by arriving into a conclusion that is inconsistent with his decision"***.

In resolving the combined two grounds of appeal, again I had to visit the trial court proceedings to find out with a view to find out what exactly transpired before it in respect of the herein appellant's concern on the issue of arbitration clause. This is what the Appellant herein submitted before the trial court (see page 6 of the typed trial court proceedings), of which for easy of reference I quote verbatim: -

"The 2nd limb that the matter was supposed to go for arbitration as I stated earlier this is a contradiction because on one side he says it was supposed to go to land courts and the other hand for arbitration. This is a guess

For arbitration to be binding must be clear

1st it has to state a particular forum that the arbitration should be subjected to

2nd to state how the Arbitrator should be appointed

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The clause here is vague and ambiguous, it does not state all these. It is termed as a bare clause the court is guided that, where there is a bare clause, the innocent has right to pursue his right to the court

So, the arbitration clause is not competent in terms of Arbitration how it proceeds. I refuse the cited cases since are all distinguishable they are bare clause". End of quote

From the above reproduced submission by the appellant he made before the trial court, it is obvious that his submission in the appeal herein speaks to the contrary to what he advanced before the trial court henceforth is again raising issues which were not canvassed by the trial court. I equally dismissed these two grounds of appeal in the manner I did in respect of the above 4th ground of appeal

The third ground of appeal, which is that ***"the learned trial magistrate erred in law and in fact by ruling out that it had no jurisdiction to entertain the instant case"***

The law of the land is categorically clear. Any dispute concerning lease agreement on a tenant and landlord relationship the proper forum for its adjudication is the Land Courts of which the District Court is not among. There is nothing advanced in the grounds of appeal by the appellant which

can move this court to interfere the findings of the trial court that it didn't have jurisdiction to entertain the appellant's suit. The findings by the trial court, which is from pp.4 – 5 of the typed judgment, describes the correct position of the law and explained where this dispute should have been channeled. The settled law is that any court of law cannot assume the jurisdiction it does not have. This position was so stated in **Shyam Thanki and Others v. New Palace Hotel** [1972] HCD n. 92 where it was held:

"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

Consequently, the Appellant's third ground of appeal is dismissed for being unmerited

In the upshot, the all the four grounds of appeal preferred by the appellant are all unmerited as such I dismissed the appeal in its entirety with costs

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 29th day of November, 2022



Musa K. Pomo

Judge

Judgment delivered on this 29th November, 2022 in presence of John Chongoro, advocate for the Appellant while for the Respondent Mr. Alexander Roudossakis, Advocate was present



Musa K. Pomo

Judge

29/11/2022