THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MBEYA DISTRICT REGISTRY)
AT MBEYA
LAND APPEAL NO. 28 OF 2021
(Originating from the District Land and Housing Tribunal for Kyela at Kyela Application No. 39 of 2019)

HUSSEIN LUTAMBIKA TOY.....APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....1ST RESPONDENT
NSOMBO AND COMPANY LIMITED.....2ND RESPONDENT

JUDGMENT

Dated: 26th January & 2nd March, 2022

KARAYEMAHA, J

The third ground in this appeal is that the chairman entertained the dispute without jurisdiction. The memorandum of the appeal has a total of three grounds of appeal. I shall, however, confine myself to the complaint concerning jurisdiction.

The appellant is represented by Ms. Jennifer Alex Biko learned advocate while the respondent enjoys the professional service of Mr. Isaya Mwanri, learned advocate. The appeal was disposed of by way of written submissions. Both parties dutifully complied with the schedule.

In the trial District Land and Housing Tribunal (herein the land tribunal) the appellant's prayer, among other things, was an order

compelling the 1st respondent to reply to the applicant's request for restructuring of repayment schedule of the loan.

Ms. Biko is now complaining that apart from knowing that the land tribunal had no jurisdiction, the same proceeded to determine the dispute instead of advising parties to file it in the proper forum. The learned counsel submitted further that the issue of jurisdiction was raised *suo motto* and parties were not invited to address the Tribunal on it. The learned counsel submitted quite vehemently that failure to invite parties to address the Tribunal amounts to infringing their natural right; to be heard. To buttress her position she referred this court to the case of ***Haji Mradi v Linda Sadiki Rupia***, Civil Appeal No. 24 of 2016 CAT – Mbeya (unreported).

In reply, Mr. Mwanri, submitted that in determining the issue of jurisdiction, the trial Chairman was answering the issue whether or not the land Tribunal had powers to compel parties to restructure the loan repayment schedule. The learned counsel argued further that the nature of the reliefs under paragraph 8 (a) of the application indicate that the appellant filed a contractual dispute in the Tribunal.

Sailing in the submissions by learned counsel, it is apparent that there is no dispute that the trial land tribunal was invited to deliberate on the issue whether it had jurisdiction or not.

I am compelled to state at the outset that with due respect to Ms. Biko, the issue of jurisdiction was raised by parties themselves not the land tribunal *suo motto*. Restating the stance of proceedings on record, it becomes apparent that before the commencement of the hearing of the application, it was agreed upon by parties and approved by the land Tribunal that the suit gave rise inter alia to issue whether the land Tribunal had powers to compel parties to restructure loan repayment schedule.

At the end of the trial the land tribunal found itself incompetent to give such orders because the matter was not a land dispute but a contractual one. In so doing, the trial Chairman was refusing to grant a relief sought under paragraph 8 (a) of the application which was to give order compelling the 1st respondent to reply to the applicant's request for restructuring of repayment schedule of the loan.

On my part I find sense in the land tribunal's decision on the reason that that the appellant and the 1st respondent had a contract which is *sacro sanct*. Mr. Mwanri's argued that the Tribunal or Court of law has a singular sacred duty to intervene in circumstances where there issues of enforcement of the contract or when it is invited to determine the validity of the contract. I am pretty sure that Mr. Mwanri is right. It is a trite law that parties to the contract can freely amend and or vary the terms of the

same without being interfered by the land tribunal or Court. This is what is meant by the principle of sanctity of the contract.

While it is a settled law that parties are bound by the agreements they freely entered into, the principle of sanctity of the contract is constantly reluctant to admit excuses for non-performance where there is no allegations of incapacity, no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting performance. In this position I am strengthened by the CAT decisions in ***Simon Kichele Chacha v Aveline M. Kilawe***, Civil Appeal No. 160 of 2018 (unreported) and ***Abualy Alibhai Azizi v Bhatia Brothers Ltd*** [2000] TLR 289.

Gaining inspiration from the above decisions, I am comfortable to state that the appellant must fulfil his contractual obligation to pay the loan as agreed and as he admits. Since the agreement in this case is a contractual agreement between the appellant and the respondent, the court is not allowed to interfere with the contractual obligation of the parties. I am guided by these words of wisdom which were stated in the case of ***General Tyre E.A. LTD v HSBC Bank PLC*** [2006] TRL 60. Also, in ***SME Impact CV & 2 others v Agroserve Company Ltd***, Civil Appeal

No. 9 of 2018 (unreported) the Court cautioned about the trend to use the court by defaulters to hide from their obligation to repay the loan.

These obvious and truthful factual pieces of evidence have increasingly attracted me observe that after a party has been in breach of the loan agreement and the other party being entitled to enforce the agreement, the party in breach cannot be entitled to extension or rescheduling of the loan in terms of the Agreement of which he is already in breach. I had an occasion to deal with this point in the recent past in ***Liza Nathan Mwankusye v CRDB BANK PLC,*** Land Appeal No. 202 of 2021.

In my humble observation, the appellant needed no much force. In the same vein, the appeal on this was unnecessary and I am invited to think that the appellant is tending to consume time. He needed to sit with the respondent as far as extension or restructuring is concerned. The 1st respondent has sole autonomy to do so with a view of benefiting each side. Conversely, it is impossible for the court to order or coerce the bank to restructure the agreement. I reservedly, say so but add that each case is to be determined pending on the prevailing circumstances.

Be it as it may, the appellant has a loan agreement with the respondent. It is also true that he defaulted paying. Therefore the land

tribunal had no powers to intervene in a manner sought under paragraph 8 (a) of the application.

The other aspect which has close relationship with the above issue and I think I should consider concerns the propriety, competency or otherwise of the application filed before the land Tribunal. The prop of the appellant's claim is relief (a) of paragraph 8 of the relief section. Contextually, the appellant seeks this court to order the 1st respondent reply to the request for restructuring the repayment schedule of the loan. In this he proves a contractual dispute not a land dispute between him and the 1st respondent, as correctly observed by the learned trial Chairman in his judgment. In my humble observation putting in consideration the totality of the application, the application was incompetent before the land Tribunal. In view of the evidence, the appellant's claim concerns the restructuring of the repayment of the loan. The record is silent on whether parties have ever engaged the court or court tribunal with jurisdiction to see each one's right over the loan agreement or whether it was improper for the 1st respondent's conduct of neglecting to reply to the appellant's request of restructuring the loan repayment schedule. This is so because in order to arrive into a conclusion on the rights of either part on the said plots of land, one must go into their original agreement and its terms and whether there was anything giving a part right over that land.

Prior lodging an application to the land Tribunals, one must consider the letters of section 167 of the Land Act, Cap113 R.E 2019 and section 3 (1) of the Land Disputes Court Act, Cap 216 R.E 202019 on which matters the land tribunals are vested jurisdiction with.

It is apparent on the record before me that the dispute between parties in the instant case arose from a breach of agreement or repaying the loan where the land in dispute was a security. Going carefully through the records particularly the evidence by the parties, it is without doubt that, the debates is on whether there was any liability by the appellant arising from the said agreement and whether the said agreement resulted into passing over to the 1st respondent the appellant's right over the suit land.

That brings me to the settled principle that in order for the Tribunal to be seized with jurisdiction pleaded facts and reliefs sought must be subjected to thorough scrutiny. I am guided in this position by the decision of ***Exim Bank (T) Limited V. Agro Impex (T) LTD & Others,*** Land Case No. 29 of 2008 where the court held that,

> *"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 o f action."

In striking out the case, the court said:-

"On looking at the prayers you will find that none is related to land. The mere fact that the second and third defendants have put some security for loan does not turn the suit to be a land dispute. Additionally, in my view, suing on an overdraft facility per ser does not turn the suit to a land dispute and give this court the necessary jurisdiction... this suit is squarely based on a contractual relationship between a banker and consumer whereby the customer has overdrawn and failed to pay."

In another case of ***Britania Biscuit Limited v National Bank Of Commerce Limited & 3 Other***, Land case No. 4 of 2011 (unreported), High Court cited with approval the ***Exim Bank Limited's*** case (supra) and had this to say at page 14 of the said decision:

"The mere facts that landed properties were mortgaged will not turn the matter to a land dispute. The matter is purely commercial in nature and it is an outcome of unperformed commercial transaction which is far away from the jurisdiction of the Land Division o f the High Court."

I associate myself with the decisions of the court in the cited cases above. Having so said, I am of a strong conviction that the dispute between the parties herein is a contractual issue which is to be looked at by the ordinary civil court. in the upshot, the application was incompetent before the land tribunal which from the inception of it the same lacked jurisdiction.

In conclusion, as this ground suffices to dispose of this appeal as it has, there is no need for this court to engage itself in other grounds of appeal. In the fine, this court dismisses the unmerited appeal with an advice that parties should file their dispute in an appropriate court. Costs to follow the event.

It is so ordered.

Dated at **MBEYA** this **2nd** day of **March, 2021**

J. M. Karayemaha
JUDGE