

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB- DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 79 OF 2022**

(Originating from Civil Case No. 108 of 2021 before District Court of Kinondoni at Kinondoni dated on 24<sup>th</sup> May 2022, before Hon. Lyamuya A.M.-PRM)

**REHEMA JOHN MUSHI.....APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK..... RESPONDENT**

**EX PARTE JUDGMENT**

*Date of last order: 30/03/2023*

*Date of Judgment: 28/04/2023*

**E.E. KAKOLAKI, J.**

Before the District Court of Kinondoni at Kinondoni, in Civil Case No. 108 of 2021, the respondent successful filed a summary suit under Order XXXV of the Civil Procedure Code, [Cap 33 R.E 2019], against the respondent claiming for Tsh. 25,251,993/ being the outstanding loan arrears together with interest and penalties as from 13<sup>th</sup> February, 2021. It was decreed that, the appellant was in breach of terms and conditions of the loan agreement and ordered to pay the respondent Tshs. 25,086,475/- plus the agreed interest and penalties as per the loan agreement as well as the cost of the suit. It was further decreed in alternative that, should the appellant fail to satisfy

the decreed amount then his landed property (unregistered) located at Mbezi Msakuzi Kusini, Ubungo Municipality within Dar es salaam Region deposited as collateral for the loan and his any other property be attached and sold to release the outstanding loan areas together with the agreed interest and penalties from the date of default to the date of full payment.

Gathered from the record, the appellant in the present appeal, applied and granted with loan facility by the respondent amounting Tsh. 30,000,000/= to be repaid in twelve equal instalments of Tsh. 2,836,788. It appeared that the appellant defaulted in repayment of loan as agreed, as a result was issued with a notice of default disclosing the outstanding loan arrears together with interest and penalties which is as of 13<sup>th</sup> February 2021 stood at Tsh. 25,251,993. It is further gathered that, through that notice appellant was asked to settle the loan arrears (debt) within sixty (60) days from the date of service, in which she failed to heed to the result of which the respondent filed a summary suit which was found in her favour to the extent explained above, after the appellant was denied with leave to defend. Not amused with that decision, she filed the present appeal fronting two grounds of appeal going thus:

1. That the District court erred in both law and fact for denying the appellant right to be heard
2. That the District court erred in law and facts for entertaining the case beyond its jurisdiction

On the basis of the above grounds, she prays the Court to quash and set aside the judgment and decree of the District Court of Kinondoni, order for costs of the appeal to be provided for and any other reliefs as this Court may deem just and fit to grant.

In the course of hearing of the appeal, both appellant and respondent appeared represented by Mr. Wilson M. Mafie and Ignas Komba, learned counsel respectively and were heard by written submissions after being ordered to file their respective submission in accordance with scheduled orders. However, respondent did not file her submission in which as per the decision in **P3525 LT Idahya Maganga Gregory v. The Judge Advocate General**, Court Martial, Criminal Appeal No. 2 of 2002 (unreported), is tantamount to non-appearance. In that case the Court held that:

*"It is now settled in our jurisprudence that the **practice of filling written submissions is tantamount to a hearing***

***and; therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution.*** *The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound...Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered. Needless to state here that submissions filed out of time and without leave of the court are not legally placed on records and are to be disregarded."* (Emphasis supplied)

On the strength of the above legal position this Court had to schedule the matter for judgment when the same was called for mention on 30/03/2023, as the respondent defaulted appearance, hence denied the Court of the opportunity to establish the reasons of her failure to comply with court's order. This judgment therefore will bank on the appellant's submission only. Submitting on the first ground of appeal, in which appellant faults the trial court for denying her the right to be heard, and relying on the cases of **Emilo Mpelembe Songambelle Vs. R**, Criminal case No. 18 of 2013 and **Regional Manager TTCL Vs. Othman Mbaraouk and 21 Others**, Civil Application No. 4/2012, (both CAT-unreported) and Article 13(6) (a) of the

Constitution of the Republic of Tanzania, 1977, contended that, the right to be heard is so fundamental constitutional, before the parties' rights are determined. He lamented that, as per record in page 3 of the typed proceedings, the trial court was notified on 19/09/2021, that the appellant had filed an application for leave to defend the suit against her by the respondent, the application which was pending in same court before Hon. Mwakalinga, RM. He said, as indicated at page 7 of the proceedings, the respondent's advocate was recorded admitting presence of that application No. 143 of 2021 and informed the court that the same was dismissed on 12<sup>th</sup> October, 2021, without submitting any proof to that effect. According to him, by entering summary judgment relying on such unproved assertion by the respondent, the trial court went against the principle of *aud alteram partem* as the court ought to have heard both parties on that fact before entering judgment, failure of which the act constitute an error which goes to the root of the matter and is fatal.

Concerning the second ground of appeal appellant faults the trial court for entertaining the case beyond its jurisdiction. In this it was his submission that, at page 3 of the typed judgment, the trial court ordered selling of the unregistered landed property deposited as a collateral by appellant together

with any other property own by him not specified in the loan agreement. He took the view that, the trial court's act of ordering for attachment and sale of any other appellant's property not mortgaged is an abuse of the court process and was done beyond the jurisdiction of the Court. He relied on the decision of this case in **Bank of Africa Limited Vs. Rose Miyago Assea Commercial**, Case No. 138 of 2017 HCT (unreported) where the Court prohibited banks from seeking attach and sale of other properties of the mortgagors upon failure to realize the loaned amount out of the secured properties under the mortgage agreement or the loan facility letter concerned.

In another argument on the jurisdiction of the trial court he contended, among the reliefs prayed in page 3 of the plaint is the declaration for sale of the defendants/ appellants registered property located at Mbezi Msakuzi Kusini and any other property. Basing on that relief he contended with force of argument that, the district court had no jurisdiction to entertain or deal with landed property provided for under section 4 (1) of the Land Dispute Courts Act, [Cap. 216 R.E 2019], since the jurisdiction is conferred on land courts only as defined under section 167 of the Land Act, [Cap. 113 R.E 2019]. He therefore implored the court to allow the appeal with cost by

quashing and setting aside and the judgment and orders of the District Court of Kinondoni.

I have keenly considered appellant's submission in light of the available records. Notably, right to be heard is the principle of natural justice which requires every litigant to be heard before a decision is made. This stance is demonstrated in a number of cases. For instance, in the case of **Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (CAT-unreported) on the right to be heard Mroso, JA (as he then was) had this to say:

*"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. For example, in the case of **General Medical Council Vs. Spackman**, [1943] A.C 627, Lord Wright said:*

*"If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the*

*departure from the essential principles of justice. The decision must be declared to be no decision."*

In the first ground of appeal, appellant alleges that the trial court denied her right to be heard during the trial, as there was no proof that his application for the leave to defend was dismissed, instead the trial magistrate entered summary judgment against her. It is a trite law that, in summary suit the defendant has no right of audience until he obtains leave of the court to defend. This is in terms of Order XXXV Rule 2(1) of the CPC. Order XXXV Rule 2(1) of the CPC provides that:

*Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that **unless he obtains leave from the court to defend the suit**, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend.*

*2) In any case in which the plaint and summons are in such forms, respectively, **the defendant shall not appear or defend the suit unless he obtains leave from the judge or magistrate as hereinafter provided so to appear and***



***defend;*** and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled-

Guided by the above provisions, it is apparent that, appellant could not be heard in the main suit unless he adhered to the above rules. This Court took trouble to call for the records of Misc. Application No. 143 of 2021 to satisfy itself whether the appellants allegations that there was no proof of dismissal of her application for leave to defend summary suit have basis. It is my finding that, the said application was dismissed on 12<sup>th</sup> October, 2021 for want of prosecution, as the respondent advocate rightly informed the trial magistrate on 31/03/2022, as reflected at page 7 of the trial court typed proceedings. The assertions by the appellant that, the trial court had to find proof of dismissed application for leave to defend suit before proceeding to enter summary judgment does not hold water as the said application was heard on the same court, and the court no doubt took judicial notice of the same. For those reasons, it is my finding that, the first ground of appeal is destitute of merit and I dismiss it.

I now move to consider the second ground of appeal in which the appellant's complaint is that, the trial court acted beyond its jurisdiction by entertaining

a land matter contrary to section 4 (1) of the Land Dispute Courts Act and that, by granting the order of attaching any other appellant's property.

Starting with the first limb, I do not subscribe to Mr. Mafie's submission that, the trial court was not clothed with jurisdiction to entertain this matter for being land matter. I hold that view as glancing at the cause of action deposed in paragraph 3 of the plaint and the reliefs sought it is obvious to me that, the same accrued from mortgage transaction between the appellant and the respondent based on loan agreement entered on 27/01/2020 where the appellant mortgaged her land property to serve as security for the loan extended to her. I am alive to the established law under section 4(1) of the Land Dispute Courts Act that, no magistrates' court established by the Magistrates' Courts Act shall have civil jurisdiction in any matter under the Land Act and the Village Land Act, for not being land courts as established under sections 167(1) of Land Act, 62(2) of Village Land Act and section 3 of the Land Dispute Courts Act. It is however to be noted that, not every litigation whose cause of action accrued from mortgage transaction or a commercial contract, regardless of its nexus to the landed property or real estate constitutes a land dispute to be entertained by the land court unless the same is a conveyance or involves dispute over ownership. But when it

includes transactions of commercial nature then the same falls within the purview of commercial case to be tried by the commercial court. Similar position was taken by this Court speaking through Ngwala J (as she then was) in the case of **Britania Biscuits Limited vs. National Bank of Commerce Limited and Three Others**, Land Case No. 4 of 2011[HC] (unreported), the position which was adopted by the Court of Appeal with exception of application of the word '*jurisdiction*' in the case of **National Bank of Commerce Limited v. National Chicks Corporation Limited & Others**, Civil Appeal No. 129 of 2015 (CAT-unreported), where the Court observed thus:

***"It must be understood that any litigation whose cause of action accrued from mortgage transaction or a commercial contract, regardless of its aftermath to the landed property/real property is not necessarily a land matter that falls within the jurisdiction of the Land Division of the High Court. It is a result of commercial transaction and it has to be dealt with by the Commercial Division of the High Court not the Land Division unless the transaction is conveyance..."***

Similarly in the case of **Exim Bank (T) Ltd Vs. Agro Impex (T) Limited & 2 others**, Land Appeal No. 29 of 2008 (HC Unreported) the court had this to say:

*"The mere fact that the second and third defendants have put some security for the loan does not turn the suit to be a land dispute. Additionally, in my view, suing on an overdraft per se does not turn the suit to a land dispute and give this court the necessary jurisdiction."*

With the above principle in mind, in this matter the mere fact that the appellant mortgaged her landed property basing in the loan agreement, the property which in the alternative reliefs the respondent seeks to attach and sale so as to realize the outstanding loan arrears, I hold does not change the nature of the cause of action from commercial transaction based on loan agreement to land matter. Since the cause of action is based on commercial transaction it is the finding of this Court that, the trial court was crowned with jurisdiction to entertain this matter under section 40(3) of the Magistrates Courts Act, [cap. 11 R.E 2019] (the MCA) as the claimed outstanding loan arrears of Tshs. 25,086,476.21 is within its pecuniary jurisdiction. The said section 40(3) of MCA provides that:

*(3) Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited-*  
*(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed one hundred million shillings; and*  
*(b) in the proceedings where the subject matter is capable of being estimated at money value, to proceedings in which the value of the subject matter does not exceed seventy million shillings.*

Concerning the complaint for trial court's order for selling appellant's other properties to realize the loan outstanding areas as played by the respondent and granted by the court, I subscribe to Mr. Mafie's submission that, the court acted beyond its jurisdiction as other appellant's properties apart from landed property (unregistered) located at Mbezi Msakuzi Kusini, Ubungo Municipality within Dar es salaam Region, did not form part of the loan agreement, hence not qualifying to be subjected to attachment and sale. This position was adumbrated in the case of **Bank of Africa Limited vs Rose Miyago Assea Commercial**, (supra) where the court held that;

*It is high time now for the banks to be aware that once they decide to exercise their statutory power of sale under the mortgage agreement and sale the sale does not realize the amount secured, they cannot come to court with the view of*

*having recovered the unrealized amount by attaching and auctioning other properties of the mortgagor. Only property mortgaged are liable for realization of the amount security under the mortgage agreement and facility letter concerned.*

With the above findings, I invoke the revisional powers bestowed to this Court under section 44(1)(b) of MCA and proceed to order that, the trial court's order for attachment and sale of other appellant/defendant's properties apart from landed property (unregistered) located at Mbezi Msakuzi Kusini, Ubungo Municipality within Dar es salaam Region which secured loan as per the loan agreement, is hereby varied. Otherwise the rest of the trial court's finding and orders thereto remain undisturbed.

Consequently, this appeal is partly allowed and partly dismissed to the extent explained above.

No order as to cost.

It is so ordered.

DATED at Dar es salaam this 28<sup>th</sup> April, 2023.



E. E. KAKOLAKI

**JUDGE**

28/04/2023.

The Judgment has been delivered at Dar es Salaam today 28<sup>th</sup> day of April, 2023 in the presence of Mr. Derick Archard, holding brief for advocate Wilson Mafie for the appellant, Mr. Kasuka Japhet, advocate for the defendants and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI  
**JUDGE**  
28/04/2023.

