IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

LAND APPEAL NO. 47 OF 2022

(Originating from Application No. 446 of 2016 of the District Land and Housing Tribunal for Mwanza at Mwanza)

ACCESS BANK TANZANIA LIMITED.....APPELLANT

VERSUS

COLLENS BUTAMBALA.....1ST RESPONDENT
LOLO INVESTMENT.....2ND RESPONDENT

JUDGMENT

23rd June & 08th September 2023

Kilekamajenga, J.

The first respondent filed application No. 446 of 2016 in the District Land and Housing Tribunal at Mwanza against the appellant and the second respondent. In the application, the first respondent sought redemption of his certificate of title on Plot No. 189 Block M at Pasiansi which he deposited with the appellant as a security for a loan facility of Tshs. 50,000,000/=. He also prayed for Tshs. 20,000,000/= as compensation and costs of the case. In his case, the first respondent was backed up with the testimonies of two witnesses. Testifying for the first respondent, PW1 (James Singu) knew the first respondent as his neighbour who issued his title deed for Mr. Mollel's secured loan. Mr. Mollel is married to Clesencia Joseph Shayo who is also the sister-in-law of PW1. At some

point, Mr. Mollel failed to service the loan and Clesencia offered her Toyota Prado which was valued above Tshs. 40,000,000/= to cover the outstanding loan. PW1 testified to have received the original registration card and accompanied the first respondent to the appellant's office where they met the loan officer, Mr. Dioniz. They presented the car to the bank in writing. The document evidencing the handing of the car to the bank was admitted as exhibit 1. He insisted that, they handed over the car to Mr. Dioniz under the agreement that the first respondent will be discharged from the loan obligation. PW2 (Collens Butambala) testified to have known Lolo Investment being manned by Losenyali Mollel. PW2 was the guarantor of the second respondent's loan facility of Tshs. 50,000,000/= from the appellant. The second respondent continued to service the loan. He finally approached the bank with the view of clearing the loan. Mr. Mollel's wife (Clesencia Joseph Shayo) was willing to offer her Toyota Prado with registration No. T259 CAQ to the appellant in order to clear the remaining loan balance of Tshs. 12 Million. At that time, the second respondent had already served the loan to the tune of Tshs. 51,789,081.59/=. According to PW2, the car was valued at Tshs. 42,000,000/=. However, despite the handing over the car, the appellant refused to discharge the title deed hence this case.

On the other hand, DW1 (Frolian Asenga) told the tribunal that, the first respondent was the guarantor of the second respondent (Lolo Investment). The

second respondent secured a loan of Tshs. 50,000,000/= from the appellant. The loan was to be serviced within 18 months with an interest of Tshs. 14,958,129.47/= hence the second respondent was obliged to pay a total of Tshs. 64,958,129.47/=. The second respondent paid 11 out of 18 instalments and the loan ballooned to Tshs. 48,475,682.66/=. DW1 was not aware whether Toyota Prado was handed over to Dioniz. DW2 cemented further that, the first respondent guaranteed the second respondent for a loan from the appellant by depositing a title deed number 48057.

The trial of the case led to the decision in favour of the first respondent hence this appeal. The appellant coined five grounds to challenge the decision of the trial tribunal thus:

1. *That, the Honourable trial chairperson grossly erred in law by entertaining the matter without having jurisdiction in terms of the subject matter.*
2. *That, the Honourable trial chairperson erred in law and in fact by ordering the appellant to release with immediate effect the 1st respondent's certificate of title No. 48057 in respect of plot No. 189 Block 'M' Pasiansi, Mwanza pledged as security to the appellant while the outstanding loan is marked unpaid.*
3. *That, the Honourable trial chairperson erred in law and in fact to exonerate the 1st respondent from his obligations of undertaking payment of the outstanding loan amount by relying on exhibit P1 in which its validity is questionable.*

4. *That, the Honourable trial chairperson grossly misdirected himself in law and in fact for failure to analyse and evaluate properly the testimonies of the appellant's witnesses and documentary evidence.*
5. *That, the Honourable trial chairperson erred in law for failing to apply the correct principles of law in awarding amount of TZS 15,000,000/= as general damages hence the awarded amount is unreasonable and unjustified.*

Before this court, the appeal was argued by way of written submissions. When addressing the first ground, the appellant's counsel, Mr. Patrick Suluba Kinyerero, was of the view that, the issue of jurisdiction may be raised at any stage of the proceedings. He fortified his argument with the case of **M/S Tanzania –China Friendship Textile Co. Limited v. Our Lady of the Usambara Sisters** [2006] TLR 70; **Mandavia v. Singh** (1965) EA 118 and **John v. R** 18 EACA. In addressing this point, the counsel referred to section 167(1) of the Land Act, Cap. 113 RE 2019, Section 62 of the Village Land Act, Cap. 114 RE 2019 and Section 3(1) of the Land Disputes Courts Act, Cap. 216, RE 2019. He further submitted that, the dispute leading to this dispute is hinged on the release of certificate of title on Plot No. 189 Block M at Pasiansi Mwanza which was pledged as a security by the first respondent to the appellant in favour of the 2nd respondent's loan facility of Tshs. 50,000,000/=. However, in this case, there is no claim of right or interest over the mortgaged security but the dispute is on the first respondent's failure to fulfil the guarantor's obligation. The case is purely

based on the breach of terms of contract and not on ownership of land or anything attached to land. In view of the case of **Charles Rick Mulaki v. William Jackson Magero**, HC Civil Appeal No. 69 of 2017 and the reliefs prayed by the first respondent, the dispute lacked the qualities of being christened as a land matter to be determined by the District Land and Housing Tribunal. The counsel stressed that, the dispute was a commercial transaction and the trial tribunal was not clothed with jurisdiction to entertain the matter hence the decision thereof was a nullity for want of jurisdiction.

The counsel simultaneously argued the second, third and fourth grounds by assailing the decision of the trial tribunal which ordered the discharge of the certificate of title whereas the outstanding loan remained unpaid. He further blamed the trial tribunal for failing to analyse and evaluate the testimonies of the appellant's witnesses and documentary evidence. The testimony of DW1 portrayed how the second respondent paid 11 out of 18 instalments; failure to pay even a single instalment amounts to breach of the loan agreement. He supported the argument with the case of **National Bank of Commerce Limited v. Stephen Kyando T/A Asky Intertrade**, Civil Appeal No. 162 of 2019 (unreported). The obligation of the guarantor is to ensure that the borrower timely pays the loan and upon failure, the guarantor stands liable to pay the loan. In this case, the first respondent was the guarantor of the loan

advanced to the second respondent. Therefore, the first respondent cannot deny liability in case of default. The exhibit D3 proved the existence of the unpaid loan. The allegation that the first respondent surrendered a motor vehicle to the appellant officer one Dioniz Mzee in order to clear the unpaid loan is questionable. The surrender of the motor vehicle was not witnessed by the branch manager and the appellant was not involved in that agreement.

On the fifth ground, the counsel assailed the trial tribunal for failing to apply the correct principle of the law leading to the award of Tshs. 15,000,000/= as general damages. In his view, there was no justification for awarding the stated general damages; the first respondent was not entitled to the general damages because the appellant was right in retaining the title deed.

On the other hand, the learned advovate, Mr. Melkizedeck Francis Gunda for the first respondent argued that, since the cause of action is hinged on the discharge of a third party mortgage entered between the appellant and the first respondent in favour of the 2nd respondent, the trial tribunal was vested with jurisdiction to try the case. He emphasised that the dispute was a land matter triable by the tribunal as the mortgage intends to deprive the first respondent from the possession of the land. In response to the second, third and fourth ground, the counsel was emphatic that the first respondent surrendered the motor vehicle

which the appellant took and sold it in order to settle the outstanding loan. He further queried on the failure to summon Dioniz Mzee for the testimony in this case who could prove or disprove on the validity of exhibit PE1. On the fifth ground, the counsel referred the court to the case of **Cooper Motor Corporation LTD v. Moshi/Arusha Group Occupational Health Services** [1990] TLR 96 and further urged the court to step into the shoes of the trial tribunal and grant justice.

In the rejoinder, the appellant's counsel reiterated that the cause of action in this case neither touches the issue of possession nor ownership rather on the claim of certificate of title hence the dispute is not a land matter. When responding on the second, third and fourth ground, the counsel insisted on the payment of the full amount before the discharge of the title deed. The alleged motor vehicle was not pledged as a security hence the appellant had no capacity to sell it to cover the outstanding loan.

The determination of the instant appeal obliges this court to revisit the grounds of appeal advanced and later argued by the parties. On the first ground, the appellant impugned the decision arguing that the trial tribunal was not clothed with jurisdiction to determine the dispute. In the view of the appellant's counsel, the dispute was not a land dispute to fall within the jurisdiction of the District

Land and Housing Tribunal. It was a dispute on the recovery of title deed rather than a land dispute. The appellant's counsel invited the court on several authorities proving that the matter was on breach of contract and not a land dispute. Specifically, the counsel cited section 167 of the Land Act; section 62 of the Village Land Act and section 3(1) of the Land Disputes Courts Act. On the other hand, the respondents' counsel vehemently objected this argument with a view that the dispute was on a third party mortgage which, if not resolved, will deprive the first respondent from ownership of the mortgaged property. In his view, the dispute is purely a land dispute triable by the District Land and Housing Tribunal.

I am aware, when jurisdiction comes into question, it may be raised at any stage of the case even at appellate level because it is a matter of law. See, **Babito Limited vs Freight Africa NV-Belgium & 2 Others**, Civil Appeal No. 355 of 2020; **Richard Julius Rukambura vs Issack Ntwa Mwakanjila & Another** [2007] TLR 91; **TRA vs. Kotra Company Ltd,** Civil Appeal No. 12 of 2009 and **TRA vs. New Musoma Textile Ltd**, Civil Appeal No. 93 of 2009. Also, in the case of **B.9532 CPL Edward Malima v. the Republic, Criminal Appeal No. 15 of 1989**, CAT at Mwanza (unreported), the Court of Appeal stated that:

> '*…we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if*

such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not a court of parties.'

In the instant case, I wish to recap the facts leading to the dispute. The first respondent guaranteed the second respondent for a loan of Tshs. 50,000,000/= from the appellant. As the guarantor, the first respondent deposited his title deed on plot No. 189 Block M at Pasiansi within Mwanza city. However, the second respondent defaulted; only 11 out of 18 instalments were paid. In an effort to settle the loan, the first respondent approached somebody called Clesensia who is the wife of the second respondent's managing director. It is alleged that, Clesensia agreed to surrender the registration certificate of a vehicle (Toyota Prado) which could be sold and settle the loan. The first respondent alleged to have handed over the vehicle to one Dioniz who was the senior loan officer from the appellant. As there was an agreement to release the title deed after the sale of the vehicle, the first respondent filed this case claiming for the discharge of the title deed which is still held by the appellant despite the handing over of the vehicle. In my view, the whole dispute revolves around a mortgage; there is no mortgage without an attachment or association with a real property (land).

The District Land and Housing Tribunal is vested with jurisdiction to determine disputes involving land. Specifically, I wish to refer to section 3(1) of the Land Disputes Courts Act which provides that:

> *"3.-(1) Subject to section 167 of the Land Act and section 62 of the Village Land Act,* ***every dispute or complaint concerning land*** *shall be instituted in the Court having jurisdiction to determine land disputes in a given area."*

Without citing section 167 (1) of the Land Act and section 62 of the Village Land Act which do not directly provided relevant information in the case, in my view, the claim for recovery of the title deed was obviously a claim founded on the land. I cannot separate the claimed of title deed with the first respondent's landed property. I find the argument, that the trial tribunal lacked jurisdiction, baseless.

On the second, third and fourth ground, the appellant is challenging the decision of the trial tribunal for failing to evaluate the evidence. The appellant's counsel went further impugning the allegation that the loan was settled with the reception of the vehicle. In the appellant's view, the first respondent failed to discharge the guarantor's obligations. On the other hand, the respondents' counsel believed, the sale of the vehicle settled the outstanding loan hence the appellant was duty bound to discharge the title deed. On this point, I find no

reason to revisit the above portrayed evidence because I have already done so. The major contention is whether the outstanding loan was settled after the presentation of the vehicle. The evidence at hand does not leave any doubt that the loan was not paid to the fullest leading to the contested agreement between the first respondent and the loan officer of the appellant. In his evidence, the first respondent tendered what was believed to be a contract which settled the outstanding loan by handing over the vehicle to the bank instead of paying the remaining instalments.

The perusal of the record leads me to the hand written agreement for the handing over of the vehicle. For the discussion, I wish to reproduce the contract thus:

"27-06-2016

YAH: MAKABIDHIANO YA KADI YA GARI

MIMI JAMES SINGU NINAKABIDHI KADI HALISI YA GARI AINA YA PRADO NO. T 259 CAQ, MAKE TOYOTA MODEL NUMBER RZJ95 NDG DIONIZ MZEE AMBAYE NI SME SENIOUR LOAN OFFICER BANK YA ACCESS TAWI LA MWANZA NINAMKABIDHI KWA NIABA YA MMILIKI NDG CRESCENCIA JOSEPH SHAYO ILI ABADILI TITLE HOLDER DETAILS, BANK IWEZE KULITAFUTA GARI HILO NA KULIKAMATA ILI IWEZE KUUZWA KUFIDIA DENI LA LOLO INVESTMENT BAADA YA KUBADILI TITLE HOLDER DETAILS ORIGINAL CARD ITAREJESHWA MIKONONI MWA MMILIKI.

SAHIHI YA MKABIDHI KADI *SAHIHI YA SHAHIDI*

JAMES SINGU *COLLINS BUTAMBALA*

SAHIHI YA MKABIDHIWA KADI

DIONIZ MZEE"

However, the hard look on the said document may trigger reservations. **First**, whereas the loan agreement was typed, the contested addendum was hand written. **Second**, whereas the loan agreement was endorsed by the appellant's branch manager, the contested contract was entered between the first respondent and the so called Dioniz. **Third**, while the first respondent alleged to have handed over the vehicle to Dioniz, the contents of the contract clearly shows that, Dioniz was given the vehicle's registration card with the view of changing owner's details and later arrest the vehicle for sale. **Fourth**, the contested contract required the appellant to return the original registration card after the change of owner's details.

Therefore, according to contested contract, the first respondent never surrendered any vehicle to the appellant nor Dioniz. What Dioniz might have received, if any, was a registration card. Furthermore, it is not clear whether the vehicle was ever arrested and sold to settle the outstanding loan. Even if it was received by Dioniz, this agreement which intended to alter the loan agreement

did not involve the appellant. The arrangements between the first appellant and Dioniz without approval from the institution cannot bind the appellant. Moreover, the new agreement contravened item 8.6 of the land agreement which required any alteration to the loan agreement to be made in writing and be approved by officers authorized by the appellant.

In my view, in case the first respondent was conned by Dioniz in their private arrangements, the appellant cannot be held responsible. The appellant could not have altered a loan agreement with such as flippant note. On this point, I find the first respondent to have not proved his case hence I find no reason to draw adverse inference against the appellant for failing to summon Dioniz. On this major point, I find merit in the appeal and set aside the decision of the trial tribunal. The second respondent should pay the outstanding loan balance or else the guarantor should be held responsible including disposing-of the security to settle the outstanding loan. The respondents should pay the costs of this case. It is so ordered.

DATED at **Mwanza** this 08th day of September, 2023.

Ntemi N. Kilekamajenga
JUDGE
08/09/2023

Court:

Judgment delivered this 8th September of 2023 in the presence of Ms. Happiness Mwangoyi, learned advocate for the appellant and in absence of respondents**.**

Ntemi N. Kilekamajenga
JUDGE
08/09/2023