

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL APPEAL NO. 9 OF 2022**

(Originating from RM Civil Case No. 07 of 2018 of the Resident Magistrate's Court of  
Moshi)

**AFRICAN BANKING CORPORATION.....APPELLANT**

**VERSUS**

**HERRY ELIUFOO CHRISTOPHER.....RESPONDENT**

**JUDGMENT**

10.08.2023 & 13.09.2023

**SIMFUKWE, J.**

Before the Resident Magistrate's Court of Moshi (the trial Court) the appellant herein instituted Summary Suit against the respondent claiming for Tshs 223,650,022.95/= which was an outstanding amount in respect of a term loan facility extended in 2016. Following such summary suit, the respondent filed leave to defend the suit which was granted. Consequently, he filed his Written Statement Defence together with the preliminary objection to the effect that: **one**, the court has no pecuniary jurisdiction to entertain the matter and **second**, the cause of action falls under the jurisdiction of the land courts.

After hearing both parties in respect of the raised preliminary objections, the trial magistrate sustained the raised objections and dismissed the suit. The appellant was aggrieved, he filed petition of appeal on three (3) grounds of appeal:

- 1. That, the court erred in law by holding that it has no jurisdiction to determine Civil Case No. 7 of 2018.*
- 2. That, the Court erred in law by dismissing Civil Case No. 07 of 2018 while the same was not determined on merit*
- 3. That the Court erred in law by failure to comprehend the legal principle in the binding authorities submitted before it by the Appellant.*

Before this court, the respondent was summoned in vain. The court ordered that he should be served through substituted service. He was served through Mwananchi Newspaper, dated 14<sup>th</sup> April 2023 at page 37. Yet he did not enter appearance. The exparte hearing order was issued and the same was effected through filing written submission. The appellant was represented by Omary Msemu, learned counsel.

Submitting on the three grounds of appeal which concern jurisdiction and that the trial court did not comprehend the legal principle in the binding authorities submitted before it by the appellant; the learned advocate, Mr. Msemu submitted that **section 40(2) of the Magistrates' Courts Act**, Cap 11 (R.E 2019) is clear that in suits for recovery of immovable property, the value should not exceed three hundred Million Shillings.

The learned advocate went on to disclose that in the instant matter among the reliefs sought in Civil Case No. 7 of 2018 was recovery of the loan disbursed to the Respondent by way of disposing the immovable property charged as security which was the House located on Plot No. 274, Block 'M' Bomang'ombe Urban Area, in Hai District, under certificate of Title No. 30417. That, the substantive claim in the said suit was Tshs 233,650,022.95 which as per the cited provision above was within the

jurisdiction of the trial Court. Mr. Msemo believed that, it was not proper to hold that the value of the subject matter was beyond the jurisdiction of the trial court.

Challenging the holding that the suit before the trial court was a land matter which falls under the jurisdiction of the District Land and Housing Tribunal, Mr. Msemo asserted that the nature of the claim was based on mortgage which is purely commercial arrangement. That, in essence, the suit was based on contractual arrangement between the Appellant and the Respondent who were the lender and the borrower/Mortgagee whereas the Respondent breached the repayment obligation as per the contract.

The learned advocate elaborated further that, it is trite law that where the suit is based on commercial/contractual arrangement, the Magistrate's Court retain jurisdiction to entertain the same even if it is a land matter. That, the position could be different if the issue was ownership of the referred property. He reminded this court that, before the trial court he cited the case of **Aziz Chombo vs Pride Tanzania**, Land Appeal No. 10 of 2010 (HC) (Unreported) and the case of **Reginald T. Sangka vs Babati Savings and Credit Cooperative Society and Others**, Land Appeal No. 20 of 2014 (HC), (Unreported) to support the arguments. Mr. Msemo faulted the trial court for failure to comprehend the principles in the cited authorities which he believed were relevant on the subject matter and binding.

On the second ground of appeal, the learned advocate faulted the trial court for dismissing the suit while it was not determined on merit. He challenged the dismissal on the following grounds: First, he said it is clear

from the proceedings and ruling that the suit was terminated on the preliminary stage without being disposed on merit. That, it is trite law that except on the issue of time limitation, the suit cannot be dismissed if the same has not been determined on merit. Second, Mr. Msemo contended that the trial Court could not dismiss the matter which it had already made a finding that it lacked jurisdiction to entertain it. That, the dismissal order presupposes jurisdiction. He was of the opinion that the trial court having found that it lacked jurisdiction, the lesser evil was to strike it out. He notified this court that before the trial court he cited the case of **Cyprian Mamboleo Hizza vs Eva Kioso & Another**, Civil Application No. 3 of 2010, (CAT) at page 2 and 3 (Unreported).

Mr. Msemo went on to submit that by assuming that the trial Court was right to hold that it lacked jurisdiction, then the proper remedy was to return the plaint as per **Order VII Rule 10 (1) of the Civil Procedure Code, Cap 33 [R. E 2019]**

In his conclusive remarks, the learned counsel prayed the Court to uphold the grounds of appeal, set aside and quash the Ruling and Order of the trial court and order the matter to be determined on merit.

Pursuant to the submission of the appellant, there are two issues to be determined:

1. *Whether the trial court had no jurisdiction to determine the matter.*
2. *If the first issue is answered in the affirmative, whether the trial court was right to dismiss the suit for want of jurisdiction.*

In her plaint which was filed before the trial court under summary procedure, at paragraph 3 of the plaint, the appellant stated that:

*"That, the Plaintiff's claim against the Defendant is for payment of Tshs. 223,650,022.95 being an outstanding amount in respect of a term loan facility extended by the Plaintiff in 2016. The Plaintiff claims further interest, costs and damages arising out of the Defendant's breach of contract."*

The quoted paragraph reveals that the appellant was claiming against the respondent herein, Tshs. 223,650,022.95 as outstanding amount in respect of a term loan facility extended by the appellant in 2016. The appellant filed his claim under summary procedure. ***Was the claimed amount and the nature of the case falling within the jurisdiction of the Resident Magistrate's Court?***

Mr. Msemu was of the view that since the claim based on immovable property then, under **section 40(2) of the Magistrate's Courts Act** (supra), the trial court had jurisdiction to entertain the claim.

With due respect to Mr. Msemu, according to paragraph 3 of the plaint which I have already quoted herein above, the appellant claimed Tshs. 223,650,022.95 as outstanding amount in respect of a term loan facility extended to the respondent by the appellant in 2016 which falls under movable properties.

As stated above, the suit which was before the trial court was filed under Summary Procedure under **Order XXXV of the Civil Procedure Code** which provides that:

*"This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*

*(a) suits upon bills of exchange (including cheques)  
or promissory notes;*

*(b) suits for the recovery of income tax; and*

***(c) suits arising out of mortgages, whether  
legal or equitable, for-***

***(i) payment of monies secured by  
mortgage;***

*(ii) delivery of possession of the mortgaged  
property to the mortgagee by the mortgagor or  
by any other person in or alleged to be in  
possession of the mortgaged property..."*

Emphasis added

According to the plaint filed before the trial court, the plaintiff prayed for the following reliefs:

- 1. A declaration that the Defendant is in breach of his repayment obligations under the loan agreement dated 15<sup>th</sup> August, 2016 to the tune of Tshs 223,650,022.95*
- 2. For orders that the Defendant pays the full outstanding amount due to the Plaintiff.*
- 3. Orders allowing the Plaintiff to sell the mortgaged property pledged to the Plaintiff to secure the Loan facility, in order to allow the plaintiff to recover the outstanding sums.*
- 4. For the payment of 23% interest from the date the sums fell due to the date of judgment*

- 5. For payment of interest at Court's rate of 12% from the date the judgment and decree entered until date of payment in full.*
- 6. For payment of all costs of this suit.*
- 7. Any other relief(s) the Honourable Court will deem just and equitable to grant.*

Looking keenly the claims which can be filed under the summary procedure suit as provided for under **Order XXXV** in connection with the plaintiff's reliefs as noted above, it goes without saying that the claims fall within the jurisdiction of normal courts subject to pecuniary jurisdiction and not the District Land and Housing Tribunal.

**Section 40 (2) (a) (b)** and **section 41 (1) of the Magistrates Courts Act, Cap 11 R.E** provides that:

*40. (2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall 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 three hundred million shillings; and*

*(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed two hundred million shillings.*

*(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.*

*41.-(1) **A court of a resident magistrate** shall have and exercise jurisdiction in all proceedings in respect of which jurisdiction is conferred by the Second Schedule to this Act and any law for the time being in force **on a court of a resident magistrate or on a district court presided over by a resident magistrate or a civil magistrate, in the exercise of its original jurisdiction.***"

Emphasis added

Guided by the above provisions of the law, the trial court has no jurisdiction to entertain claims in respect of movable properties whose value exceeds Two hundred million as rightly decided by the trial magistrate at page 9 of her ruling, or seventy million in respect of commercial cases. Therefore, the claimed amount of Tshs 223,650,022.95 is ultra vires the jurisdiction of the trial court.



The last issue for determination is *whether the trial court was right to dismiss the suit for want of jurisdiction.*

Mr. Msemo was of the view that having found that it lacked jurisdiction, the trial court should have struck out the matter and not to dismiss it.

It is settled principle that where the case has not been determined on merit, the court should strike it and not to dismiss the same. In the instant matter, the trial court having found that it had no jurisdiction, the option was to strike out the suit so that the aggrieved party could re-institute the matter before the court of competent jurisdiction.

I subscribe to the Court of Appeal decision in the case of **Zaidi Sozi Mziba vs Director of Broadcasting RTD and the Attorney General, Civil Appeal No. 4 of 2001**, (CAT) in which it was held that the word dismissed is used where the case has been heard to its finality and that where the matter is dismissed it cannot be re-instituted before the court.

In another case of **Cyprian Mamboleo Hizza vs Eva Kioso & Another (Civil Application 3 of 2010) [2011] TZCA 40** at page 2 to 3, it was held that:

*"It is important to observe here that **one would have expected the judge to strike it out rather than dismiss it because he did not determine the application on merit.** I am supported in this view of the decision by the Court of Appeal in Eastern Africa for the celebrated case of **Ngoni - Matengo Cooperative Marketing Union Ltd. V. Alimahomed Osman (1959) EA 577** where at page 580 an effort is made at*

*distinguishing the meaning of "striking out" an appeal etc. and "dismissing" etc. thus: -*

*".... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."*

Thus, I am of considered opinion that the trial court erred by dismissing the suit after finding that it lacked jurisdiction to entertain the matter.

That said and done, I hereby partly allow this appeal with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 13<sup>th</sup> day of September 2023.



X

S. H. SIMFUKWE  
JUDGE  
Signed by: S. H. SIMFUKWE

**13.09.2023**