

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 02 OF 2023

(Originating from the Resident Magistrates' Court of Dar es salaam in Civil Case No. 13 of 2022)

BANK OF AFRICA TANZANIA LIMITED..... APPELLANT

VERSUS

FRANKLIN GERALD BAGALA..... RESPONDENT

JUDGMENT

09th November, 2023 & 08th February, 2024

BWEGOGE, J.

The appellant herein above named commenced civil proceedings against the respondent in the Resident Magistrates' Court of Dar es salaam in Civil Case No. 13 of 2022 claiming for payment of TZS 57,750,000/= being outstanding balance payable to the appellant by the respondent herein following the respondent's breach of the loan agreement by defaulting to repay his loan according to the terms of the executed agreement, among others.

In tandem with filing defence, the respondent advanced a notice of preliminary objection on the point of law that:

"The suit arises out of the plaintiff's commercial transactions; this court lacks jurisdiction to entertain the suit."

On the date scheduled for hearing of the objection, the respondent's counsel changed course and charged that the respondent's suit was a land matter of which the trial court had no jurisdiction to entertain. Notwithstanding the appellants objection on the mode taken by the respondent in raising new point of law which was not pleaded and submission in reply fronted thereto, the trial court sustained the preliminary objection. The trial court had reached the conclusion that the appellant's suit was land dispute in nature falling within the ambit of Land Act of which it was not seized with requisite jurisdiction to preside. Consequently, the trial court proceeded to dismiss the suit for want of jurisdiction. The appellant was not amused; hence, this appeal.

The appellant raised three grounds of appeal as hereunder mentioned:

- 1. The trial magistrate grossly erred in law in determining the question of law which was never raised as a preliminary objection by the defendant/respondent.*
- 2. The trial magistrate erred in law and facts in entertaining written submission by the defendant/respondent on the matter which was not at issue; hence, reached the erroneous conclusion.*
- 3. The trial magistrate erred in law by holding that the Resident Magistrates' court doesn't have jurisdiction to hear and determine the matter.*

The appeal herein was argued by way of written submissions. Mr. Augustin Rutakolezibwa, learned advocate, argued the written submission in chief for the appellant whereas Mr. Devis Vedastus, learned advocate, argued the written submission in reply for the respondent herein.

In substance, in substantiating the 1st and 2nd grounds of appeal, Mr. Rutakolezibwa argued that it was wrong on part of the trial court to allow the respondent to argue the point of law which was not formerly raised. That it was odd that the respondent's counsel having raised a notice of preliminary objection on point of law in that the trial court was not clothed with jurisdiction to preside the suit with commercial nature, had submitted on the point of law that the trial court had no jurisdiction to preside land

dispute. The counsel contended that the trial court should have adhered to the principle that parties are bound by their pleadings as reckoned in the case of **Hood Transport Co. Ltd., vs. East African Development Bank** (Civil Appeal No. 292 of 2019) [2022] TZCA 383 whereas the Apex Court in subscribing to the previous decision in the case of **NHC vs. Property Bureau (T) Ltd**, Civil Appeal No. 91 of 2007, CA (unreported), aptly held;

"It cannot be overstated that for an issue to be determined by the court it must have been specifically raised in the pleadings. The rationale to this is not hard to discern; pleadings are designed to facilitate the setting out of the plaintiff's claim sufficient particularity to enable the defendant to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut it."

Based on the foregoing, the counsel concluded that the trial court erred and misdirected herself on acting on the submission made on the unpleaded point of law and arrived to erroneous conclusion that the court was not seized with jurisdiction to preside the matter.

In respect of the 3rd ground of appeal, the counsel argued that the appellant having enforced her recovery right by selling the mortgaged

property following the respondent's default to repay the loan, and the proceeds of sell failed to satisfy whole debt, she was entitled to file normal suit which is commercial in nature for recovery of remaining balance in accordance with the credit facility agreement. He cited the cases; **Bank of Africa Tanzania Ltd., vs. Rose Miago Asea**, Civil Appeal No. 214 of 2019 and **CRDB Bank PLC vs. True Colour Ltd., & Another**, Civil Appeal No. 29 of 2019 to bolster the point.

Lastly, the counsel argued that the appellants case at the lower court is commercial in nature. That the provision of section 40 (3) of the Magistrates' Courts Act [Cap.19 R.E. 2022] enjoins the subordinate court with jurisdiction to preside commercial cases of which the value of the subject matter doesn't exceed TZS 70,000,000/=. The cases; **Wazir Hassan vs. Arafa Bakari** (DC) Civil Appeal No. 12 of 2017 HC [2020] TZHC 214 and **Dangote Industries Ltd., vs. Warnercom Tanzania Ltd.**, Commercial Appeal No. 01 of 2020 HC [2022] TZHC ComD 98 were cited to validate the point.

On the other hand, responding to the 3rd ground of appeal, Mr. Vedastus contended that the trial court's decision is proper in the circumstances of this case as the appellant's claim was pegged on mortgage. The counsel reasoned that the loan agreement was secured by mortgaged property

which automatically created interest on land. Hence, a dispute arising thereof is a land matter which should be determined by a competent court prescribed under section 167(1) of the Land Act [Cap. 113 R.E. 2019] whereas the resident magistrates court is not among the prescribed court with jurisdiction to preside land matters. That the provisions of section 4(1) of the Land Disputes Courts Act bars the resident magistrates court from presiding land matters. The counsel referred the case of **Arnold Moshi and Another vs. Shirwa Company Limited & The Registered Trustees of Chama cha Mapinduzi**, Land Case No.125 of 2019 [2020] TZHCLandD 4004 to validate his argument.

Otherwise, in responding to the allegation made in respect of the 1st and 2nd grounds of appeal, the counsel contended that it was mentioned in the particulars set out in the defence filed by the respondent in that the suit instituted by the appellant was land dispute in nature. Therefore, the trial court was right in allowing the respondent to submit on the impugned issue. This is all about the submissions made by counsel herein.

I would canvass the grounds of appeal in seriatim commencing with the 1st and 2nd grounds of appeal. Unarguably, it is settled law that parties are bound by their pleadings. See the cases; **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019)

[2022] TZCA 434 and **Metropolitan Tanzania Insurance Co. Ltd., vs. Frank Hamadi Pilla** (Civil Appeal 191 of 2018) [2019] TZCA 281, among others. The rationale behind the rule is that a party should not be taken by surprise in court. The respondent herein having raised the notice of preliminary objection on point of law in that the trial court was not clothed with jurisdiction to preside a suit which was commercial in nature, it was improper to have changed course and submitted on another point of law which was not raised in that the trial court had no jurisdiction to entertain a land dispute. The appellant had a right to request the trial court to afford her room to brace herself for counter argument. However, my observation notwithstanding, as the trial court allowed the respondent to submit on the new point of law promptly raised, and the respondent had willingly made submission in reply; hence, afforded the right to be heard and the trial court entered its decision thereto, this court has no cogent ground to fault the same. The question which is in my prerogative is whether the decision entered by the trial court is tenable in law. That said, the 1st and 2nd grounds of appeal are found without substance.

I would now proceed to canvass the 3rd and pertinent ground of appeal herein. As I aforementioned, the gist of the point of law raised by the respondent in the trial court is that, the overdraft facility entered by

parties herein was secured by legal mortgage. And, obligation including enforcement and recovery are matters regulated under the Land Act. Thus, in view of the provision of section 4(1) of the Land Disputes Courts Act which excludes the magistrates' courts from the courts with jurisdiction to preside matters under the Land Act, the trial court ruled that it was not clothed with jurisdiction to entertain the suit. Was the trial court correct in holding so? This question, I am obliged to answer.

Being faced with question of like nature, the Apex Court in the case of **National Bank of Commerce Ltd vs. National Chicks Corporation Ltd & Others** (Civil Appeal 129 of 2015) [2019] TZCA 345 had this to say;

*".....we have seriously examined the pleading and nature of the claims in the suit and we are satisfied that the dispute arose from the appellant's claim, as rightly submitted by Mr. Nyika, for repayment of the alleged outstanding amount that arose from the overdraft facility advanced by the appellant to the 1st respondent. **So, the underlying claim is based on the loan agreement between the two. The claim arose from the loan agreement which created a contractual relationship relating to business between them. The cause of action arose from a commercial contract.** That claim falls squarely in the purview of the area of specialization of the High Court (Commercial Division) as stipulated in item (iii) of Rule 2 of the High Court (Commercial Division Procedure) Rules, 2012."* (Emphasis Mine).

Further, the Court expounded:

"The mortgaged properties are a subject of the case because they were used as security. And, therefore, they are liable to be sold so as to repay the loan and interest in case the appellant's claims are proven against the 1st respondent without resort to a civil action. For the sake of convenience, that is observing the specialization of the Divisions of the High Court, and considering that the underlying contract being of commercial nature and the claim being payment of loaned amount and interest thereon, therefore, the matter was rightly instituted in the Commercial Division of the High Court." (Emphasis mine).

Likewise, in the case of **Britania Biscuits Limited vs. National Bank of Commerce Limited and Three Others**, Land Case No. 4 of 2011[HC] (unreported) at page 182 of the ruling, it is stated that: -

"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..." (Emphasis added).

In the same vein, in the case of **Exim Bank (T) Limited vs. Agro Impex (T) Limited & 2 Others**, Land Appeal No. 29 of 2008, (HC) (Unreported) it was held that:-

*"On the plaint filed, it clearly shows that the plaintiff is claiming a total of Tshs. 1,215,598,942.00 being the outstanding amount due and owing to the plaintiff arising from an overdraft facility extended by the plaintiff to the first defendant. The claim therefore against the defendant is founded on a credit facility. On the part of the second and third defendants the cause of action is founded on a contract of guarantee. There is no doubt that the suit is purely founded on contract. On looking at the prayers you find that none is related to land. **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 facility per-se does not turn the suit to a land dispute and give the court the necessary jurisdiction.**" (Emphasis added).*

Therefore, based on the foregoing authorities, I am of the settled view that the suit at the trial court arose from overdraft facility secured by mortgage; hence, commercial in nature, not land dispute. Thus, as rightly asserted by the counsel for the appellant, by virtue of the provision of section 40 (3) of the Magistrates' Courts Act, the subordinate court is enjoined with jurisdiction to preside commercial cases of which the value of the subject matter doesn't exceed TZS 70,000,000/= . I need not state that the case of **Arnold Moshi & Another vs. Shirwa Company Limited & The Registered Trustees of Chama cha Mapinduzi** (supra) cited by the respondent's counsel to support his argument is

distinguishable from this case. In the respective case, the claim was for compensation arising from tenancy relationship. The High Court (Land Division) found that it had no jurisdiction to entertain a matter which was not related to the ownership or interest on land. It is not the case herein. That said, I find the 3rd ground of appeal with substance.

In fine, I hereby find the appeal meritorious. The trial resident magistrate strayed into an error in deciding that the dispute between the parties herein is land matter which she has no jurisdiction to preside. The appeal is hereby allowed. The decision and orders entered by the trial court are hereby quashed and set aside. The case file be remitted back to the trial court for determination on merit. The respective case shall be heard by a different resident magistrate. The appellant shall have her costs.

So ordered.

DATED at **DAR ES SALAAM** this 08th day of February, 2024.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", with a long horizontal flourish extending to the right.

O. F. Bwego

JUDGE

