THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LAND APPEAL NO. 43 OF 2023

(Originating from the District Land and Housing Tribunal for Kyela at Kyela

Application No. 14 of 2021)

AUGUSTINO SANGA ..... APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE (NBC) LTD ..... RESPONDENT

JUDGMENT

Date of Last Order: 21/11/2023

Date of Judgment: 16/02/2024

NGUNYALE, J.:

The appellant Augustino Sanga filed the Application No. 14 of 2021 before the District Land and Housing Tribunal for Kyela at Kyela (DLHT) against the respondent **NATIONAL BANK OF COMMERCE** seeking several reliefs against the suit land registered under certificate of title

No. 13989 MBYLR, L.O No. 189473, Plot No. 4 Block 'Nkuyu' Kyela Urban Area. The suit was not heard on merit, it was dismissed on 2nd day of March 2023 for want of jurisdiction. In dismissing the application, the learned charman stated in part; -

> *'Hivyo, baraza hili halina mamlaka ya kuanza kupitia mkataba/makubaliano ya mkopo baina ya wadaawa ili kubaini ni nani ametekeleza na ni nani ameshindwa kutekeleza masharti ya mkataba/makubaliano hayo kama anavyoeleza mdai. Ni rai yangu kwamba shauri hili lilipaswa kufunguliwa labda kwenye Mahakama ya biashara (Commercial Court) au Mahakama nyingine (Ordinary Courts) zinaazaoshughulika na migogoro ya mikataba. Kwa hoja hizo, baraza hili halina mamlaka ya kusikiliza na kuamua shauri hili, hivyo maombi haya hayapo sahihi mbele ya baraza hili, kwa muktadha huo yamefutwa (dismissed). Kwa kuwa hoja hii iliibuliwa na baraza, kila upande utabeba gharama zake.'*

The appellant was seriously aggrieved with the decision of the DLHT the fact which made him to file the instant appeal founded on three grounds of appeal per memorandum of appeal dated 2nd May, 2023:-

One, that the learned Chairperson of the trial tribunal erred in law and in fact for violating the right to be heard of the appellant when she

compelled the appellant to argue on a point of law despite having representation of counsel **two**, that the learned trial Chairman erred in law and in fact by disregarding the notice of absence of the counsel for the appellant at trial and thus denying the appellant his right to legal representation and **three**, that the learned trial Chairman erred in law and in fact when holding that the trial tribunal lacks jurisdiction to entertain the matter. Later the appellant filed additional grounds of appeal that; **one** the trial tribunal erred in law for dismissing the case while the law provides for alternative remedies **two**, the trial tribunal misdirected itself as the issue of jurisdiction was blanketly and erroneously raised and the parties were not properly addressed and invited to address the court over the same and **three,** the trial tribunal failed to appreciate the facts and for construing in isolation the facts that constitute the cause of action of trespass into landed property.

The hearing took the form of written submission as suggested by the parties and blessed by the Court. The appellant was represented by Mr. Ignas F. Ngumbi while the respondent was enjoying the service of Mr. Kamru Habibu Msonde both learned Counsels.

Starting with the additional grounds of appeal, Mr. Ignas F. Ngumbi submitted that the DLHT erred to dismiss the matter because dismissal connotes that the suit has been heard on merits which was not proper. He cited the case of **Ngoni Matengo Cooperative Union Ltd vs Ali Mohamed Osman** [1959] 1 EA 577. It was his further view that the tribunal ought to deal with the application in accordance with the provision of Order VII Rule 10 (1) and (2) of the CPC which is elaborated in the case of **Qamara Kwaslem Gwareh vs Anwary Hassan and Two Others**, Civil App No. 92 of 2015 Court of Appeal unreported. The very provision and the decision above require the Chairperson to endorse her reasons and return the application so that it can be presented to the court in which the suit should have been instituted when he was satisfied that the tribunal had no jurisdiction. Since the exercised remedy was erroneous, they prayed the court to nullify the orders and the records be returned to the trial tribunal for proper handling.

In support of the second ground of the additional grounds of appeal Mr. Ngumbe submitted that on 15th day of December when the tribunal invited the parties to address it as to whether or not the tribunal had

jurisdiction to entertain the matter the invitation was not sufficient issued because the question of jurisdiction covers different categories of jurisdiction from subject matter, territorial, exclusivity, personal to pecuniary and compulsory jurisdiction. The chairperson ought to detail her invitation as to what type of jurisdiction she invited the parties to address. The respondent only addressed the tribunal about pecuniary jurisdiction which means the counsel thought it was about pecuniary jurisdiction. To the contrary the learned chairperson intended the parties to address her on subject matter jurisdiction as evidenced by her decision. The tribunal did not raise properly the issue of jurisdiction and as a result it was not properly addressed which is tantamount to the denial of the right to be heard which is fatal and calls for nullification of the decision as was held in **Mbeya Rukwa Auto Parts & Transport Ltd vs Jestina George Mwakyoma** [2001] TLR 251.

The appellant Counsel in support of the third ground of appeal in the additional grounds of appeal submitted that the trial tribunal erred to rule that it had no jurisdiction on the subject matter because the dispute was based on contractual issues. He relied to the case of **Exim Bank**

(T) Ltd vs Agro Impex (T) Ltd and Others, Land Case No. 29 of 2008 where it was established that; -

> *"Two matters have to be looked before deciding whether the court is clothed with jurisdiction. Once you look at the pleaded facts that may constitute cause of action. Two you look at the relief claimed and see as to whether the court has power to grant and whether they correlate with the cause of action"*

Relying on the above position he submitted that the subject matter was a landed property registered under certificate of title 13989 MBYLR the suit land which was mortgaged for the overdraft facility and was supposed to be released. The appellant moved the tribunal to declare him as the owner of the suit property free from encumbrances.

The learned Counsel in the other move argued the original grounds of appeal by starting with the first ground of appeal that the tribunal had no justification to compel the appellant who was being represented by counsel to argue a point of law in absence of his counsel. He said that Regulation 13 (2) of the Land Disputes (DLHT) Regulations, 2002 gives power to the tribunal to compel the appellant to proceed on his own only if his advocate is absence for two consecutive dates. In the present

suit the advocate for the appellant missed only once on 31st day of January, 2023 with notice.

On the second ground of appeal in the memorandum of appeal he submitted that on 31/01/2023 the Counsel for the applicant filed a notice of absence on ground that he was attending compulsory legal aid during law week festival and he attached the timetable to that effect. The tribunal however, chose to ignore the letter on some extraneous matters and proceeded with the hearing. The letter was self-explanatory, the trial tribunal Chairman erred to disregard it. The trial tribunal ought to take judicial notice on the seal of the court which was stamped in the notice of absence timetable. Failure by the tribunal to regard the notice of absence as issued was fatal and violated the appellant's right to legal representation and right to be heard. They prayed the court to be pleased to nullify the proceedings and orders from 31st January 2023.

In reply to the first additional ground of appeal the Counsel for the respondent conceded to it that the chairperson was supposed to return the application to be filed in an appropriate court in terms of the provision Order VII Rule 10 (1) and (2) of the Civil Procedure Code Cap

33 R. E 2019. He prayed the court to substitute the dismissal order with the order returning the application to the applicant to be presented before the appropriate court. On ground two of the additional grounds of appeal he was of the view that the parties were fully availed a right to be heard on the point of jurisdiction which was sufficiently raised ***suo mottu*** by the tribunal. It was incumbent upon the parties to study the matter and address the tribunal on the correct position of the law. It should be noted that the question of jurisdiction is so fundamental as held in the case of **Fanuel Mantiri Ng'unda & Two Others** 1995 TLR 155 (CA). Therefore, the trial tribunal correctly invited the parties to address it on the important issue of jurisdiction. He prayed the court to overrule the ground of appeal.

About the third ground of appeal among the additional grounds of appeal he submitted that the tribunal decision is correct. Per the case of **Exim Bank (T) Ltd vs Agro Impex (T) Ltd & Others** cited by learned Counsel for the appellant; one has to look the pleaded facts as well as reliefs sought in order to determine the jurisdiction of the court. Looking at the pleadings in the case at hand, it is not in dispute that the land in dispute were among the securities mortgaged by the appellant.

The issues for determination are whether the overdraft facility agreement was performed so that the loan security to be discharged. The idea was rightly decided by the learned chairperson that the parties were in a contractual issue. He cited the case of **Hussein Lutambika Toy vs National Microfinance Bank Plc & Another**, Land Appeal No. 28 of 2021 High Court of Tanzania at Mbeya (unreported) which cited with approval the case of **Exim Bank (T) Ltd vs Agro Impex (T) Ltd & Other** where it was held; -

> *'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 se does not turn the suit to a land dispute and give this court jurisdiction… this suit is squirrely based on a contractual relationship between a banker and consumer'*

He again referred to the case of **Hussein Lutambika Toy vs National Microfinance Bank Plc & Another**, Land Appeal No. 28 of 2021 High Court of Tanzania at Mbeya (un reported) which was relied by the trial Chairperson clearly that if the matter is contractual, the tribunal lacks jurisdiction to entertain it. Therefore, the trial Chairperson was correct in

following the decision of this court on what amounts to a land dispute and those decisions binding upon him. Therefore, the suit at hand does not involve landed property as learned counsel for the appellant suggests but contractual issue and ordinary courts are the proper to adjudicate the same.

On the first ground of appeal from the original memorandum of appeal the respondent Counsel submitted about compelling the appellant to proceed with his case notwithstanding that he had engaged an advocate. He stated that the advocate made himself absent without any good reason of not attending court session on the date of hearing. The tribunal like any other court has powers to have a firm control over its proceedings and an adjournment can only be granted upon sufficient reasons. He relied to the case of **Amratlal Damodar vs A. H Jariwala** [1980] TLR 31 where Mwakasendo, J. A (as he then was) held that; -

> *"a court of trial has a duty not only to follow the rules of procedure but also to exercise firm control over the proceedings before it and, if need be, to impose and enforce a timetable for litigation … litigation is the resolution of civil contention by methods preferable to violence … But the rule of law is not to be equated with a reign of litigiousness …Moreover, dilatory procedure*

may defeat the very purpose of judicial process, namely to vouchsafe justice, since if litigation is prolonged, not only is there waste of time and money and moral energy, but circumstances may change in such a way that what would have been at the outset a just conclusion is in the end no longer so…"

Therefore, the trial Chairman was right to order the appellant to proceed with his case because the case is of the parties and not the advocate. A prudent litigant could have even asked to withdraw such advocate and engage another who is willing to proceed with the matter instead of deciding to abandon his case and leave the tribunal premises.

On the second ground of appeal in the original memorandum of appeal there was a complaint that the tribunal ignored the appellant counsel letter which he requested for adjournment on grounds that the advocate was attending law week events. There was no evidence which justify that the learned Counsel for the appellant was engaged in all days of the law week, thus the tribunal was right to proceed with the matter.

In rejoinder the appellant reiterated his earlier submission that the tribunal had jurisdiction while insisting that his right to fair trial was waived by the tribunal by insisting him to proceed while unrepresented.

Having heard the rival submission, I find three important issues to be determined in this judgment **one**, whether the appellant was denied a right to be heard during hearing on 31st January 2023 **two**, whether the parties were properly introduced to the subject matter of jurisdiction for addressing the court and **three**, whether the trial tribunal correctly ruled on the issue of jurisdiction.

I am in agreement with the appellant that the right to be heard is fundamental as far as the fair trial is concerned. The fact that such right is fundamental its violation vitiates the proceedings and orders of the court. In the present case the appellant complain that his right to be heard was violated when he was compelled by the tribunal to argue the point of law despite having representation of the learned Counsel. In determining whether he was denied a right to be heard or not I will start by considering the argument of the parties. The appellant submitted that his advocate filed notice of absence before the court therefore it was wrong for the tribunal to ignore and proceed with the hearing in absence of his advocate. From the outset I am of the firm view that the parties were availed an equal right to address the court. In other words, they were sufficiently availed a right to be heard in accordance with the

law and practice as accurately argued by the respondent. On 15th December, 2022 the tribunal informed the parties that it has perused the records and noted that it needed to be satisfied as to whether the tribunal was legally clothed with jurisdiction or not. It invited the parties to get prepared for addressing the tribunal on the issue of jurisdiction. The tribunal adjourned the matter till 31st January, 2023 for the parties to address the issue before the tribunal. The period between 15th December, 2022 till 31st January, 2023 was reasonable notice for one to exercise his right to be heard. Fortunately, it is apparent from the records that the date set for the parties to address the tribunal was suggested by Mr. Ignas Ngumbi the learned Counsel for the appellant. The suggestion was blessed by the tribunal. The tribunal guaranteed the parties the right to be heard thus it gave them enough time for preparation of the subject matter which was known to them. For no good reason, the appellant Counsel missed the important session set for addressing the court.

There is no dispute that the appellant Counsel one Ignas Ngumbi could not attend to address the tribunal on the issue of jurisdiction on ground that he was attending legal aid activities during the law week. In his

letter he could not state the institution or person who posted him to law week activities for the court to weigh out the essence. I therefore subscribe to the findings of the trial tribunal that the learned counsel did not advance sufficient reasons for his absence before the tribunal on 31st January 2023. The tribunal had justification to proceed with hearing in absence of the learned Counsel for the ends of fair and timely justice. Consequently, the complaint about the right to be heard is an afterthought, it is wealth of being dismissed. The decision of the learned Chairman was a prudent move in connection with the control of proceedings through individual court calendar. This has been properly illustrated by the case of **Amratlal Damodar (supra**) as cited herein above.

I now move to the second issue as to whether the parties were properly introduced to the subject matter of jurisdiction to address the court. The court manifestly stated that it wanted to be satisfied on whether it had jurisdiction to determine the application or not. In dealing with this issue, I tend to agree with the appellant Counsel that the issue of jurisdiction carries a wide scope and it was possible for the learned chairman to narrow down the scope and specify the criteria of

jurisdiction which he wanted the parties to address. His failure to narrow down and specify the criteria is not fatal because the parties were not prevented to address the court on all criterion of jurisdiction to assist the court to decide as to whether it had jurisdiction or not. Having said and done, I think this is not the point to detain the court, the complaint is overruled.

The last issue for consideration is whether the trial tribunal correctly ruled on the issue of jurisdiction. The complaint about jurisdiction was raised in the third ground of appeal from the original memorandum of appeal also the second and the third grounds of appeal in the additional grounds of appeal.

In answering to this last issue, I will start by reminding myself the content of the pleadings and the reliefs claimed by the appellant. In paragraph 6 (vi) b the appellant in his application he stated that the suit land will be discharged from security should the applicant pay a lump sum amount that covers a substantial part equivalent to the amount that was extended after renewal of the facility but such land was not discharged as agreed. In paragraph 7 among reliefs, he prayed for the declaration that the suit land was his lawful property and the respondent

to be restrained from interfering on the suit land in any manner whatsoever.

Upon a careful screening of the pleadings and the relief claimed, I am in agreement with the respondent that before the tribunal the issue for determination was whether the overdraft facility agreement was performed as agreed so that the loan security to be discharged. In my firm view this was a contractual issue between the appellant and the respondent in their bank and customer relationship or in a mortgage deed. The parties to the contract are bound by the terms of their agreement and nothing more. It is a rule of law that a contract is sacrosanct which means nobody is allowed to interfere with the agreement of the two sides. The principle of sacrosanct of the contract does not allow excuses in enforcing terms, even the courts are not allowed to interfere with contractual obligations. The concept of sanctity of contract was lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive)*

or misrepresentation, and no principle of public policy prohibiting enforcement"

In the case at hand, the issue of discharge of the suit land which secured the loan was among the contractual terms which were enforceable in the mortgage deed between the parties. It is unlawful to consider it as a land dispute, it is purely a contractual issue as correctly ruled by the trial tribunal. I subscribe to the position stated in the case of **Exim Bank (T) Ltd (supra)** as cited by the parties that putting land as security does not turn the suit land to be a land dispute, it remains a contractual dispute. After all, in the present case there is no dispute that the suit land is the property of the appellant, there is no dispute about ownership of the same the only dispute is based on their contractual relationship in the loan agreement. In that respect and in my view, I think even the relief raised by the appellant that the suit land to be declared as his property has been misplaced because it is known that he mortgaged his property and there is no dispute as to ownership.

Before I conclude I wish to briefly deal with the order made by the learned Chairman which dismissed the suit. The appellant complained that the learned Chairman ought to return the application for them to file in a proper channel, it was wrong for him to dismiss it. This error

was supported by the respondent who stated that the proper approach was to return the application for necessary correction and not to dismiss it. I subscribe to the stance of the parties that the proper way was to return the application for the appellant to file it in a proper channel subject to limitation.

In the end result, I am satisfied that the trial tribunal correctly found that it had no jurisdiction to hear and determine the matter save for the order of dismissal. The proper order was to struck out the application as I hereby do. The appellant is at liberty to file the application in a proper channel subject to limitation. Order accordingly.

Date this 16th day of February, 2024 at Mbeya.

D. P. Ngunyale

JUDGE

16th Febr.2024

The judgment has been delivered on 16th day of February, 2024 remotely by the aid of video conference in the presence of Mr. Ignas Ngumbe counsel for the appellant and in the absence of the respondent linked from High Court Mbeya.

D. P. Ngunyale

JUDGE

16th Febr.2024