

**IN THE HIGH COURT OF TANZANIA  
(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**LAND CASE NO. 11 OF 2023**

**NYANDA KISINZA LWENGI @KISINZA MIMBONDULU ..... PLAINTIFF**

**VERSUS**

**CRDB BANK PLC ..... 1<sup>ST</sup> DEFENDANT**

**NUTMEGA AUCTIONEERS AND**

**PROPERTY MANAGERS AND CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**SALUM NASSORO MOHAMED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*16<sup>th</sup> April & 11<sup>th</sup> June, 2024*

**MRISHA, J**

This ruling is in respect of a Preliminary objection on the competence of the Land Case No. 11 of 2023 against the defendants who were severally and jointly sued by the plaintiff who sought for a declaratory order that the defendants are trespassers on plaintiff's farm No. 91 registered under a Certificate of Title No. 47661-MBYLR, L.O 50087, LD No. NKS/91/2 located at Mkole Village, Nkasi District.

In their response, the defendants disputed the plaintiff's claims by filing written statement of defence and in addition to that, the 1<sup>st</sup> and 2<sup>nd</sup>

defendants filed a notice of preliminary objection which is to the effect that:

1. This court has no jurisdiction to determine this case.

On 12<sup>th</sup> March, 2024 when this matter come for hearing of a preliminary objection, the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants prayed to make an amendment of the name of the 2<sup>nd</sup> defendant which was written as Twin Auction Mark Co. Ltd, instead of Nutmeg Auctioneer and Property Managers Co. Ltd; the prayer not objected by the parties. Hence, the court granted the prayer and amendment was made accordingly.

On hearing of the preliminary objection, both parties agreed that the matter to be heard by way of written submissions. Meanwhile, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were represented by Baraka Mbwilo, learned advocate whilst the plaintiff was represented by Mr. Deogratius Phailod Sanga, also learned advocate and both parties complied with the order of the court dated on 13<sup>th</sup> March, 2024.

Arguing in support of the preliminary objection, the advocate for the respondent submitted that the parties to the loan agreement which is annexure NKL 02 to the plaint in clause 14, agreed irrevocably to settle

their dispute related to the interpretation, performance, non-performance of terms and conditions of the said contract to the High Court of Tanzania, Commercial Division.

He argued that clause 14 of annexure NKL 02 exclude other courts to adjudicate their disputes by consent and parties are bound by the sanctity of the contract. Hence, it was his argument that this court has no jurisdiction and is barred to entertain the matter, under section 7(1) of the Civil Procedure Code, Cap 33 R.E. 2019.

To buttress his position, he cited the cases of **Mashishanga Salum Mashishanga v CRDB Bank PLC and Others**, Civil Appeal No. 535 of 2021, **CRDB Bank PLC v Chama cha Walimu cha Ushirika cha Akiba na Mikopo Wilaya ya Kyela and another**, Civil Case No. 14b of 2016 HCT Mbeya, **Sunshine Furniture Co. Ltd v Maersk (China) Shipping Co. Ltd and another**, Civil Appeal No. 98 of 2016 CAT Dar es Salaam and **SCOVA Engineering S. P. A. and another v Mtibwa Sugar Estates Ltd and Others**, Civil Appeal No. 133 of 2017 CAT Dar es Salaam (all unreported).

Stressing on the case of **Mashishanga Salum Mashishanga** (supra), the learned counsel argued that it is a current decision whereby the Court of Appeal interpreted Clause 14 of the contract which is same as the one under scrutiny in this case. Again, he submitted that in the case of **CRDB PLC v Chama cha Walimu** (supra), the Court interpreted clause 14 and declared this court has no jurisdiction. Therefore, he prayed to the court to sustain the preliminary point of objection raised by the respondents and strike out the suit with costs.

In reply, Mr. Sanga resisted such preliminary objection by contending that the submission of the 1<sup>st</sup> and 2<sup>nd</sup> defendants is baseless and without merits. I was his argument that he is aware and acquainted with the position of the law under section 7(1) of the Civil Procedure Code and all the cases cited by his learned friend.

However, he distinguished the above cited cases with the present case and submitted that the present case is not subjected to any mortgage deed. He added that the cause of action was did not arise from the breach of mortgage deed, as wrongly submitted by the defendants' counsel.

Stressing on the same issue, he argued that the defendant never contested on paragraph 5 of the plaintiff's plaint which expressly provides that the cause of action is trespass to the disputed farm, the farm which is not associated to any mortgage.

He added by argued that, the farm referred in SA-NKL 2 is farm No. 35, Plot 29 and 40 Uvinza Ranch Kigoma which was subject to mortgage and not sold. However, the Farm No. 91 with Certificate of title No. 47661-MBYLR located at Mkole village Nkasi District, Rukwa Region, was not subject to the mortgage and it was sold.

He finally submitted by concluding that the suit is competent and this court has jurisdiction to determine the same simply because the sole base of defendants' objection is on annexure SA-NKL 2 which has no any connection with the base of plaintiff's claim. Thus, he prayed that the objection be dismissed to it's entirely and the matter be proceeded on merits.

In his brief rejoinder, Mr. Mbwilo responded to the argument which is based on the comment that the dispute in this case is on trespass to the disputed farm which is not subject to mortgage. It was the learned

counsel's contention that the center of the dispute is on loan agreement, whereby the plaintiff claimed that the sold farm was not mortgaged; that to his understanding, the 1<sup>st</sup> defendant did not act according to the loan agreement.

He stressed that the dispute between the parties herein, is on performance and non-performance of the loan agreement. Hence, the counsel argued that clause 14 of the loan agreement applies to this case and reiterated his prayer that the suit be struck out with costs.

I have on my part, duly considered the rival submissions made by the learned counsel for the parties. I would therefore, consider the counsel arguments to ascertain whether this court is not vested with jurisdiction to determine this matter. I am aware that if the issue of jurisdiction is determined in affirmative, that will dispose of the suit.

To answer the above raised issue, it is important for me to quote clause 14 of the loan agreement between the parties which was annexed to the plaint. The respective clause reads as follows: -

"...Clause 14 of the loan facility letter reads:

### ***DISPUTE RESOLUTION***

*In case of any dispute arising from interpretation, performance or non-performance of the terms and conditions contained in this loan facility letter and where the amount involved is within the pecuniary jurisdiction of the High Court of Tanzania, the parties hereto irrevocably submit themselves to the commercial division of the High Court for adjudication of the dispute...".*

According to clause 14 as quoted above, it is apparent that the plaintiff and 1<sup>st</sup> Defendant had agreed themselves to refer any dispute arising from interpretation, performance or non-performance of the terms and condition contained in the loan Facility letter to the Commercial Division of the High Court of Tanzania and this is not in dispute between them at all.

The relevance of the above cited clause of the loan facility letter, is that parties had expressly shown their intention to submit their dispute regarding the loan facility which was annexed with the plaintiff's plaint, to the High Court of Tanzania, Commercial Division.

Pursuant to section 7(1) of the CPC which was relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel to argue that clause 14 of the loan Facility letter bars the court other than the High Court of Tanzania, Commercial Division to entertain the suit, it provides that:

*"7(1) subject to this Act the courts shall have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred."*

In interpreting the above provision of the law in relation to the choice of forum clauses, the Court of Appeal, in the case of **Mashishanga Salum Mashishanga** (supra) which I find to be relevant to the circumstances of the present case, observed that:

*"...it is common ground that the appellant and the 1<sup>st</sup> respondent had, by clause 14 of the Loan Facility Letter, agreed that in case of any dispute arising from interpretation, performance or non-performance of the terms and conditions contained in the Loan Facility Letter, they would submit themselves to the Commercial Division of the High Court for the adjudication of the dispute. That being the case and based on the position of the law as regards choice of forum as amply demonstrated above, it is clear that the appellant wrongly and improperly instituted Land Case No. 03 of 2016 in the Land Division of the High Court. As he was bound by clause 14 of the Loan Facility Letter, the appellant ought to have referred the suit to the Commercial Division of the High Court as per his agreement with the 1<sup>st</sup> respondent. Land Case No. 03 of 2016 was thus not properly before the Land Division of the High Court*



*which ought not to have taken cognizance of the same and adjudicated the dispute between the parties."*

Further, the above position was also stated in the case of **Scova Engineering S. P. A. and Another** (supra), where the parties to the case agreed that the Guarantee shall be governed and interpreted in accordance with Italian law by the Court of Rome, this is according to Clause 1.9 of the Agreement. The Court of Appeal held that:

*"That agreement bound the parties and it was not open for the appellants to resort the High Court, Commercial Division. To that extent, the High Court was right to refuse to take cognizance of the suit and rightly bound the parties to their bargain."*

In claiming that the cause of action of the case did not arise from the breach of a mortgage deed, Mr. Sanga submitted that the Farm No. 91 Mkile village, Nkasi District with Certificate of title No. 47661- MBYLR located at Mkole village Nkasi District, Rukwa Region was not subject to the mortgage and was sold, and thus clause 14 was not applicable.

This argument gave me time to read the plaint filed by the plaintiff on 05<sup>th</sup> October, 2023; at paragraph 11 of the plaintiff's plaint, which I find to be

interesting and relevant to the above argument raised by the plaintiff's advocate; I desire to quote the said paragraph as hereunder:

*"11. That, during the incidence at paragraph 10 herein the plaintiff had changed/moved his business area/project to the disputed farm and all the said agreement entered there. Alongside entering into the said agreement, the 1<sup>st</sup> defendant via his officer Mr. Filo Patrick Msuha required the plaintiff to give them the title deed of the disputed farm not a security, but as assurance that they will at all when need him at a disputed farm, whereof the plaintiff with trust did as requested and no any document was signed to that regard."*

The above extract explains that the plaintiff surrendered his title deed of the disputed farm which is not a security of the legal mortgage, but as an assurance of the performance of the agreement entered after the restructuring of the loan facility. In my view, the surrendering of the disputed farm would not be done where the plaintiff performs the agreement by disbursing the loan agreement.

It is also my view that the Farm No. 91 Mkole village, Nkasi District with Certificate of title No. 47661- MBYLR located at Mkole village within Nkasi District, Rukwa Region which is in dispute, came into the loan facility after the plaintiff and 1<sup>st</sup> Defendant agreed restructure the loan and to make

assurance of performance of what they agreed; the plaintiff surrendered the said farm for assurance, thus, in the circumstance, clause 14 of the dispute resolution will be applied for resolving the dispute which arose between the parties herein.

On the strength of the above position, it is my settled view that based on what was agreed by the parties under clause 14 of the loan facility, and in absence of any reasonable cause, the Plaintiff ought not to have departed from their respective position.

Generally, the court of law should always and primarily embrace, encourage, respect and give effect to the intention of the parties to the contract regarding terms of their contract which is within the ambit of the law of land. In the present case, the parties had mutually agreed that should the dispute arise between them, it would be submitted to the exclusive jurisdiction of the High Court, Commercial Division.

For the above reasons, I answer the above issue in the affirmative and proceed to hold that the point of law raised by the Mr. Mbwilo for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, has merits and it is therefore, sustained. The plaintiff may re-file his suit in the Commercial Division of the High Court as per

clause 14 of the Loan Facility Letter, if he so wishes. Under the circumstance of this matter, I make no order for costs.

  
**A.A. MRISHA**  
**JUDGE**  
**11.06.2024**

**DATED at SUMBAWANGA this 11<sup>th</sup> day of June, 2024.**



  
**A.A. MRISHA**  
**JUDGE**  
**11.06.2024**