

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 18 OF 2003

AKIBA COMMERCIAL BANK LTD.....PLAINTIFF  
VERSUS  
THE NETWORK OF TECHNICAL  
PUBLICATIONS IN AFRICA.....1<sup>ST</sup> DEFENDANT  
MR. ELIESHI LEMA.....2<sup>ND</sup> DEFENDANT  
MR. THOMAS KAMUGISHA.....3<sup>RD</sup> DEFENDANT  
MR. MARTIN VAN LANUVELD.....4<sup>TH</sup> DEFENDANT  
HON. NDIMARA TEGAMBWAGE.....5<sup>TH</sup> DEFENDANT

RULING

KIMARO, J.

The plaintiff, AKIBA COMMERCIAL BANK LTD, is suing the NETWORK OF TECHNICAL PUBLICATIONS IN AFRICA, Ms Elieshi Lema, Mr. Thomas Kamugisha, Mr. Martin Van Lanuveld and Hon. Ndibalema Tegambwage for the recovery of T.shs 14,492,842.24 being a loan and overdraft facilities extended to the first defendant. The second to fifth defendants are Directors of the first defendant and they guaranteed the loan.

It is only the third defendant who filed a Written Statement of Defence. He has raised three points of preliminary objection –

- (a) *That the suit is not maintainable as it is not properly before the court because it has been filed against wrong parties to wit: the guarantors instead of filing against the borrower. It should therefore be struck out with costs.*

- (b) *The suit has been filed in a wrong court i.e. in violation of Act No.25 of 2002. It should therefore be rejected with costs.*
- (c) *There is no evidence that the mortgage was registered. The mortgage is therefore void.*

The Learned Advocates appearing in this case; that is Mr. Swai for the plaintiff and Mr. Mjindo for the third defendant, advanced written arguments.

The argument by Mr. Mjindo in respect of the first point of objection is that, the third defendant being only a guarantor, should be the last person to be sued. Mr. Mjindo seeks justification for this argument on what was taken by the plaintiff as security for the loan. First there was Bank guarantee (100%) from ABN-AMRO proposed by HIVOS. Second, was personal guarantees from all Directors/Trustees and the third was chattel mortgage or debenture on all assets of the company. Mr. Mjindo is of a view that the plaintiff should first sue the borrower or else go for the chattel mortgage or debenture of the company. Steps against the third defendant should be a last resort.

The response by Mr. Swai is that the third defendant has been properly joined into the suit because he has admitted being a guarantor to the loan which was advanced to the first defendant. He also said that the third defendant is aware that the first defendant has defaulted repayment, despite several demands. Mr. Swai observed that since the principal is in default, the guarantor has been properly joined.

It must be pointed out that this point of preliminary objection is misconceived. Order II rule 3(1) allows joinder of several causes of action against defendants jointly. The first defendant borrowed. The loan was secured by

personal guarantee of the 3<sup>rd</sup> defendant. The loan has not been repayed. The plaintiff is entitled to sue the borrower and the guarantor. The first point of preliminary objection is dismissed.

The second point of objection is on the jurisdiction of this court after enactment of Act No.25 of 2002. Act No. 25 of 2002 amended the Magistrates Courts Act 1984 raising the pecuniary jurisdiction of the District Courts and Courts of Resident Magistrate to T. shs 100 million for movable property and T.shs 150 million for immovable property. Mr. Mjindo's argument on this matter is that, since the pecuniary value of the subject matter of this suit is below T.shs100 million, the suit ought to have been filed in the District Court. Section 13 of the Civil Procedure Code, 1966 was cited to augment his submission

The reply by Mr. Swai is that the amendments made by Act No.25 of 2002 do not affect the jurisdiction of this court because the High Court has unlimited jurisdiction in Civil and Criminal matters and that the amendments are only concerned with Magistrates and do not affect the High Court.

**In HAJI UKWAJU t/a WAJENZI ENTERPRISES VS NATIONAL MICRO FINANCE BANK & JOSEPH MUSIBA** Commercial Case No.27 of 2003 (Unreported), my Brother Judge, Dr. Bwana pointed out the negative effects experienced from Act No.25 of 2002. I respect his views and will add that Act No.25 of 2002 defeats the purpose of the establishment of the Commercial Division of the High Court in as far as expediency in finalization of cases is concerned.

However, I am in total agreement with Mr. Mjindo that Act No.25 of 2002 ousts the jurisdiction of this court. the Civil Procedure Code 1966 regulates the procedure for the Civil process system in both the High Court and the Courts of Resident Magistrate and the District Courts. Section 13 of the Civil Procedure

Code, 1966 requires any civil matter to be instituted in the lowest court competent to try the matter. The pecuniary value of the subject matter involved in this case is shs 14,492,842.24. Act No.25 of 2002 has raised the pecuniary jurisdiction of the Courts of Resident Magistrate and District Court to T.shs 100 million. This means that Court of Resident Magistrate and the District Courts are the Courts of lowest grade competent to try the matter.

The argument raised by Mr. Swai that the amendment were meant to affect only the subordinate courts (Magistrates Courts) and leave the High Court can not be valid. If the law is let to operate that way, there will be a total confusion. We need stability. The option of where to start can not be left on the parties. There must be a control. Act No.25 of 2002 provides such a control. The negative effects found in Act No.25 of 2002 have to be corrected by the relevant authority which is responsible for that duty. Otherwise the interpretation which comes out of it is that with the raising of the pecuniary jurisdiction of the District Court to T.shs 100 million, it is only matters whose value is above T.shs 100 million which should come before the High Court. Any matter involving pecuniary value below T.shs 100 million has to be filed in the District Court until such time the law is amended again to provide otherwise.

With what has been said, I join my Brother Judge Kalegeya in the case of **The Courtyard Dar-es-Salaam vs The Managing Director Tanzania Postal Bank**, Commercial Case No. 35 of 2003 (unreported) and uphold the preliminary objection.

Mr. Mjindo abandoned the third point of preliminary objection after realising that it was a matter of evidence.

