

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

COMMERCIAL CASE NO. 43 OF 2006

DUNIA WORLDWIDE TRADING
COMPANY LIMITED..... PLAINTIFF

VERSUS
PRESIDENTIAL PARASTATAL SECTOR
REFORM COMMISSION.....1ST DEFENDANT

M/S BUNDA OIL INDUSTRIES.....2ND DEFENDANT

R U L I N G

MJASIRI, J.

The Plaintiff's claim in this case is for a declaration that the decision by the 1st Defendant to cancel the first tender for the sale of assets of TANITA II cashew nut factory is unlawful, unfair and contrary to the tendering practice and procedure and was actuated by bias and thus null and void and that the Plaintiff being the highest bidder in that tender, and having committed itself into continuing with the cashew nut processing activities of the said factory, is entitled to be

awarded the tender. The Plaintiff is represented by Dr. Lamwai, Advocate the first Defendant by Mr. Laizer, Advocate and the second Defendant by Mr. Maira and Mbamba, Advocates.

The Counsel for the 2nd Defendant Mr. Maira Advocate raised a preliminary objection in law that in view of section 167 (1) of the Land Act 1999 read together with section 3(1) of the Courts (Land Disputes Settlement Act 2002) which grants exclusive jurisdiction to the High Court Land Division there is no jurisdiction in this Honourable Court to entertain this proceeding.

Mr. Maira therefore asked the court to dismiss and/or strike out the same with costs for two Counsels.

Mr. Laizer Counsel for the first Defendant supported the objection raised by Mr. Maira Counsel for the second Defendant. Mr. Maira strongly argued that the matter before the court concerns land and the subject matter is landed property. The parties are essentially interested in the sale or disposition of land in a floated tender; and their prime concern is buildings on the land.

According to Mr. Maira section 167 of the Land Act Cap 113 vests exclusive jurisdiction on the land issues to the Land Division of the High Court and not this court.

Mr. Maira also cited the case of *Anthony J Mushi V Jonathan Mwingira* High Court Land Case No.239 of 2004 (unreported). It was held in the above case the High Court Land Division has exclusive jurisdiction to all matters concerning land.

Dr. Lamwai with equally strong force submitted that this court has jurisdiction in view of section 2(1) of the Judicature and Application of Laws Act Cap 358 which gives unlimited civil jurisdiction to the High Court.

Dr. Lamwai also argued that the case of *Anthony Mushi V Mwingira* is not applicable. The *Mwingira* case concerned a collateral. The issue was mortgages. Dr. Lamwai further argued that the Land Division of the High Court is vested with exclusive jurisdiction in all manner of disputes action and proceedings concerning land, therefore the above description relates to matters of ownership of land, landlord and tenant and mortgages in view of the Land Act.

Section 37 of the Land Disputes Courts Act does not confer exclusive original jurisdiction to the Land Division of the High Court – There is therefore conflict between section 167 of the Land Act and section 37 of the Land Court Disputes Act.

Dr. Lamwai further submitted that the Plaintiff's case is not a land case. Judging from the pleadings, the plaintiff is claiming that the sale of the assets is unlawful and he was victimised in the tendering process; complaining about that tender; the contract of sale and the conduct of sale in respect of a commercial transaction. The transaction in question is therefore a commercial transaction. Dr. Lamwai also submitted that paragraph 16 of the plaint is a complaint about fraud in the way the sale was conducted in a commercial transaction.

On looking at the pleadings and the totality of the record, the claim filed by the Plaintiff relates to a commercial transaction. It is an issue relating to tender, irregularities in the contract of sale, etc; there is no issue relating to land ownership of land, leases mortgage and or transaction falling under the jurisdiction of the Land division of the High Court. The action before the court does not concern land as such

but is an action concerning a commercial transaction. The tender process is being challenged. In enacting section 167 of the Land Act the legislature had in mind action on land pure and simple.

The High Court Registries (Amendment Rules 1999 (GN No.141 of 1999) defines a commercial case as follows:

“Commercial Case” means a civil case involving a matter considered to be of commercial significance including but not limited to

(iv) the liability of a commercial or business person, arising out of that persons commercial or business activities.

In **National Westminster Bank p/c V Kitch** 1996 4ALL ER 495 an action was commenced by a bank in Queen’s Bench Division for recovery of a loan secured by a mortgage. The mortgage was not relied upon in the proceedings. The issue which arose was whether the action was properly commenced in Queen Bench Division and whether the action was a mortgage action.

It was held that an action by a bank against a customer for the recovery of an overdraft which is secured by a mortgage or a charge is not a mortgage action within the meaning of RSC 88 rule 1 where the bank does not rely on the mortgage in making its claim. It follows that the provisions of RSC 88 do not apply and as a result such an action can properly be commenced in the Queen's Bench Division of the High Court.

This decision goes a long way in making a distinction in respect of a commercial transaction even though the overdraft transaction was secured by a mortgage as long as the mortgage is not relied upon in an action filed by the bank.

Looking at the circumstances of the case which is before the court, and taking into account that there is no issue relating to a claim of land or a mortgage, I have no hesitation whatsoever in concluding that this court has jurisdiction. In view of what has been stated hereinabove, the preliminary objection raised by the second Defendant is hereby dismissed with costs.

Sauda Mjasiri
Judge
January 30, 2007

Delivered in Chambers on the presence of Dr. Lamwai, Advocate for the Plaintiff and Ms Maira, Advocate for the second Defendant and in the absence of Mr. Laizer, Advocate for the first defendant this 30th day of January 2007.

Sauda Mjasiri
Judge
January 30, 2007

1880 words
jd

I Certify that this is a true and correct
of the original, under Judgement Rulling
Sign _____
Registrar Commercial Court Dsm.
Date _____