

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2010

SHABAN MAKUMLO T/a MAKS
GENERAL ENTERPRISES.....APPLICANT
VERSUS

NATIONAL BANK OF COMMERCE LTD... 1ST RESPONDENT

KAM COMMERCIAL SERVICES.....2ND RESPONDENT

R U L I N G

Hon. Mruma, J

The Applicant Shabani Makumlo t/a Maks General Enterprises has instituted commercial case No. 16 of 2010 against the defendants National Bank of Commerce Ltd and KAM Commercial Services Ltd for:

- (i) A declaration order that the 1st Defendant's decision to sale the mortgaged property is premature.*
- (ii) A declaration that the 1st Defendant violated the law that gives the mortgage power of sale for not complying with the condition precedent thereof.*

- (iii) *An order restraining the 1st and 2nd Defendant or any of their agents from selling or disposing of the mortgaged property or any assets of the plaintiff until the negotiations between the plaintiff and the 1st Defendant are concluded so that the plaintiff repays the loan to the 1st defendant or otherwise until determination of the suit.*
- (iv) *The 1st defendant be ordered to reschedule and restructure the repayment of the outstanding loan and interest thereon at the rate of Tshs.35,000,000.00 per month from May, 2010.*
- (v) *Costs of the suit be provided for and the traditional prayer of "any other reliefs or orders as the Honourable court may deem just and appropriate to grant in order to meet justice of this matter.*

The gist of the plaintiff's pain can be derived from the plaint. Sometimes in early 2007 the plaintiff applied for a credit facility from the 1st defendant's bank. On 15th June 2007, the bank extended an overdraft facility to the plaintiff to the tune of Tshs.250,000,000.00 for purpose of supplementing the plaintiff working capital to enable him to execute orders from his customers and meet other operational expenses. Apparently (though not mentioned in the plaint), as a security for the facility

extended to him, the plaintiff mortgaged his double storey residential building on medium density plot no.88 Block "M" with CT No.30609 Ilala Municipality in Dar es Salaam.

The plaintiff has defaulted and the defendant's bank has instructed the second defendant to sale by public auction the mortgaged property. The plaintiff's complaint is that he was not served with the statutory notice as required by law before the sale is advertised.

Together with the plaint, the plaintiff filed chamber summons (under certificated of urgency), supported by an affidavit of the Applicant seeking for an interim order (ex-parte) restraining the Respondents from the seeking and/or disposing of the mortgaged property pending the hearing and determination of the Application for restraining orders inter parties.

I refused to dispense with notice to the Respondents for reasons stated in my orders and directed service to both Respondents and set the matter for hearing on 12.3.2010

When the matter was called for hearing on 12.3.2010, Mr. Nyika learned counsel for the Respondents quickly took the floor. He told the court that having gone through the chamber summons and affidavit he had a feeling that this court lacks jurisdiction to entertain the matter. He said that the dispute in this matter concerns landed property and in view of the provision of section 167 of the Land Act [cap 113 RE 2002] this court has no

jurisdiction to entertain it. The learned counsel contended that even the Chief Justice's circular which empowers all judges of the High to determine Land cases does not vest jurisdiction in this court to hear the matter because that power can only be exercised in respect of matters instituted in the Land Court registry.

Exercising his right of reply, Mr. Masatu, Advocate for the Applicant stated that a similar objection was raised and dismissed the Land court in the case of **Exim Bank (T) Ltd vrs Agro Impex (T) Ltd and two others.** Land case no.29 of 2008, Mziray J (unreported), on the ground that failure of the lender to observe contractual obligations or terms is not a land matter. He stated that the gist of the Applicant's complaint in this matter is failure by the Bank (ie the 1st Respondent) to observe the provisions of section 127 of the Land Act [cap 113 RE 2002], as amended by Act No.17 of 2008. The counsel submitted that the dispute here is about breach of contract which falls squarely within the jurisdiction of Commercial Court.

In rejoinder, Mr. Nyika reiterated that the fact that the Applicant seeks an injunction against the sale of mortgaged property takes the whole matter under the shadow of S.167 of the Land Act. He said that the only power the court has in the circumstances of this case is to order for its transfer to the Land Division of the High Court.

Let me start with the issue whether an action to contest a Notice of Default or to exercise power of sale of a mortgaged property is a land issue.

As rightly submitted by Mr. Nyika S.167 (1) of the Land Act [cap 113 RE 2002] gives the Land Division of the High Court exclusive jurisdiction to hear and determine all disputes concerning Land. The said law provides as follows:

"(1) The following courts are hereby vested with exclusive jurisdiction, subject to the provisions of this part, to hear and determine all manner of disputes, actions and proceedings concerning land, that it to say:

- a) The Court of Appeal;*
- b) The Land Division of the High Court established in accordance with law for time being in force for establishing courts divisions....."*
- c)[not relevant]*
- d)[not relevant]*
- e)[not relevant].*

Proceedings relating to mortgages and mortgage financing are governed by Mortgage Financing (Special Provisions) Act, 2008 which came into operation in May 2009 vide Government Notice No.106 of 2009 published on 1st May 2009, as Act No.17 of 2008. Section 18 which amends section 140 of the Land Act [cap 113 RE 2002] provides that:

*"(2) Notwithstanding any other provisions of this Act, an action for exercise of **power of sale** or for possession of a mortgaged property may be brought in the Land Division of the High Court.*

(3) Notwithstanding any other provision of law, and excepting any action on a customary mortgage under section 115, any action brought in a forum other than the High Court to contest, stay, suspend terminate or seek relief from demand for payment of a debt secured by a mortgage of real property or an action for possession of mortgaged property or exercising of a power of sale under this Act shall be transferred to the Land Division of the High Court immediately upon commencement of an action in that forum on the same subject matter and consolidated with such action."

Sub-section (2) of section 18 of the Mortgage financing (Special Provisions) Act, 2008 quoted above answers the issue whether exercising power of sale of mortgaged property is a land matter in the affirmative.

The Law vests jurisdiction over mortgages on the Land Division of the High Court. Thus, it is my considered view that when section 18(2) and (3) of the Mortgages financing (Special Provisions) Act, 2008 is read together with section 167(1) of the Land Act [cap 113 of the RE 2002] and section 37(1) of the Land Disputes

Courts Act, there can be no doubt as to the exclusive nature of the jurisdiction of the Land Division of the High Court over land matters including an action to contest exercise of a power of sale of a mortgaged property.

It has been submitted by Mr. Masatu that the gist of the dispute in this matter is failure by the Respondent to observe the provision of section 127 of the Land Act, which failure in Mr. Masatu's opinion constitutes an obligation under the contract therefore is a contractual issue and not a land matter. I do concede that it might be possible that a matter like the one at hand may sometimes consist of both contractual (and therefore commercial) and land elements.

In such a situation the court should look into the kernel of the dispute and see whether it consists of commercial elements or land elements. In the instance case the central theme is about a Notice of Default and Exercising a Power of Sale. These are land matters within the ambit of section 18 of the Mortgage Finance (Special Provisions) Act, 2008. Moreover sub-section 6 of section 127 of the Land Act cited by Mr. Masatu has a reference to the court. Court under the Land Act means anybody established by or under any written law which is referred to in Section 167 of the Act as having jurisdiction to determine the land dispute. Commercial Division of the High Court is not among the Courts mentioned under Section 167, therefore if the dispute stems from

the interpretation of section 127 of the Land Act, clearly commercial court has no jurisdiction to hear and determine it.

As for the transfer of the case to the Land Court in the event I find that this court does not have jurisdiction over the matter, I am unable to find any provision of the law which either mandatorily or by implication requires this court to transfer the matter to the Land court. Both counsel referred to Act No.17 of 2008. For obvious reason neither Mr. Nyika nor Mr. Masatu could cite any specific provision of that law that gives this court power to transfer the matter to the Land Division of the High Court. Probably they had in mind section 18(3) of the Mortgage Financing (Special Provisions) Act, 2008, which for purposes of clarity I would reproduce hereunder. The said law says:

"(3) Notwithstanding any other provision of Law, and excepting any action on a customary mortgage under section 115, any action brought in a forum other than the High Court to contest, stay, suspend, terminate or seek relief from demand for payment of a debt secured by mortgage of real property, or an action for possession of mortgaged property or exercise of a power of sale under this Act shall be transferred to the Land Division of the High Court immediately upon commencement of an action in that forum on the same subject matter and consolidated with such action."

It would appear to me that for a matter to be transferred to the Land Division of the High Court, the following prerequisites must be established:

- i. The matter must have had been filed in a forum other than the High Court. The term High Court is not defined in the Land Act, logically. It follows therefore that a forum other than the High Court would implies the subordinated courts and/or other tribunals subordinate to the High Court.*
- ii. The law (under S.18(3)) as quoted above presupposes the existence of an action in the Land Division of the High Court on the same subject matter as the one instituted in a forum other than the High Court, and directs that the two action shall be consolidated.*

The two pre requisites are lacking in the present matter. This matter is not in a forum other than the High Court but it is in the High Court which by virtue of the provisions of section 167 of the Land Act does not have jurisdiction to determine it. Secondly, because this action is not filed in a forum other than the High Court, it is only that other forum other than the High Court which can order the matter to be transferred to the Land Division of the High Court in terms of section 18(3) of the Mortgage Financing

(Special Provisions) Act 2008. In my view the High Court does not have that mandate.

In the event, and for the foregoing reasons I find that the objection raised on the point of law has merits. Looking at the nature of the reliefs sought from this court I have no flicker of doubt in my mind that the matter touches on the land and the dispute concerns land. In terms of S.167 of the Land Act [cap 113 RE 2002], read together with section 18(2) & (3) of Act No.17 of 2008, and section 37(1) of the Land Disputes Courts Act, this court does not have jurisdiction to entertain and determine the matter.

The suit being incompetent, it is accordingly struck out with costs.

A.R.MRUMA
JUDGE
16/3/2010

Date 16/3/2010

Coram: Hon. A.R.Mruma, Judge.

For the Applicant – Mr. Masatu for the applicant.

For the 1st Respondent } Mr. Nyika for both Respondents.
For the 2nd Respondent }

CC: R.Mtey.

COURT: Ruling delivered.

A.R.MRUMA
JUDGE
16/3/2010

2,598 words

I Certify that this is a true and correct
of the original/order Judgment Rulling
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Sign: _____
Registrar, Commercial Court. DSM.
Date: _____

I Certify that this is a true and correct
of the original/order Judgment Rulling
Sign: _____
Registrar, Commercial Court. DSM.
Date: 19/3/10