

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

**COMMERCIAL CASE NO. 162 OF 2014**

**GOSBERT MUTAGAYWA ..... PLAINTIFF**

**VERSUS**

<b>JAMILA KASSIM RAMADHANI KIZENGA</b>	}	<b>.....DEFENDANTS</b>
<b>MWAMVITA KASSIM RAMADHANI KIZENGA</b>		
<b>RADHIA KASSIM RAMADHANI KIZENGA</b>		

23<sup>rd</sup> April & 21<sup>st</sup> May, 2015

**RULING**

**MWAMBEGELE, J.:**

The plaintiff, a natural person, instituted this suit against the defendants jointly and severally for breach of contract, and particularly for the defendants' failure to repay the loan of Tshs. 100,000,000/= which the plaintiff had advanced to them on the 04.01.2014. It is stated in the plaint that repayment was agreed to be done within six months in lump-sum and without interest. It is stated further that, as security, the defendants offered their rights of occupancy over their landed

properties. The said amount of money advanced as a loan was deposited into the defendants' bank account bearing the name M/S B.A.K Trading Co. Ltd at Stannic Bank, Kariakooo Branch on 06.01.02014. This suit was filed after the defendants had failed to repay the loan within the agreed time.

A joint Written Statement of Defence filed by the defendants was prefaced with a preliminary objection grounded on two points of law; namely:

- a) The honourable court has no jurisdiction to hear and determine this matter as it is not of "commercial significance"; and
- b) The plaint is fatally defective for contravening and or offending Order VI Rule 14 and Order VII Rule 1(1) (I) of the CPC.

The learned counsel representing the parties were Mr. Makene and Mr. Josiah for the plaintiff and defendants respectively. Before I delve into their arguments, I feel it desirable to recount briefly the history of the proceedings in respect of this matter. This suit was filed on 01.12.2014. On 03.02.2015, the defendants appeared before the Deputy Registrar in the absence of the plaintiff and informed this court that they have not been served with the plaintiff and therefore sought to be served so that they could file a defence. The Deputy Registrar made an order for service and that the Written Statement of Defence should be filed by 23.02.2015.

On 05.03.2015, both parties appeared duly represented by their respective learned counsel. The learned counsel for the plaintiff told the court that the defendant's counsel had lied on the 03.02.2015 when he said that the defendants were not served by then because they had been served and therefore the WSD was filed out of time. He went on to state that the defendants had paid the principal sum of Tshs. 100,000,000/= and that they were negotiating a settlement which was to be filed on the 03.02.2015 but was not filed because the defendants had not signed it. This was confirmed by Mr. Mambosho, learned counsel who had appeared for the defendants. On that date I ordered the matter to be adjourned and set it to come on 23.04.2015 with a view to ascertaining the status and necessary orders.

Before that date; on the 16.03.2015 to be exact, Miscellaneous Commercial Cause No. 57 of 2015 was filed by the plaintiff under Rule 20 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter “the Rules”) praying for orders that the Court orders vacation of the Deputy Registrar's order of 03.02.2015 as it was made on misdirection, that the court strikes out the defendant's written statement of defence for being filed out of time without leave, costs be borne by respondent, and any other relief.

An affidavit in support thereof was sworn by Mr. Makene. A counter affidavit was also sworn on behalf of the defendants and was prefaced

with a notice of preliminary objection based on various grounds. On 23.04.2015 the parties appeared for the hearing of the said application. However, as practice require, a preliminary objection (hereinafter "the PO") in respect of the application was to be heard first. Before embarking on the said hearing, Mr. Josiah, learned counsel told this court by way of suggestion that since there is a preliminary objection against the main suit in respect of the jurisdiction of this court, I should hear them first on that objection. As there was no objection, I outrightly agreed to his suggestion. This is a ruling thereof.

At the hearing, Mr. Josiah learned counsel for the defendants, opted to drop the second point of PO. Submitting in support of the PO, the learned counsel stated that jurisdiction of this court is provided for under Rule 5 of The Rules. He said that the focus of the objection is on the term "commercial case". He went on to contend that rule 3 items i - j provides a list of the cases and further another key word in the definition is "of commercial significance" which were considered in the cases of ***Kibo Match Ltd Vs Mohamed Enterprises Ltd***, Commercial Case No. 6 of 1999 (unreported) and ***Zanzibar Insurance Corporation Ltd Vs Rudolf Temba***, Commercial Appeal No. 1 of 2006 (also unreported).

He went on to argue that there is no case which has extended the definition of cases and our laws do not define "commercial" but looking at the **Oxford Learners' Advanced English Dictionary** by A. S

Hornby, 7<sup>th</sup> Edn, the word "commercial" means making or intended to make profit. Making further reference to P. K Majumder, *et al* 2<sup>nd</sup> Edn, he stated that the term "commercial purpose" is defined at page 510 as purpose, object with view or for which it is made and it covers an undertaking, the object of which is to make profit out of the undertaking and also an undertaking of any trade, commerce or business.

Surmising, the learned counsel stated that from the definitions, there are four elements constituting a commercial case of commercial significance; namely:

1. Business or professional undertaking;
2. The undertaking be of trade or commerce in nature;
3. With intention of Making profit; and
4. Intention to make profit or loss.

From the above, argued the learned counsel, the question is whether the case at hand is of commercial significance and went on to submit that, to determine the jurisdiction, as was held at page 6 of the case of ***Hamidu Ndalahwa Magesha Mandagani Vs Raymond Msangi & Another***, Commercial Case No. 52 of 2007 (unreported) we look at the cause of action. He contended that the plaint states that the cause of action was the loan advanced but the loan was granted without interest though repayable after six months. It was his further contention that

there was no consideration for the money advanced and neither was the purpose for money advanced disclosed. He stated that the plaintiff being not a lending institution, neither was there to be any business undertaking, or a trade and further that since it was not stated whether there could be a profit out of the transaction, the matter was not of commercial significance, but rather could be treated as matrimonial because the first defendant is the wife of the first defendant. Since it is not of commercial significance, contended the learned counsel, the suit ought to be dismissed because the court has jurisdiction only on matters of commercial significance.

Mr. Makene, learned counsel, in reply, stated that this court has jurisdiction as stipulated under rules 5 and 3 because rule 3 defines the term "commercial case" to mean civil case of commercial significance. It was his contention that the cause of action is the breach of the fundamental term of the agreement whereby the plaintiff advanced the moneys to the defendants and further that the contract itself shows the plaintiff as creditor and the defendants as borrowers and therefore this was not a domestic matter as contended by the learned counsel for the defendants but, rather, a contractual arrangement as covered under sections 10, 11 and 12 of the Law of Contract Act, Cap. 345 of the Revised Edition, 2002 (henceforth "the Law of Contract Act") which defines what a contract is. It was his further contention that, in terms of sections 25 and 27 of the Law of Contract Act which defines consideration, the loan agreement had consideration between the

parties which was that the plaintiff should advance Tshs. 100,000,000/= and the defendants to refund the same within a period of six months.

Referring to rule 3 (b), (e) and (g) of the Rules and cases of ***Plan B Company Limited Vs Anne Kansiime***, Commercial Case No 188 of 2014, ***Frederick Safari Limited Vs The DED Meatu District*** Commercial Case No. 123 of 2013 (at p. 3 - 7 and 9), all unreported decisions of this court as well as the ***Kibo Match*** and ***Rudolf Temba*** cases (supra), he stated that the term "commercial case" is defined clearly and neither of these cases or the law define commercial case to mean commercial profit but rather the cases state that it is commercial liabilities of a commercial person.

Making further reference to **Black's Law Dictionary**, he contended that to define the term "commercial" one has to define commerce which is defined therein as exchange of goods and services. He went on to contend that the dictionary referred to by the counsel for the defendants is not a legal dictionary and therefore cannot be referred to and further that the definition provided at rule 5 and rule 3 of the Rules is enough and therefore there is no need to rely on an ordinary dictionary. The learned counsel also made reference to **the judicial dictionary** which defines "commercial action" without reference to profit and loss.

Referring to annexure GM5 which was the defendants counsel's letter whereby the defendants admit the claim, he contended that the plaint concerns a business transaction. It was his further contention that the matter is not matrimonial because it does not concern divorce, children of marriage or matrimonial property. He went on to refer to paragraph 4 of the loan agreement at which it is categorically stated that if the loan was not repaid the creditor would seek court intervention and further that the defendants had deposited their title deeds as security which were still in possession the plaintiff. It was his further argument that the transaction is of commercial significance because the said loan amount was deposited to the defendants' bank account upon their instruction so that their property could not be sold by the Bank.

Finally he submitted that the subject of this case is of commercial significance because liability to pay the loan does not face borrowers and bank but can also be between creditors and borrowers who can be even individuals as stated at rule 3 (g) of the Rules.

In rejoinder, Mr. Josiah, learned counsel briefly reiterated that there was no consideration in terms of sections 10, 11, 12, 23 and 25 of the Law of Contract Act, and further that it was not a business activity and neither was there a business entity. He went on to distinguish the cited cases of ***Fredrick Safari, the DED Meatu District***, and ***Plan B*** with the present case. He stated that ***Fredrick Safari*** and ***Plan B*** dealt



with a dispute of commercial undertaking in the wildlife area and the question of territorial jurisdiction respectively.

It was his final submissions that the mere admission that the defendants took the loan does not make the transaction commercial, and further that the loan agreement which ought to establish that this is a commercial case does not do so.

I have keenly considered the rival arguments of both counsel. I must admit that though the subject matter; that is the jurisdiction of this court is quiet topical which has received considerable amount of attention and dealt with at length, this contention before me has somewhat a qualification which, in my view, needs additional elaborations to the abounding decisions of this court among which have been referred to by both learned counsel.

The qualification lies in the contention that the matter is not of "commercial significance". Thus, the learned counsel are of sharply opposed view as to what indeed is a commercial case. The learned counsel for the plaintiff is of the view that since there was lending and borrowing of the money which is not contested by the defendants, the matter is commercial because it is a civil case. On the other hand, counsel for the defendants maintains that in order for the case to be filed in this court it must be a civil case of commercial significance

which, on basis of authorities including **Black's Law Dictionary**, it must portray an element of commerce with intention to make profit.

At this juncture, in my considered view, in order to disentangle their dilemma, I am called to answer the question as to what amounts to a commercial case so as to warrant this court jurisdiction to entertain the same.

As I have alluded to earlier on, this is quite a topical issue which has received a considerable consideration by this court. I do not intend to reproduce them here, but of significance in this circumstance, is one case by my learned brother Mruma, J. in ***G. K Hotels and Resort (Pty) Vs Board of Trustees of the Local Authorities Pensions Fund***, Commercial Case No. 1 of 2008 (Unreported). Therein, His Lordship dealing with a similar question enunciated the tests of a commercial case which I take liberty to reproduce hereunder thus:

- "1. It must be a civil case – a criminal case of commercial significance e.g. involving say fraud in buying and selling of goods and or services cannot be a commercial case
2. That civil case must be of commercial significance, in other words that case must have connection with buying and selling of goods and or services. This

excludes cases like matrimonial causes (which are civil in nature but are not commercial) from categories of commercial cases”

I do not see any peculiar or compelling reasons so far in the case at hand for which I might be persuaded to depart from the observations by my brother at the Bench; Mruma, J. I will demonstrate my standpoint on this regard.

Inasmuch as both counsel seem to agree that this court has jurisdiction over commercial cases, I find that the definition of the term “commercial case” as appearing in rule 3 the Rules to be clear and straight-forward. Let me reproduce it:

“Commercial case” means a civil case involving a matter considered by the Court to be of **commercial significance**, including any claim or application **arising out of a transaction of trade or commerce** but not limited to ...”

(Emphasis supplied).

The rule then goes on to define instances that amount to a commercial case in items (a) through to (j). Admittedly, the transaction in the

present case does not fit squarely in any of the items. However, it is my considered view, that the use of the words "but not limited to" in the rule connotes that the categories listed in items (a) through to (j) are not closed; there are categories other than those listed. I find fortification in this stance in ***Suryakant D. Ramji Vs Savings and Finance Limited & Three Others*** Civil Case No. 30 of 2000 (unreported). In that case Kalegeya, J. (as he then was) grappling with an identical situation under rule 2 of the High Court Registries Rules, as amended by GN No. 141 of 1999 (the Old Rules), had this to say:

"The eleven categories enlisted under Rule 2 of the High Court Registries (as amended by GN 141 of 1999) defining what a "Commercial Case" is are not exhaustive as amply portrayed by the opening paragraph thereof ... running as under,

'Commercial case means a Civil Case involving a matter considered to be of Commercial significance, **including** but **not limited** to' ..."

I am of the view that in a transaction, like the one in the present instance, in which two parties enter into an agreement whereas one party lends and the other borrows money payable in a specified period of time, the transaction is but a commercial one irrespective of the fact

the loan is repayable with or without interest. I am not inclined to believe that spouses cannot not enter into business transactions which fall within the realm of the definition of commercial significance as provided by the Rules.

In view what I have stated hereinabove, I find the PO to be seriously wanting in merit and would dismiss it. I dismiss it with costs.

Order accordingly.

DATED at DAR ES SALAAM this 21<sup>st</sup> day of May, 2015.



A handwritten signature in blue ink, which appears to read "J. C. M. Mwambegele", is written over a horizontal line.

**J. C. M. MWAMBEGELE**

**JUDGE**