

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

**COMMERCIAL APPEAL NO. 2 OF 2015
(Appeal From the Resident Magistrates' Court of Dar es Salaam at
Kisutu in Civil Case No. 284 of 2013)**

**PRIDE TANZANIA LIMITED APPELLANT
VERSUS
MWANZANI SAKATU KASAMIA RESPONDENT**

14th July & 25th October, 2016

RULING

MWAMBEGELE, J.

Pride Tanzania Limited; the appellant herein, filed the present appeal against the judgment and decree of the court of the Resident Magistrates of Dar es Salaam sitting at Kisutu in which the appellant was ordered to pay Mwanzani Sakatu Kasamia; the respondent, Tshs. 80,000,000/= as general damages and condemned to pay costs of the suit as well. On 03.12.2015, the respondent filed a preliminary objection against the appeal. The Preliminary objection reads:

"The appeal is bad in law and incompetent for being misconceived and for being instituted in a

wrong forum in contravention of Rule 69 (1) of the High Court (Commercial Division) Procedure Rules GN No. 250 of 2012”.

As practice dictates, the courts had to dispose of the PO first. Thus the PO was argued on 14.07.2016 during which both parties were represented. The appellant had the representation of Ms. Linda Bosco and the respondent was advocated by Mr. John Mhozya; both learned counsel. Both learned counsel had earlier filed their respective skeleton written arguments for and against the PO which they sought to adopt at the oral hearing. This is a requirement under rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. This ruling is in respect of the said PO.

Arguing for the PO, Mr. Mhozya, learned counsel, submitted that rule 69 (1) of the Rules allows an appeal to this court from a subordinate court in a commercial case. The instant appeal emanates from an ordinary civil suit whose cause of action was breach of secrecy. This is not a Commercial issue and has no commercial significance. He argues that commercial cases before subordinate courts are filed as such and there is a separate register for it. This being Civil Case No. 250 of 2013, an ordinary civil suit, the appeal does not lie to this court; the Commercial Division of the High Court, but to the High Court, Dar es Salaam Registry. The learned counsel relied on the case of ***Mauma Joseph Vs the Director Edward Bomba & Another***, Commercial Appeal No. 2 of 2014 (unreported) as authority for this proposition. The learned counsel also submitted that the appeal offends the provisions of rule 69 (2), (4), (5) and (6) of the Rules. On this premise, the learned counsel prayed that the PO be sustained and the appeal be dismissed with costs.

Arguing against the PO, Ms. Bosco, learned counsel, submitted that there is no law to the effect that matters filed at the Resident Magistrates Court must be filed under a Commercial Cases Register. The relationship between the appellant and respondent was contractual in nature and the cause of action was for breach of the contractual arrangement that existed between the appellant and respondent. The said breach was breach of confidentiality arising out of that contractual arrangement; looking at the particular content of the said breach, it comes squarely within the definition under rule 3 (c) and (d) of the Rules. The mere fact that the case was registered in the lower court as a civil case is not a determining factor that the case was not commercial in nature, she argued, what determines is whether it falls within the definition of what a commercial case is under the Rules and under the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2002 (MCA).

The learned counsel reverted to the definition under the MCA and the Rules that a commercial case is a civil case and therefore the fact that it was registered as a civil case, does not mean that it is not commercial in nature. She submitted that as the learned counsel has cited the unreported case of *Mauma* but has not appended it, the court should have it disregarded. She also prayed that the provisions of rule 69 (2), (4), (5) and (6) of the Rules should be disregarded as they were not the basis of the PO. She invited the court to dismiss the PO raised because it lacks merit.

In a brief rejoinder, Mr. Mhozya, learned counsel submitted that the matter that led to the filing of the case the subject of appeal did not arise from a breach of contract but from breach of the duty of confidentiality/secretcy which is a tortious matter. At no point did the appellant and respondent contract to divulge secrets so third parties thus the definition of what a

Commercial case is, does not apply, he argues. As regards reference to rule 69 (2), (4), (5) and (6) of the Rules, the learned counsel submitted that a point of law can be raised at any time. He, however, conceded that the *Mauma* case which was not cited and relied upon but not supplied should be disregarded. The learned counsel reiterated his prayer to have the PO sustained.

I have subjected the learned arguments of learned counsel for the parties to serious scrutiny. The issue on which the learned counsel seem to have locked horns on is whether the suit the subject of this appeal was a commercial case or an ordinary civil case. The learned counsel for the respondent has pegged his argument that the suit the subject of this appeal is not one of commercial significance on the nature of the cause of action and the manner in which it was registered in the subordinate court. Let me start with the assertion by Mr. Mhozya to the effect that in the subordinate court, commercial cases are registered as such and in a Commercial Cases Register. With due respect to the learned counsel, I find this assertion too cheap to buy. As rightly submitted by Ms. Bosco, there is no law which requires that commercial cases in the lower court should be registered as such and more so in a special register. If that is done it is so done by practice and even so, that cannot be a legitimate way of distinguishing a commercial case from an ordinary civil case. What I am aware of as a judge in this court for quite some reasonable time now, commercial cases in the subordinate court are not necessarily christened as such; they are titled as normal civil cases are. This is not the first time to deal with an appeal from the subordinate court. Neither are they registered in a separate register; they are registered together with ordinary civil cases. They are registered indiscriminately. I have dealt with some and I take note that they are titled as normal civil cases. One such appeal is

Toyota Tanzania Limited Vs Tanga Hardware and Autoparts 2006 Ltd, Commercial Appeal No. 6 of 2014 which was an appeal from the District Court of Tanga in Civil Case No. 30 of 2010.

For the avoidance of doubt, I have laid my hands on the **Mauma** case which the learned counsel for the respondent relied on but could not supply it and conceded to the point that it should be disregarded. In that case, the appellant was represented by Mr. John Mnaku Bonaventura Mhozya, who is representing the respondent herein. There arose preliminary points of objection raised by Dickson Venance Mtogesewa, learned counsel for the respondent in that appeal, which did not involve the point under discussion here but in the course of arguments, Mr. Mhozya for the appellant therein chipped in a point to the effect that this court had jurisdiction to entertain any appeal from subordinate courts; not necessarily appeals on commercial cases. This court (Makaramba, J.) despite refraining from delving onto this point observed in passing that:

"I have refrained from engaging into whether an aggrieved party may appeal to this court against decision of a subordinate court in all or only in commercial cases. However rule 69 sub rule 1 of the rules is clearly clear that appeal to this court against decision of subordinate court is only on commercial cases."

My reading of the ruling of the **Mauma** case have not shown anywhere the court holding that in the subordinate court commercial cases are registered as such and in a special register. Mr. Mhozya's argument on this limb is without merit.

The second limb; on whether the suit the subject of this appeal was commercial in nature, one has to look into what was the nature and cause of action in the suit. The plaintiff has is that the respondent was a longtime customer of the appellant and had obtained a loan from the latter. That the appellant had disclosed some details on the loan to a third party; one Basil Gasper Soka. Such disclosure, the respondent claimed at para of the plaint, "amounts to breach of the law and an abuse of acceptable lending practices."

I am therefore in agreement with Ms. Bosco, learned counsel and satisfied that the relationship between the appellant and respondent was contractual in nature and the cause of action was for breach of the contractual arrangement that existed between them. The said breach was breach of confidentiality arising out of that contractual arrangement in the lending business. The suit the subject of this appeal therefore fell within the scope and purview of the definition of what a commercial case is under the MCA and under the Rules.

For the avoidance of doubt, I have disregarded the complaint in respect of rule 69 (3), (4), (5) and (6) of the Rules as it was so belatedly raised without notice to the court and the appellant under the pretext that it being a point of law could be raised at any time of the proceedings. It is important that a preliminary objection should be raised in time so as to give ample time to the opposite party to prepare for it and make a meaningful defence thereon – see: ***M/S Majembe Auction Mart Vs Charles Kaberuka*** Civil Appeal No. 110 of 2005 (unreported). Reasonable notice would also enable the court to prepare itself to hear the parties on the point. That was not done in the present case and thus, it appears to me, it was an afterthought to which the respondent has not responded for defence. Neither had the court made any preparation to hear the appellant. Surprises in preliminary objections cannot

be condoned by this court. That complaint is struck out. The respondent is, however, at liberty to raise it at another opportune moment after this ruling should he still want to stick to his guns.

In the upshot, I find the respondent's PO seriously wanting merit and, consequently, overrule it with costs.

Order accordingly.

DATED at DAR ES SALAAM this 26th day of October, 2016.

J. C. M. MWAMBEGELE

JUDGE