

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

Commercial Case No. 02/2018

COMMERCIAL BANK OF AFRICA }
(TANZANIA) LIMITED**PLAINTIFF**

Versus

PATROBA ADELI ADEMBA DEFENDANT

RULING

06th June, 2018

A.R. MRUMA, J.

Following the striking out of the Defendant's application for leave to appear and defend, counsel for the plaintiff prayed for the court to enter summary judgment for the plaintiff and against the Defendant under Rule 2(2) (a) of Order XXXV of the Civil Procedure Code hereinafter to be referred to as the code.

Rule 2(2) (a) of Order XXXV of the code under which the prayer is premised provides as follows:

"In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtain leave from the judge of Magistrate as hereinafter provided so to appear and defend, and in default of his obtaining such leave or of his appearance and defence in pursuance thereof the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled –

- (a) *Where the suit is a suit referred to in paragraph (a)(b) or (d) of rule 1 or a suit for recovery of money under mortgage and no other relief in respect of such mortgage is claimed, to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) and such sum for costs as may be prescribed unless the plaintiff claims more than such fixed sum in which case the costs shall be ascertained in the*

ordinary way, and such decree may be executed forthwith”.

Having perused the summons served on the Defendant I realized that the amount or sum mentioned in the summons and the plaint is T.shs. 65,314,341.31, and the plaint contains an alternative prayer of appointing Mr. Gasper Nyika as a receiver Manager with powers to sale the mortgaged property on plot No. 251 and 253 Block “A” Kiseke Area in Mwanza and Title No. 13046 in respect of Plot No. 178 Block ‘H’ Nyamanoro Area in Mwanza. I entertained doubt as to whether in view of the provisions of Rule 5(2) of the High Court (Commercial Division) Procedure Rules of 2012 this court does have jurisdiction to enter a summary judgment and therefore to hear the matter the subject of which is below T.shs. 70,000,000.00 prescribed by that Rule.

Mr. Jonathan Wangubo, counsel for the plaintiff has addressed me on that issue. He is of the view that this court has jurisdiction to pass the judgment and decree on the following grounds:

First that Rule 5(2) of the Rules contravenes the provisions of Article 108 of the Constitution of the United Republic of Tanzania under which this court draws its jurisdiction.

Secondly that Rule 5(2) of the Rules is inconsistent with section 40(3)(b) of the Magistrates Court Act and in terms of section 36(1) of the Judicature and Application of Laws Act any provision of a subsidiary legislation which is inconsistent with the provision of the Act under which it is made or any other Act of the Parliament the provision of the subsidiary legislation is void to the extent of such inconsistency. It is therefore the submission of the learned counsel that because Rule 5(2) of the Rules is inconsistent with section 40 (3) (b) of the MCA, then in terms of section 36 (1) of the Interpretation of Laws Act Section 40 (3) (b) of the MCA prevails.

Thirdly, it is the submission of the learned counsel that section 4 of the Judicature and Application of Laws Act, gives the Chief Justice powers to make Rules of procedure and it doesn't give him powers to confer jurisdiction in any court. The learned counsel contends that the act of the Chief Justice to enact a rule which confers pecuniary

jurisdiction to the court (i.e. Rule 5(2) of the Rules) was a misdirection on his part.

I have carefully read and internalized the counsel's submissions, the pleadings (i.e. plaint) together with the summons served on the Defendants. Admittedly the amount claimed in the suit is far less the minimum pecuniary jurisdiction of this court which is T.shs. 70,000,000.00 in terms of Rule 5(2) of the Rules. The said Rule provides:

(2)“The court shall have and exercise original jurisdiction in a commercial case in which the value of the claim shall be at least one hundred million shillings in case of proceedings for recovery of possession of immovable property and at least seventy million shillings in proceedings where subject matter is capable of being estimated at a money value.”

From the above quoted provisions of the law, the clear words of the law are undisputable. Counsel for the plaintiff does not dispute the wording of the law but the law itself. He contends that Rule 5(2) of the Rules contravenes Article 108 of the constitution. Reading between the lines

of Article 108 of the Constitution one would realize that actually Rule 5(2) of the Rules was enacted in consonant with Article 108. The Constitution does not particularize the specificity of the jurisdiction instead it sets a frame work which of course is the work of the constitution. Under sub-article (1), the constitution provides that the jurisdiction of the High Court shall be specified in the constitution or any other law. Thus the constitution stipulates that there may be other laws which may confer jurisdiction to the High Court. That other law includes the High Court (Commercial Division) Procedure Rules 2012.

Sub-article (2) of the Constitution stipulates a situation where there is a specialization of matter that can be heard and determined by the High Court and that where the constitution or any other law does not expressly provide that any special matter shall first be heard by the court specified for that purpose then the High Court shall have jurisdiction to hear every matter. In consonant with this provision the Chief Justice promulgated the High Court Registry Rules (1984) as amended by GN 141 of 1999 which was later repealed and replaced by GN 96 of 2005 which was amended by GN 250 of 2012. The court

which is a specialized court was established under Rule 5A of the High Court Registries Rules.

Specificity of the matters that can be instituted in commercial court is found under Rule 3 of the Rules which defines what is a commercial case. Thus because Article 108 of the constitution stipulated the establishment of special courts for specified matters, the coming into being of Commercial Division of the High Court and its rules is well in consonant with the constitution.

Regarding the alleged inconsistency between Rule 5(2) of the Rules and section 40 (3) (b) of the MCA in any view I find none. By virtue of section 40 (3) (b) of the MCA, the pecuniary jurisdiction of a District Court in commercial cases is limited to T.shs. 30,000,000.00. This means that the District Court does have jurisdiction to entertain a commercial case where the value of the subject matter of the claim exceeds T.shs. 30,000,000.00.

In Packaging and Stationers Manufactures Ltd. Vs. Dr. Steven Mworira & Another – Commercial Case No. 52 of 2010(unreported), I held that this court does have jurisdiction to hear

and determine all commercial case which ordinary registry of the High Court has jurisdiction to determine. Sub article (2) of Article 108 articulates that the jurisdiction

Of the High Court comes into play comes where there is no court specified for that purpose.

Section 2 of the Judicature and Application of Laws Act vests the High Court with full civil jurisdiction and it goes ahead to subject the said jurisdiction to written laws in force. Section 7 (7) of the code puts emphasis on the mode in which jurisdiction can be expressly barred. It is my conviction that Rule 5(2) of the Rules expressly bars this specialized division of the High Court from entertaining a matter which the value of the subject matter of the claim is below T.shs. 70,000,000.00.

However a party with a commercial dispute the value of the subject matter of which is below T.shs. 70,000,000.00(which is the minimum threshold of the Commercial Division of the High Court) and above T.shs. 30,000,000.00 which is the upper limit of the District Court is not left without forum. Rule 1 (4) of Order IV of the Civil Procedure Code

provides clearly that it not mandatory for a commercial case to be instituted in the Commercial Division of the High Court. It follows that a party with a commercial case in which the value of the claim is over T.shs. 30,000,000.00 but below T.shs. 70,000,000.00 has the option of instituting it in the ordinary registry of the High Court.

Since the wordings of Article 108(2) of the constitution clearly suggests that the pecuniary jurisdiction of the High Court covers all matters outside the pecuniary jurisdiction of subordinate courts it goes without saying any claim over T.shs. 30,000,000.00 but below T.shs. 70,000,000.00 can be instituted in ordinary registry of the High Court and not this specialized division whose jurisdiction over those is barred by Rules 5(2) of the Rules.

That said, it is any findings that this court cannot pass a summary judgment and decree under Order XXXV Rule 2(2) (a) of the Code in a suit in which the amount mentioned in the summons is below the minimum pecuniary jurisdiction of the court as stipulated by Rule 5(2) of the Rules. Moreover, reading Rule 2 (2) (a) of Order XXXV of the code between the lines, it seems that summary judgment can only be entered where no other relief in respect of the mortgage is claimed. In the

present suit there is a prayer for the appointment of a receiver Manager with power to sale the mortgaged property. By the wording of sub-rule 2 (a) of Rule 2 this relief cannot be granted summarily.

That said, and this being a court of law and not sympathy I have no option but to strike out Commercial Case No. 2 of 2018. The plaintiff is at liberty to re-institute it in the ordinary registry of the High Court. I will make no orders as to the costs.




A.R. Mruma

JUDGE

06/06/2018