

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

COMMERCIAL APPEAL NO. 01 OF 2023

MKOMBOZI COMMERCIAL BANK PLC.....PLAINTIFF

VERSUS

MAKONGORO MGABO NYAMHOZA DEFENDANT

(Appeal arising from the ruling and decree of the District Court of Ilala at Kinyerezi)

**(F. E. Luvingira, SMR)
dated 28th day of October 2022
in Civil Case No.101 of 2021.**

JUDGMENT

Date of Last Order: 14/08/2023
Date of Judgment: 07/09/2023

NANGELA, J.:

This appeal arises from a ruling on points of law, one raised by the Respondent against the suit and the other raised suo moto by the learned District Court's Magistrate of Ilala at Kinyerezi (F.E. Luvingira SRM). In the suit, the Appellant herein (as Plaintiff in that suit) had sought for the following:

1. Declaratory orders that the Defendant was in breach of repayment obligations regarding a loan facility duly extended to him by the Plaintiff of which as of the

7th day of October 2021, the principal amount and the accrued interests thereon stood at TZS 29,413,121.40.

2. A Declaration and order permitting the Plaintiff to dispose of by way of sale of the property with CT. No. 139927, L.O No.484086, Plot No.125 Block "A" at Kisukulu Area registered in the name of the Defendant.
3. Interest on the aforesaid amount of TZS 29,413,121.40 only, at 17% rate from the date they fell due to the date of full and final payment and for interest on the decretal amount at 7% from the date Judgement to the date of full payment.
4. Costs of the suit.
5. Any other order(s) as the Honourable Court may deem fit to grant.

When the trial court was set for the hearing of the suit, the Defendant raised a preliminary legal issue to wit, that, the suit was bad in law since the Honourable Court lacked the requisite jurisdiction to entertain it.

After deliberations the court made a finding that the objection had no merits as it had the requisite jurisdiction. However, the court went ahead and struck out the suit from the court on the ground that it was filed in the wrong registry. The striking out was with costs.

Aggrieved by the ruling of the trial court, the Plaintiff appealed to this court, preferring to bring to its attention, three grounds of appeal which I will reproduce verbatim as here below, that:

- (i) *The Honourable Trial Magistrate erred in law for having found that the objection that was raised by the Defendant lacked merit to proceed to struck out the suit on the ground neither raised by the Defendant nor afforded parties right to be heard.*

(ii) *That, the Honourable Trial Magistrate erred in law in raising **suo moto** and during writing of the ruling, an issue of filing the commercial suit in normal Civil Registry and proceeded to decide the same without hearing the parties.*

(iii) *That the Honourable Trial Magistrate erred in law having found that the Court has jurisdiction to determine Commercial Cases to proceeded (sic) to struck out the Appellant's suit.*

On the 2nd day of March 2023, the appeal was called on for necessary orders. On the material date, Mr. MakakiMasatu, learned advocate, appeared for the Appellant while Mr. Rashod Said, learned advocate, appeared for the Respondent.

Earlier, Mr. Rashid had raised a preliminary objection but upon reflection and exercise of wisdom he withdrew it from the court. Even so the matter could not proceed to its

hearing course as the records of the trial court were yet to be availed to this court.

Due to the absence of the records of the trial court, the appeal remained on the mention course. It was set for orders on 21st day of March 2023, (a date when both advocates for the parties appeared); 27th of April 2023, 25th of May 2023, 26th of June 2023, and 12th of July 2023. In all those dates, (except the 2nd day of March 2023 and the 21st of March 2023) the learned advocate for the Respondent never appeared in court.

Following the forwarding and receipt of the records of the trial court, this appeal was set for hearing on the 14th of August 2023, and all parties were duly notified. As per the affidavit of proof of service, which was availed to the court, the learned advocate for the Respondent was duly served the summons to appear and defend this appeal, having appeared twice as stated earlier herein.

Unfortunately, and despite being duly served with the summons to appear for the hearing of this appeal, the learned advocate for the Respondent chose not to appear in court and this court proceed with the hearing of this appeal *ex-parte*.

Mr. MakakiMasatu, the learned advocate for the Appellant seized the moments and addressed the court on the three grounds raised by the Appellant herein. He chose to address them jointly having noted that they bear a common resemblance.

Mr. Masatu's submission was basically centred on the issue of right to be heard. He argued that the striking out of the suit by the trial magistrate was an inappropriate action. He considered it to be inappropriate and, hence, illegal, because it was an act not based on the objection raised by the Defendant (which objection the court had overruled) but on a point of law raised *suo motu* by the trial magistrate. Mr. Masatu contended that, worst still, having raised the matter *suo motu*, the trial court proceeded to determine it without affording the parties an opportunity to be heard on that point.

To back up his submissions, Mr. Masatu relied on the Court of Appeal decision in the case of the **National Bank of Commerce Limited vs. National Chicks Corporation & 4 Others**, Civil Appeal No.129 of 2015 (unreported). In that case, while appreciating the need to ensure that cases are

filed in their appropriate registries, still the Court of Appeal stated, at pages 31-32 as follows, and I quote:

“In the event a case not of the division’s specialization is instituted in any of the divisions, the parties should not be thrown out as was the case herein in the pretext of lack of jurisdiction. Instead, the parties should either be advised to withdraw and file the same in another court competent to try it; otherwise, such a case should be heard to its conclusion.”

As regards determination of an issue raised suo moto, reliance was placed on the Court of Appeal decision in the case of **Kluane Drilling (T) Ltd vs. Salvatory Kimboka**, Civil Appeal No.75 of 2006 (unreported). In that case the Court of Appeal had the following to say on page 13 of the typed Judgement of the Court:

“The issue whether or not the words contained in the email are offensive or whether or not the email was tampered with were raised by the

court *suo motu* in the course of writing the judgement and the same were decided without hearing the parties. That was, with respect, a procedural irregularity because the parties were denied the right to be heard.”

On the premise of the above noted authorities and considering the submissions of Mr. MakakiMasatu, the learned counsel for the Appellant, I am inclined to agree with him that, the trial Magistrate erred in law as he should have proceeded with the hearing and determination of the suit before him. That is particularly so, having determined that the objection raised by the Defendant was with no merit.

Secondly, I do also agree that the trial court ought to have summoned and heard the parties regarding the new issue which it had raised *suo motu* instead of proceeding to determine it without first affording the parties opportunity to submit on it.

In principle, where a court raises an issue *suo motu*, unless it is an ancillary question that would naturally flow in the normal course of discussion, from a substantive issue

under consideration, the court must summon the parties, bring the issue(s) to their attention, and hear their submissions before proceeding with its business of composing a decision thereon.

Doing otherwise amounts to committing a procedural mistake whose effects is to vitiate the entire proceedings. That will indeed be the effect since in the **Kluane Drilling (T) Ltd** (supra), the Court of Appeal was of a settled view (citing its earlier decision in the case of **Margwe Erro and 2 Others vs. Moshi Mohalulu**, Civil Appeal No.111 of 2014 (unreported), that:

“It is trite position of the law that the effect of the irregularity is to vitiate the decision.”

Considering that the trial court in the Civil case No. 101 of 2021 proceeded to determine a point of law which it had raised itself *suo motu* without affording the parties the opportunity to be heard on that point of law raised by the court, there was occasioned a grave irregularity which vitiates the proceedings.

In the upshot of the above, this court settles for the following orders:

- (i) That, this appeal has merits and is hereby allowed with costs.
- (ii) The ruling of the District Court of Ilala at Kinyerezi, (F.E. Luingira SRM) dated 28th of October 2022 is hereby set aside, proceedings that gave to its rise nullified, and the suit is to proceed to its hearing and determination before another magistrate.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 07TH DAY OF
SEPTEMBER 2023**



John Nangela

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**DEO JOHN NANGELA
JUDGE**