

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.79 OF 2023

MSIMBAZI CREEK HOUSING ESTATES LTD 1ST PLAINTIFF

**SHAHEEN HASSANLI (being the Executrix of
the Will of the late HASSAN SHIVJI KARIM) 2ND PLAINTIFF**

SALIMA KARIM 3RD PLAINTIFF

SUKAINA KARIM 4TH PLAINTIFF

VERSUS

DIAMOND TRUST BANK TANZANIA PLC DEFENDANT

RULING

Date of last Order: 05.05.2023

Date of Ruling: 10.05.2023

A.Z. MGEYEKWA, J

This is a ruling on a preliminary objection taken at the instance of the Defendant, attacking the competence of the suit which is pending in this

Court. On 27th March 2023 the Plaintiffs instituted the instant suit against the Defendant, claiming that the Defendant issued the 1st Plaintiff with a purported demand notice via letter reference number DTB/CB/0878/2023 demanding immediate repayment of its debt. The suit has encountered impediment, coming by way of preliminary objection raised by the Defendant. The objection is to the effect that:-

That this Court has no jurisdiction to determine the instant suit.

When the matter was called for hearing the preliminary objection on 5th May 2023, the Plaintiffs enjoyed the legal service of Mr. Ashiru whereas, the Defendant had the legal service of Mr. Karoli Tarimo, learned counsel.

As the practice of the Court. I had to determine the preliminary objections first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook.

Mr. Karoli argued that the applicant has raised an objection to the effect that this Court has no jurisdiction to try this matter on the premise that the case is not a land matter. He stated that this is a Land Division vested with jurisdiction for land matters while the plaintiff's suit is based on commercial transaction between the parties as captured in paragraph 6 of the Plaint and

the cause of action does not direct landed property but a contract, joint venture facilities letter, and the Plaintiffs are praying for injunctive orders. Mr. Karoli contended that there is a lot of narration and looking at the body of the Plaintiff the cause of action is all about the breach of contract or facility letter. To buttress his submission he cited the case of **Zaoma Ltd & Another v Equity Bank (TZ) LTD** No. 139 of 2019. He insisted that since the main complaint is about the contract then this court has no jurisdiction to deal with the contract matter.

In conclusion, Mr. Karoli beckoned upon this Court to strike out the instant suit since it was improperly being filed before this Court.

In his reply, Mr. Ashiru urged the Court to disregard the respondent's objection for being short of merit. He submitted that the premises of the Defendant's objection that this Court lacks jurisdiction because the plaintiff suit is based on commercial transaction between the parties is a misconception. He submitted that reading the Plaintiffs' claims in particular the paragraphs related to cause of action and reliefs, the cause of action has elements of lands and commercial. To buttress his submission he referred this Court to paragraph 6 (b) of Plaintiff, the Court will see that the Plaintiffs

are challenging the default notice and paragraph 6 (c) and 6 (f) touches on landed property, thus, there is no doubt that this matter is related to land.

Mr. Ashiru continued to submit that under section 127 of the Land Act, Cap. 113 talks about the default notice and what it should contain, the section describes how the notice would be issued in default, which is not a commercial transaction but deals with land matter. Mr. Ashiru argued that the Plaintiff challenges the Mortgage Deed whereas, all of them are not pure commercial disputes. Fortifying his submission he cited the case of **The National Bank of Commerce Ltd v National Chicks Corporation Ltd & 3 Others**, Civil Appeal No. 129 of 2015. He added that the rule as it stands to this day is that where a party files a case with elements of land or commercial matters then the Plaintiff has an option, he can go to Commercial or Land Divisions.

Mr. Ashiru distinguished the facts of the instant case from **Zaomazi's** case since the parties' claims for different reliefs and the same are pure constructive issues and given the facts of this case. He stresses that in the instant case at hand there are serious challenges to the breach of the Land Act, the same makes the cause of action a mixed grill; land and commercial matter.

In conclusion, Mr. Ashiru beckoned upon this Court to overrule the preliminary objection.

Rejoining to the rebuttal submission, Mr. Karoli reiterated his submission in chief. He submitted that saying that the matter related to land and commercial is just an aftermath related to land matter. He argued that the facilities letter problem or Mortgage Deed is a contract that relates to the terms and conditions of the mortgage. He argued that in paragraph 6 of the Plaintiff, there is no any landed property in dispute but a Mortgaged Deed or facility letter. Mr. Karoli argued that the cited case by Mr. Ashiru is distinguishable because the Court of Appeal of Tanzania was deciding a matter which had elements of landed and commercial matter while in the matter at hand, there are complaints of aftermath related to contract; mortgaged deed, or facility letter that they may go to the suit property but it does not relate to land matter. Ending, the learned counsel for the Defendant urged this court to strike out the case and order them to lodge the same in a proper forum.

I have carefully summarized the submissions made by learned counsels for the Plaintiffs and Defendant. From these rival submissions one issue arises; *is whether or not this Court has jurisdiction to determine the instant suit.*

Before I embark to determine the contention by counsels, it serves me to state, albeit in brief terms, that the duty is cast upon courts to ensure that before a dispute is instituted, their mandate as expressly conferred upon them by a statute is established. This trite position has been underscored in several decisions, both in this Court and in the Court of Appeal of Tanzania. These include the holding in **Consolidated Holding Corporation Ltd. K Rajani Industries Ltd & Bank of Tanzania**, Civil Appeal No. 2 of 2003 CAT (unreported), **Shyam Thanki and Others v New Palace Hotel** HCD No 97 and **Laurian Mlemi v Serikaliya Kijiji Kasisa**, Land Appeal Case No. 88 of 2018 HC (unreported). In **Fanuel Mantiri Ng'unda K. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995 (unreported), the Court of Appeal underlined the importance of jurisdiction in the following words:

"The jurisdiction of any court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different nature ... the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the

court has jurisdiction to adjudicate upon the case. "[Emphasis added]

To be able to properly determine the question of jurisdiction, the need arises for finding out if the suit is a land or commercial dispute. To determine the said objection, I perused the Plaint to look at the nature of the cause of action, the facts are very clear in paragraph 18 of the Plaint, the cause of action arose after the Defendant issued a demand notice to the 1st Plaintiff demanding immediate repayment of the debts to the tune of USD 108,408.17. And the Defendant gave the Plaintiff only 7 days to pay the overdue loan payment of USD 108,408.17. The issuance of default notice is related to non-repayment of the loan, the same is not a land matter. Issuing a notice of payment does not mean the Defendant wants to sell the property.

For those reasons, I fully subscribe to the learned counsels for the Defendant that the matter is purely related to the contract not land matter. It is an outcome of an unperformed contract that is far away from the jurisdiction of the Land Division of the High Court. This position is fortified with the holding of Hon. Mziray J (as he then was) in his ruling in **Exim Bank (T) Limited v Agro Impex (T) LTD & Others, Land Case Appeal No. 29 of 2008** where he held as follows:-

*“Two matters have to be looked upon before deciding whether the Court is clothed with jurisdiction. One, you look at the pleaded facts that may **constitute a cause of action**. Two, you **look at the reliefs** claimed and see as to whether the Court has the power to grant them and **whether they correlate with the cause of action**... The claim therefore against the first defendant is found on a credit facility. On the part of the second and third Defendant the cause of action is founded on a contract of guarantee.” [Emphasis added].*

Scrutinizing reliefs in the Pleint which are also stated in paragraph 6 of the Pleint; the Pleintiff in paragraph 6 (a), prays for this Court to declare the facility letter void and non-execution, unconscionable interest. Paragraph 6 (b) the Pleintiff wants this Court to find that the issuance of default notice by the Defendant to the 1st Pleintiff is void and of no effect for being defective. One can see that the center piece of the controversy between the parties is concerned terms and conditions of a contract; mortgaged deed, or facility letter. I do agree with Mr. Ashiru's submission that the Pleintiff's one relief contains mixed grill element; contract and land matter. See paragraph 6 (a), (b), (d), (e) (f) and (g) of the reliefs are all related to business transactions and 6 (c) the Pleintiff prays this Court to restrain the Defendant from

disposing the 1st Plaintiff's property. A close look at relief (c), it clearly shows that the reliefs claimed do not correlate with the cause of action.

The Plaintiff does not show a cause of action involving land ownership or trespass, thus, the issue of ownership is not the subject matter neither disposition of land. In the end result, I see nothing which would give jurisdiction to this Court to entertain this suit. Thus, in my considered view, this is suit that suffers from the wrong forum crunch that renders it utterly untenable.

For the sake of clarity, the cited case of **The National Bank of Commerce Ltd** (supra) is distinguishable in the case at hand, the Court of Appeal of Tanzania was faced with a situation where the **cause of action** was related to a contractual relationship. The disputes between the parties arose out of a contractual relationship relating to business. On the other side, the case was characterized and framed as a summary suit on the basis of mortgage hence they termed it as a land matter. In determining the issue of jurisdiction the parties in the cited case of **The National Bank of Commerce Ltd** (supra) did not refer the Court of Appeal to the Plaintiff's reliefs. In the matter at hand the cause of action is purely a commercial matter, out of the blue, the Plaintiff included a relief which do not correlate with the cause of action.

For the said reasons I hold that this is not a proper forum for adjudicating this dispute. I, therefore, proceed to uphold the Preliminary Objection on points of law raised by the Defendant's Advocates.

In the end result, I strike out this suit without costs.

Order accordingly.

DATED at Dar es Salaam this 10th May 2023.




A.Z.MGEYEKWA
JUDGE
10.05.2023

Ruling delivered on 10th May 2023 in the presence of Mr. Ashiru Lugwisa, learned counsel for the Plaintiffs, and Mr. Kephass Mayenje, counsel for the Defendant.




A.Z.MGEYEKWA
JUDGE
10.05.2023