

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

CIVIL APPEAL NO 47 OF 2021

*(Originating from Civil Case No. 68 /2020 in the court of the Resident Magistrates of
Mwanza at Mwanza)*

FSA MKOLANI SACCOS LTD APPELLANT

VERSUS

YUSUF MAJALIWA ALMAS 1ST RESPONDENT

HOLL MOSES MAYALA2ND RESPONDENT

JUDGMENT

9th March & 12th April, 2022

Kahyoza, J.

FSA Mkolani Saccos LTD sued **Yusuf Majaliwa Almas** and **Holl Moses Mayala** in the court of the Resident Magistrates of Mwanza at Mwanza, praying for the following-

1. The payments of Tzs. 15,000,000/= and 3,500,000/= as interests.
2. The payments of 18% per month of the principal from the date of institution of the suit to the date of delivery of judgments, the 12% per annum from the date of judgments to payments in full.
3. In the alternative in case the whole amount is not paid then the attachment and of the savings and shares at the plaintiff together with the plot No. 708 Block 'A' Buhongwa.
4. Costs of the suit.

Background of the suit is that; **FSA Mkolani Saccos LTD** lent Tzs. 15,000,000/= to **Yusuf Majaliwa Almas**, which **Holl Moses Mayala** guaranteed and gave her spousal consent. **Yusuf Majaliwa Almas** secured the loan with his shares in **FSA Mkolani Saccos LTD** together with the land registered as Plot No. 708 Block "A" Buhongwa. The suit proceeded *ex parte* as **Yusuf Majaliwa Almas** and **Holl Moses Mayala** refused to enter appearance. One witness testified for and on behalf of **FSA Mkolani Saccos LTD** explaining how **Yusuf Majaliwa Almas** and **Holl Moses Mayala** obtained a loan and defaulted to repay. He also told the court that an attempt to dispose land proved futile as the land did not belong to the respondents. After hearing the evidence, the trial court entertained doubts whether it had jurisdiction to hear the case. The trial court invited the appellant's advocate to address it.

The trial court found that it had no jurisdiction to entertain the suit as the cause of action arose from the mortgage transaction. The Court struck out the suit for want of jurisdiction, hence this appeal.

The issue is whether the trial court had jurisdiction. It is beyond dispute that the cause of action was breach of contract to repay the loan. One of the appellant's prayers in the Plaint is payments of Tzs. 15,000,000/= and 3,500,000/= as interests. The appellant prayed in the alternative to attach the respondent's shares and sell of the land allocated on plot No. 708 Block 'A' Buhongwa. The appellant was seeking redress for breach of contract. He was not seeking to enforce his rights under the mortgage. It is common knowledge that once a Plaintiff prays reliefs in alternative the court has consider which prayer to grant and it is not

required to award a main prayer and an alternative prayer. To award main prayer and alternative prayer would jeopardize the defendant.

The Court of Appeal in the case of **Jomo Kenyatta Traders Limited and 3 Others v. National Bank of Commerce Ltd**, Civil Appeal No. 48/2016 (CAT unreported) dismissed the preliminary objection that the High Court Commercial Division had no jurisdiction to entertain the suit founded on enforcement of mortgage. It held that-

*"Secondly, the challenge on jurisdiction is anchored on a wrong premise because **the suit was not primarily for foreclosure, sale, delivery of possession falling under Order XXXV rule 2(2)(b) of the CPC dealing with suits relating to mortgages of immovable property rather, recovery of the debt secured by a mortgage.**"*

The facts in **Jomo Kenyatta Traders Limited** as summarized by the Court of Appeal are like the facts in this current case. The facts are that **Jomo Kenyatta Traders Limited** defaulted to repayment of the facilities in accordance with the terms agreed. The respondent demanded payment on vain. By reason, of default the respondent issued notices of default to the third and fifth appellants who had executed legal mortgages in her favour. Despite the notices of default, none of them heeded thereto. The respondent instituted a suit under summary procedure regulated by Order XXXV of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC). The respondent raised an objection that the Commercial Court had no jurisdiction to entertain the land matter. The facts are similar. It is my firm position that in the present case the appellant is seeking to enforce

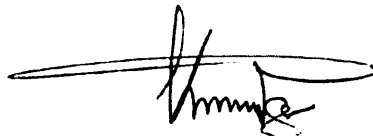
repayment of the loan in the alternative she is seeking to enforce her rights under the mortgage. The trial court had no jurisdiction to entertain the alternative prayer but it had mandate to enforce the appellant's prayer for repayment of the loan.

I find that the trial court erred to hold that the cause of action was enforcement of a mortgage, hence it lacked jurisdiction. The trial court had jurisdiction as the cause of action of breach was contract and the appellant prayed for enforcement of the contract by ordering the respondent to repay the loan. Consequently, I set aside the judgment and decree. I order the trial court to proceed writing an *ex parte* judgment.

The appellant is awarded costs. It further order that the trial magistrate or the successor magistrate if, the trial magistrate is not easily available to proceed to determine this matter with dispatch.

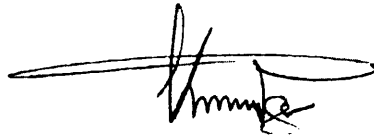
It is ordered accordingly.

DATED this 12th day of April, 2022.



J.R. Kahyoza
JUDGE
12/4/2022

Court: Judgment delivered this 12th day of April, 2022 in the absence of the parties. The appellant's advocate sent his legal officer Ms. Agnes. B/C Ms. Martina (RMA) present.



J.R. Kahyoza
JUDGE
12/4/2022

