

TANZANIA / JUDGMENT

20181211 TZHC Mwanza

COURT
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IN THE HIGH COURT OF TANZANIA MWANZA DISTRICT REGISTRY. ATMWANZA LAND APPEAL NO. 90 OF 2017. (ORIGINATING FROM THE RULING AND ORDER OF THE DISTRICT LAND AND HOUSING ·, TRIBUNAL FOR MARA IN LAND APPLICATION NO. 136 BY KAARE, CHAIRPERSON) BWIRE MUSSO ALPHAYO APPELLANT. VERSUS · NMB BANK BUNDA BRANCH 1 ST· RESPONDENT. NSAMBO & CO. LIMITED 2No RESPONDENT. Date of las order: 27/11/2018 Date of judgement:11/12/2018.

JUDGEMENT.

MAGOIGA, J. ____ The appellant, 'SWIRE MUSSO ALPHAYO aggrieved by the ruling of the

District Land and Housing Tribunal for Mara at Musoma dated 04/10/2017 has appealed to this court faulting the trial court findings in the following grounds: -

1. That the chairman erred in law in holding that-the trial tribunal has no jurisdiction to entertain the matter before it.
2. That the chairman erred in law and in fact to rule the case basing of facts and evidence of the case while the same was supposed to 1 discuss during the hearing of the case and not during preliminary objection as he did. The facts of this appeal as can be depicted from the statement of claim in the application are that the appellant is the lawful owner of a house located at Namhura village within Kibala ward at the district of Bunda in Mara region. The facts go further that in October 2016 the appellant got . a loan to the tune of twenty -five million shillings from the first respondent for purpose of developing his business, which money were to be paid within one year plus interests by November 2017. But the business did not go well and he informe9 first respondent and sought _more.time to pay all the loan plus interest. However, to his surprise the second respondent went to his residential house which was not mortgaged and posted an advertisement that "NYUMBA INAUZWA NA NMB" AND "DAWA YA DENI NI KULIPA" to another house ·which was mortgaged contrary to the law and his certification of registration. It was against this background the appellant went to District Land and Housing Tribunal for redress. The respondents, upon served with the application, filed written statement of defence disputing the reliefs sought and simultaneously. 2 raised a preliminary objection that the trial tribunal is not seized with·

jurisdiction to try the matter. After hearing the parties, the learned chairman upheld the first limb of objection that it had no jurisdiction to try the matter and dismissed the application with costs. Aggrieved, the appellant, has come to this court challenging the findings of the trial tribunal. When this appeal was called for hearing the appellant appeared in person, unrepresented and was ready for hearing. On the other hand, the respondents were enjoying the legal services of Mr. Gwakisa Gervas, learned advocate from Mwanza based legal clinic of GALATI LAW CHAMBERS and ready for hearing too. The appellant was brief to the point that the trial tribunal was wrong to hold that it had no jurisdiction to entertain the matter, while it had jurisdiction to hear the application before it. According to him the trial tribunal is the court dealing with landed matter and is the very forum where he can get his remedy. Submitting on the second ground, it was the appellant argument that the trial tribunal was supposed to hear the appellant evidence as to why he failed to pay the loan and by sustaining the preliminary objection it tantamount to deny him right to be heard. In conclusion, the appellant prayed that his appeal be allowed with costs and order a fresh hearing inter parties on merits. Mr. Gervas in opposing this appeal submitted that the trial chairman had no jurisdiction because at paragraph 7 the appellant was praying for extension of time within which to pay the loan. According to Mr. Gervas the conflicts which the trial tribunal is vested with powers to adjudicate are landed conflicts and not contractual ones. Mr. Gervas cited the case of TWAHA M. GUJWILE V. NMB AND ANOTHER, LAND CASE NO. 04/2011 (HC)BUKOB (unreported) in which it was held that the tribunal nor High Court has no jurisdiction to interfere with parties' contract/agreement to extend time. On the second ground of appeal, it was the submission of Mr. Gervas that the trial chairman was right not to go on hearing the evidence because he has declared himself with no jurisdiction and therefore going on hearing evidence that would be waste of time. To conclude his reply Mr. Gervas prayed that this appeal be found with no merits and same be dismissed with costs. 4 In rejoinder, the appellant had nothing to rejoin but just told the court, he leaves it to court to decide. This marked the end of the hearing of this appeal. I have carefully considered the rival submissions of the parties in this appeal. I have gone through the pleadings the subject of this appeal in the trial tribunal with a very keen legal mind and eye and I have noted that the reliefs clause contained the following prayers:-

1. An order that the disputed house belongs to applicant and that no one is entitled to sell.
2. An order that the applicant be given grace period of three years to pay the loan.
3. Costs of this application be provided for by respondents
4. Any other relief(s) the honourable court may deem fit to grant. Going through the pleadings and the prayer clause the appellant is admitting to have taken a loan in which he is in default and that the respondents are about to exercise the legal remedy as duly agreed in the contract. Admittedly, this appeal has painstakingly disturbed my mind a great deal especially if courts are indeed ousted jurisdiction to entertain contracts of mortgages. To my understanding of the law on mortgages in Tanzania courts are not ousted jurisdiction to

entertain this areas of commercial transaction. The amendment of the Land Act, [Cap 113 R.E. 2002] by MORTGAGE FINANCING (SPECIAL PROVISIONS) ACT, 2008, has several impacts to the law relating to mortgages in Tanzania. The relevant provision, to this appeal is section 139 (1) of the Mortgages Financing (Special Provisions) which provides as follows:-

139 (1) Where the mortgagee under the mortgage of land which consists of or includes a dwelling house to which subsection (5) of section 130 applies, brings an action in which he claims possession of the mortgage land or a mortgagor brings an action to suspend or stop sale pursuant to section 132, the courts may exercise any of the powers -- --- conferred on it by section 140 if it appears to the courts, with a high degree of certainty, that in the event of its exercising that power- (emphasis mine) .

(a) a mortgagor is likely to be able, within a reasonable period to pay any sum due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; and 6

(b) there is sufficient value in the mortgaged property that despite the delay, in the event that the mortgagor fails to cure his default and pay the sums due, the mortgagee will be likely to recapture the amount of its entire claim from the sale of the property. {emphasis mine}

Perusal of the above provision of the law it is clear that courts are not ousted jurisdiction to entertain mortgage contracts. I have had time to go through the case of TWAHA M. GWUJILE V. NATIONAL MICROFINANCE BANK LTD AND ANOTHER, LAND APPEAL NO. 04 OF 2011 cited by the counsel for respondent on this matter and have gathered that it is distinguishing on the following:- ---- - - One, in the above cited case the court was found to have no jurisdiction on account of the pecuniary jurisdiction which was over and above 50 million which was the pecuniary limit of the District Land and Housing Tribunal as the value of the subject matter in that application was Tshs. 75,000,000/= and therefore by virtue of section 33 (2) of the Land Disputes Court Act, [Cap 216 R. E. 2002] truly the trial tribunal had no jurisdiction and I subscribe to the holding of the court in that case. Two, in the instant appeal the estimated value of the subject matter is/was 7 Tshs. 50 million well within the jurisdiction of the trial tribunal. Three, the trial tribunal in its ruling agrees that this dispute is over a landed

• ' . property in which the tribunal has jurisdiction to entertain but quickly turn around and declined to entertain the application on reason that would amount to intervene and amend and rectify conditions as contained in the manner the applicant has prayed in his application. With due respect to the trial chairman and the learned counsel for respondent, the fact that the appellant prayed for extension of time to pay the loan per se cannot at any strength of imagination. oust the tribunal's jurisdiction to entertain the application. Going by the application and as rightly quoted the provisions of the law above which govern mortgages, the contracts of mortgages are not absolute and do not oust the court/tribunal's jurisdiction at all. Four, the amount of loan taken is Tshs. 25,000,000/= and the estimated value of the disputed house is Tshs. 50,000,000/= which was neither disputed by the first respondent. This is to say even if there is slight delay still when the mortgagee wants to

realize by sale can fetch more money to cover all monies due. This was the intention of the parliament in enacting the provisions of section 140 (l)(b) of Act, 2008. I am aware and live with the principle that a judge of the same court is not necessarily bound by the decision of another judge of the same court, but for certainty of decision making, the judge who wants to take a dissenting opinion on the same issue must give reasons for not following the other judge's decision. In the case of *ULC (TANZANIA) LTD V. NATIONAL INSURANCE CORPORATION AND ANOTHER* [2003] TLR 212 quoted the following passage by the court of appeal in the case of *JS Mtungi v. University of Dar es Salaam* which underscore the point in the following words:- "it is not a matter of judicial courtesy but a matter of duty to act judiciously which requires a judge lightly not to dissent from the considered opinion of his brethren . . . One expects (in case of dissent) to be different from that of an earlier case This is necessary to avoid giving parties and general public a false impression that results of cases in court of law perhaps depend more on the personalities of judges than the law of this land." In the instant appeal, the counsel for respondent cited the case of *TWAHA* (supra) and urged me to follow suit the holding thereon. In the first place, I have distinguished the case on point of jurisdiction on the reason that the amount involved in that case was above the pecuniary limit of the court as opposed to the instant appeal. Two, the learned judge in his reasoned opinion was of the firm view that there is no law for extension under which the court can grant such orders or interfere with the parties' arrangements. The appeal that was before Hon. Mjemmass judge was given in 2011 while the above provisions of the Mortgages were in place by 2008 and so far no amendment has been done to the said provisions to my research. So, in other words the decision of that case was given in ignorance of the law and as such vitiating the binding

- power of the same. With the above reasons and with due respect to Hon. Mjemmass, judge, I find that the circumstances of this appeal and issues involved call for me to part ways with him on this point. The issue I can resolve now and determine is whether the suit involving mortgage is a landed dispute or not? To my opinion the law is settled that a mere fact that parties have put some security for the loan does not turn the suit to be a landed dispute. Additionally, suing on the overdraft facility per se does not turn the suit into a land dispute and give the District Land and Housing Tribunal or High Court the necessary jurisdiction. However, based on the above cited provisions of the law now is my considered opinion that the suit is a landed matter if according to section 140 read together with sections 130 and 132 of the Mortgage Financing (Special Provisions) Act 2008, in particular, where the mortgagee is taking possession of the mortgaged property, selling the mortgage property, appointing a receiver and lending the mortgage land. (Emphasis mine). In the instant appeal, there is no dispute that the mortgagee in this appeal was exercising one of the remedies as stipulated in section 140, and by appointing the second respondent to sell the mortgaged property ----- that by itself confers courts with jurisdiction to deal with the matter as land dispute. Another point worth to note in this appeal and the pleading of the appellant is clear that he pleaded that his two houses are subject of sale, including a house not mortgaged. This calls for court's intervention to

protect even weaker party to these transactions, depending on facts of each case and issues at hand. 11 The core question that emerges for consideration is whether upon the appellant prayed the extension of time for payment of the loan alongside with other prayers, truly the courts are ousted jurisdiction to entertain the matter? It is from this am constrained to find that the trial chairman fallen into error by not appreciating the facts in proper perspective before him. At any strength of imagination court's/tribunal's jurisdiction cannot be taken away lightly just by prayer clause. That said and done and for the reasons discussed above I find merits in this appeal and allow it. The ruling of the trial tribunal and orders emanating therein are hereby quashed and set aside and an order for retrial of this matter inter parties in the District Land and Housing Tribunal of Mara at Musoma is accordingly ordered. The appellant will have costs of this appeal. It is so ordered. Dated at Mwanza this 11 th Decemberl 2018. - 12

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