

TANZANIA / JUDGMENT

PAUL PHARES MNYANDWA 222Edit

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CIVIL APPEAL NO 15 OF 2023 (Originating from Civil Case No. 02 of 2023,
in the District Court of Hanang' at Katesh) PAUL PHARES
MNYANDWA.....APPELLANT VERSUS CRDB BANK
PLC..... RESPONDENT

JUDGMENT

18th April & 28th May, 2024 KAMUZORA, J The Appellant instituted a civil suit before the district court of Hanang' in Civil Case No. 02 of 2023 seeking for an order of permanent injunction to restrain the Respondent from disposing his houses, general damages and costs of the suit. The district court dismissed the Appellant's suit with costs by upholding the preliminary objection raised by the respondent hence, this appeal. The brief background of the matter albeit is that, in different occasions, the Appellant applied and was advanced loan by the Page 1 of 8 Respondent for business undertakings. The Appellant mortgaged his houses as security for the loan; two houses located on un-surveyed plot styled as Plot No 413 Block V and one house on surveyed plot No. 407 Block V all located at Unguu Road street at Magoeko Ward, Gairo District in Morogoro region. The Appellant defaulted in paying the loan but sued the Respondent claiming that the Respondent instigated recovery measures contrary to the terms of the loan agreement. While the Appellant admitted to have defaulted in repaying the loan, he still moved the trial court to intervene and stop the sale of the mortgaged property on ground that he was committed to continue paying the loan. He contended that the default was triggered by the draught which affected his agricultural activities hence affecting him financially. When responding to the claim, the Respondent raised two points of preliminary objections; one, that the trial court lacked jurisdiction to entertain the matter and two, that the plaintiff (Appellant herein) had no cause of action against the defendant (Respondent herein). Upon hearing both parties, the trial court overruled the objection based on jurisdiction but sustained the objection based on cause of action. It concluded that the Appellant had no cause of action against the Respondent for the Appellant was the one who defaulted in servicing the loan. Page 2 of 8 The Appellant was aggrieved and brought this appeal on the following grounds;

1. That, the Honourable magistrate erred in law for holding that the plaintiff had no cause of action while the plaint and its annexures disclosed that there was breach of contractual terms and the defendant illegally started to dispose the plaintiff's properties contrary to the loan agreement.
2. That, the Honourable trial magistrate erred in law for dismissing the suit. When the matter was called for hearing, the Appellant appeared in person while the Respondent was represented by Mr. Mosses Mmbando, learned Advocate. Submitting in support of the first ground, the Appellant argued that he was not issued with a notice of intention to sell his house. He claimed that he had evidence indicating that he paid part of the loan but still was not heard on the reason for default in paying the outstanding loan. He contended that he was ready to pay the outstanding amount if given time by the Respondent as he had cultivated maize which he intended to sell and pay the loan. That, he is ready to commit himself by paying the outstanding amount in at least two instalments. The Appellant also submitted that despite availing the Respondent with documents showing that he suffered financial difficulties, they still Page 3 of 8 charged him with interest while the case is in court making the claim to extend from 18 million to 22 million. To him, there was breach of contract on the part of the Respondent because they issued a notice intending to sell his houses but the said notice was served to another person instead of being served to the Appellant. In reply, Mr. Mosses Mmbando, learned advocate for the Respondent submitted that the claim that the Respondent tried to sell the houses without notice is not part of the grounds of appeal. That, apart from that, there is no any evidence showing that the bank attempted to sale the houses while the case was in court. On the argument that the interest accrues while the case is in court, the Respondent's counsel submitted that interest is within the contract thus, the existence of case in court does not waive charging of interest unless it was so agreed by parties. On the argument that the bank notice was served to another person, the learned counsel submitted that, an attempt to sell the mortgaged property if any, is part of recovery measures. That, recovery measures for the property attached to land can only be challenge by filing a land dispute before the District Land and Housing Tribunal and not by civil suit before the District Court. To him, the claim that the bank served the notice to another person and tried to sell his houses can only be Page 4 of 8 entertained as a land dispute because they are centred on properties related to land and the district court had no jurisdiction for the same. On the Appellant's request for time to pay the outstanding amount, the counsel for the Respondent submitted that this is not part of the grounds of appeal. He however advised the Appellant to pay the outstanding amount as soon as possible for the bank's doors are open for him and that the purpose is not to sell the houses but to recover the loan amount. The counsel for the Respondent concluded with a prayer for the appeal to be dismissed for the Appellant was unable to address the grounds of appeal. He however prayed for each party bear its own costs. At the outset and before I venture into discussion on the grounds of appeal, I would like to address the issue of jurisdiction seemingly addressed by the Respondent's counsel in his submission. That issue was raised and determined by the trial court and neither of the parties appealed against the decision on that

issue. If the Respondent thought that the decision meted by the trial court on that issue was improper, the law and practice require the aggrieved party to challenge the decision by way of appeal and in this matter, the room was open for cross appeal by the respondent. It is therefore unprocedural to challenge the decision of the trial court during submission while the same was not one of the Page 5 of 8 grounds of appeal before this court. I therefore hesitate from entertaining that issue. Turning to the grounds of appeal, the Respondent's counsel claimed that the grounds of appeal were not addressed by the Appellant in his submission. Sailing through the Appellant's submission, I observed that the Appellant did not directly address the grounds of appeal raised. However, his submission indirectly suggest that he was contesting the trial court's holding that he had no cause of action. He believes that he had cause of action because the Respondent initiated the recovery measures without serving him with a notice and without considering the circumstances which triggered his default in servicing the loan. Going through the pleadings before the trial court, this court agrees with the trial court's conclusion that the Appellant had no cause of action against the Respondent. Throughout his plaint, the Appellant admitted to have received the loan facilities from the Respondent. He also admitted to have mortgaged his houses for the loan and admitted to have defaulted in servicing the loan as agreed. While the Appellant claimed that the Respondent initiated the recovery measures, the Respondent denied such fact in her written statement of defence. It is unfortunate that no reply was made to support the claim that there were recovery measures initiated by the Respondent. Page 6 of 8 Despite mentioning in his plaint that the notice of sale was published in the local newspaper widely read, the name of newspaper was neither mentioned nor annexed to the plaint by the Appellant. In fact, there is no any document that was annexed by the Appellant to his pleadings justifying that the Respondent initiated the recovery measures or, if the Respondent acted contrary to the terms of the loan contract for the Appellant to institute a suit on account of breach. I therefore find that the trial court was correct to conclude that the plaintiff (Appellant herein) had no cause of action for the plaint itself did not disclose that there was breach of contractual terms by the defendant (Respondent herein). Contrary to the Appellant's contention, there is no any annexure to the plaint evidencing that the Respondent illegally started to dispose the plaintiff's properties contrary to the loan agreement. On the Appellant's prayer for time to pay the outstanding amount in instalment, this court has no mandate to order the Respondent to restructure the loan repayment schedule in this matter. If the Appellant intends to seek for re-structuring of the loan repayment, he can ask the Respondent for that consideration as it was well suggested by the counsel for the Respondent and, the Respondent had a sole autonomy to consider the Appellant's request. Page 7 of 8 From the above observation, I am of the settled mind that the trial magistrate was correct in dismissing the suit. This appeal is therefore devoid of merit hence, dismissed. Since the Respondent pressed no costs, no order for costs is made. DATED at MANYARA this 28th Day of May, 2024 Ay D.C. KAMUZORA JUDGE Page 8 of 8

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