

11 October 2019



Court of Appeal Clarifies on Jurisdiction of High Court

- Court holds that banks can file recovery suits at Commercial Court notwithstanding that there is a landed property
- Commercial Court has jurisdiction to determine such cases
- Issue of default notice still unresolved
- Land and Commercial matters are sometimes interwoven
- Jurisdiction is a creature of statute and parties cannot by agreement or otherwise confer jurisdiction upon the Court

In its usual spree to determine and get to the merit of cases, the Court of Appeal of Tanzania in Civil Appeal No. 129 of 2015 has recently delivered a welcome decision to disentangle contradicting views among Courts and the legal fraternity on which, between the Land and Commercial Divisions of the High Court, is a fit Court for trying suits arising from the mortgaged property/real property.

The appeal originated from the ruling of the High Court of Tanzania (Commercial Division) at Dar es Salaam, (Nyangarika, J.) in Commercial Case No. 11 of 2014 between the National Bank of Commerce (NBC) and National Chicks Corporation Limited (1st Respondent) and 4 others (Guarantors).

Background

In 2014 NBC instituted a summary suit claiming for payment of amounts outstanding on overdraft and loan facilities respectively against the 1st Respondent. The Respondents successfully sought and obtained leave of the Court to defend the suit and consequently lodged a joint Written Statement of Defence accompanied with a notice of five preliminary objections.

Honourable Nyangarika, J. found three objections unmerited and overruled them while sustaining two objections, to the effect that: (1) the High Court (Commercial Division) had no jurisdiction to try a mortgage suit as a commercial case; and (2) the suit against the Defendants was incompetent and bad in law for being premature for want of notice of default.

On the point of jurisdiction the High Court Judge held that the High Court (Commercial Division) was not the parties' 'priority' as against the High Court (Land Division). He held so as the matter dealt with mortgaged property and there is a Land Division of the High Court and thus the High Court (Commercial Division) lacked jurisdiction. As regards the objection on the need to issue a notice of default before instituting a suit in Court, the Judge decided that a notice to the Respondents prior to instituting a suit was a condition sine qua non (essential) and that lack of it defeated the suit for want of cause of action.

Aggrieved by the ruling, NBC lodged a two point memorandum of appeal, to the effect that: (1) the learned judge erred in law in holding that the High Court (Commercial Division) does not have jurisdiction to hear and determine the matter; and (2) the learned judge erred in law in holding that the suit was premature for want of notice of default.

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The Decision

The Court of Appeal (Lila, Ndika, Sehel, JJJ.A) ruled in favour of the Appellant Bank that any litigation whose cause of action accrued from a mortgage transaction or a commercial contract, regardless of its aftermath to the landed property/real property, is not necessarily a land matter because it is result of a commercial transaction and can be dealt with by the High Court (Commercial Division) and not only the Land Division unless the transaction is conveyance. The Court of Appeal arrived at this decision after reasoning that the underlying claim arose from a loan agreement which created a contractual relationship between the parties and over which the High Court (Commercial Division) had jurisdiction.

The Justices of Appeal observed that the Land and Commercial divisions of the High Court were established to expedite resolution of disputes pertaining to land and of commercial significance respectively. Given the sensitivity of the suits relating to land and those of commercial nature, the Justices however also advised the 'responsible authorities', (likely meaning the Registrars of the High Court), to put a mechanism in place which will ensure that litigants are appropriately advised to lodge in other registries matters not specifically assigned to a particular division so as to ensure that the purpose for which the divisions are established are not paralysed. The Justices wisely advised that "In the event a case not of the division's specialization is instituted in any other 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."

On the issue of default notice, overruling the High Court's decision, the Justices stated that since evidence was required to establish whether it complied with the law or not, it could not be dealt with as a preliminary objection at the High Court.

This is a welcome decision where lenders can now freely institute suits at the High Court (Commercial Division), although whether or not to plead the mortgage in the plaint before issuance of the 60 days default notice may still be a sticky point.

To read a copy of the judgment [click here](#).

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