

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL APPEAL NO. 3 OF 2019**

**(C/f Civil case No. 133 of 2017 at the Resident Magistrates'  
Court of Dar Es Salaam at Kinondoni)**

**NATIONAL BANK OF COMMERCE LIMITED..... APPELLANT**

**Vs**

**RAYMOND SHAURI NKINGO..... RESPONDENT**

**JUDGMENT**

**B.K.PHILLIP, J.**

The appellant herein being aggrieved by the judgment of the Resident Magistrate's court of Dar es Salaam at Kinondoni, lodged this appeal on the following grounds;

- i. That the trial court had no jurisdiction to re-open and determine the same cause of action which was determined and dismissed by the High court of Tanzania (Commercial Division) at Dar es Salaam in Commercial Case No. 59 of 2016 for being time barred.
- ii. The learned trial magistrate erred in law and in fact by determining the case contrary to the principle of *res-judicata* following the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam in Commercial Case No. 59 of 2016 that the cause of action was time barred.

- iii. The learned trial magistrate erred in law and fact by entertaining a case which was time barred.
- iv. The learned trial magistrate erred in law and in fact by entertaining a plaint which did not disclose any cause of action against the Appellant.
- v. The learned trial magistrate found that the certificate of title in question was mortgaged to the Appellant but erred in law and in fact by shifting the determination of the duty of Appellant from basing on mortgage and wrongly determined the same on the basis of principles of fiduciary relationship incorrectly held by the learned trial magistrate to exist between banks and their clients.
- vi. The learned trial magistrate erred in law and in fact by holding that the Appellant was stopped from denying the fact that it had a duty to release the certificate of title without first analyzing the evidence tendered to ascertain the existence and the legal basis of the alleged duty.
- vii. The learned trial magistrate erred in law and in fact by holding that despite of the Respondent being not a party to the loan agreement between the Appellant and Ray & Company Limited; he was not a stranger to that loan agreement as the Respondent was a customer of the Appellant.
- viii. The learned trial magistrate erred in law and in fact by basing some of the findings on hearsay evidence especially on matters relating to the overdraft facility between the Appellant and Ray & Company Ltd.
- ix. The learned trial magistrate erred in law and in fact by imposing an obligation on the Appellant as a bank to advise the Respondent properly.

- x. The learned trial magistrate erred in law and in fact by holding that the Appellant breached the duty without analyzing the facts of the case and evidence tendered for proving the legal basis and nature of the duty alleged to be breached and without proving the specific duty alleged to be breached.
- xi. The learned trial magistrate erred in law and in fact by awarding compensation of Tshs. 100,000,000/= for the loss of use of Title Deed No. 5227 – DLR Plot No. 3, Block “Y” Kibaoni Medium Density, Singida Township which is in form of specific damages without the respondent pleading and strictly proving the same.
- xii. The learned trial magistrate erred in law and in fact by ordering unconditional released of the Title Deed No. 5227 – DLR Plot No. 3, Block ‘Y’ Kibaoni Medium Density, Singida Township; and payment of interests with no legal basis proved for the same.

At the lower court the respondent alleged that he offered his property situated on Plot No. 3 ,Block “Y” Kibaoni, Singida Township, Ct No. 5227-DLR as security for an overdraft facility that was granted by the appellant to Ray & Company Ltd. Another property that was offered to secure the overdraft facility was situated on Plot No. 136, Block “K” CT No. 44141, Mbezi beach Dar es Salaam. It was the plaintiff’s case that the said overdraft facility was fully repaid and the appellant discharged the legal Mortgage over the property situated on Plot No. 136 ,Block “K” CT No. 44141, Mbezi beach Dar es Salaam, but retained the certificate of title in respect of the property on Plot No. 3 ,Block “Y” Kibaoni , Singida Township, CT No. 5227-DLR. Despite the fact that the Certificate of Title in respect of his property aforesaid was retained, the plaintiff entered into a sale agreement for selling the same to one Valerian Aloyce Kimambo. The respondent further alleged that he failed to hand over the premises to the buyer due to the appellant’s failure to release the right of occupancy in

respect of that property. At the lower court the case was decided in favour of the respondent. The Court ordered as follows;-

- i. Unconditional release of the original Title Deed NO. 5227 –DLR Plot No. 3, Block “Y” Kibaoni Medium Density, Singida Township.
- ii. Payment of Compensation to the respondent to tune of Tshs. 100,000,000.00/= for the loss of use of the Title Deed No. 5227 – DLR Plot No. 3, Block “Y” Kibaoni Medium Density, Singida Township.
- iii. Payment of interest to the respondent at the rate of 12% per annum from the date the cause of action arose to the date of filing this case on the sum of Tshs. 100,000,000.00/=.
- iv. Payment of interest to the respondent at the rate of 7% per annum on the decretal amount from this date of judgment to the date of full satisfaction.
- v. Costs to follow the event.

Now, back to the appeal, the learned Advocates Makarious Tairo and Ibrahim Mbugha appeared for the appellant and the respondent respectively. This appeal has been disposed of by way of written submissions.

At this juncture, it is worth noting that the grounds of appeal are divided into two major parts. The first part consists of three grounds of appeal which are pure points of law and are related to each other. The same were raised in the lower court as points of preliminary objection, however, all of them were overruled. The second part consists of grounds which are partly based on the evidence adduced in court and the Law. In this judgment I will start dealing with the first part of the grounds of appeal as determination of the same is crucial in paving the way or blocking it towards the determination of the remaining grounds of appeal.

Submitting for the first three grounds of appeal, Mr. Tairo argued that this matter had already been determined and dismissed by this Court in Commercial Case No.59 of 2016, between Ngudje Nehemia Michael who was suing on behalf of the respondent by virtue of the power of attorney issued by the respondent herein (Raymond Shauri Nkingo and the appellant herein (National Bank of Commerce Limited). Mr. Tairo contended that upon the dismissal of Commercial Case No 59 of 2016, the respondent was supposed to appeal to the Court of Appeal against that decision, if at all he was aggrieved by the same. He further argued that the respondent's decision to institute a fresh suit similar to the one that was dismissed by this court is improper. He was of a strong view that the lower Court erred to overrule the points of preliminary objection raised by the appellant that the court had no jurisdiction to entertain the case (Civil case No.133 of 2017) as the High Court had already held in Commercial Case No 59 of 2016, that the respondent was time barred to sue the appellant on that cause of action and respondent's claim was time barred. Mr. Tairo maintained that this court's findings that respondent's case was time barred remains unchallenged, therefore no court has powers to entertain the same. To Cement his arguments, he cited the case of **Tanzania Dairies Ltd Vs Chairman , Arusha Conciliation Board and Isaack Kirangi, ( 1994) TLR 33.**

Mr. Tairo went on to submit that Commercial case No. 133 of 2017 was *res judicata*, following the decision of the High court Commercial Division in Commercial Case No.59 of 2016. He referred this court to the case of **Ester Igna Luambano Vs Adriano Gedam Kipale , Civil Appeal No. 91 of 2014** (unreported) and the provision of section 9 of the Civil Procedure Code, Cap 33 R.E 2019 (Hence forth " the CPC"). He contended that the cause of action and the respondent's claims in Civil Case No. 133 of 2017, are the same to the ones determined by this court in Commercial case No. 59 of 2017. Moreover, Mr. Tairo submitted that the effect of the decision of this Court that the case was time barred means that the respondent was barred from re-filing the same suit on the same

subject matter because it had already being declared to be time barred. He cited a number of cases to buttress his argument, one of them is the case of **George Shambwe Vs Tanzania Italian Petroleum Co. Ltd (1995) TLR No.20**. He invited this court to allow this appeal and set aside the judgment of the lower court with costs.

In addition to the above, Mr. Tairo submitted that the respondent's claim was time barred because the loan at issue was fully paid on 2001, that is per the demand letter from the respondent's advocate. He contended that according to paragraph 17 of part I of the schedule to the law of Limitation Act, the time limit for claims for redemption of Land in possession of the Mortgagee is twelve (12) years and the same expired in 2013. That it was wrong on part of the lower court to try the respondent's case which was time barred. He referred this court to the case of **Tanzania Diaries Ltd** (supra) to buttress his arguments.

In rebuttal, the learned Advocate, Mr. Mbugha submitted that this court dismissed the said Commercial Case No. 59 of 2016 upon upholding the point of preliminary objection that was raised by the appellant, that the case was time barred as per item 17 of part I of the Law of Limitation Act, on the ground that respondent's case was for claims for redemption of land in possession of a mortgagee. Mr. Mbugha contended that this court dismissed the case (Commercial Case No. 59 of 2016) on the strength of the above mentioned point of preliminary objection while in actual fact the Respondent's claim was for release of the Certificate of title in respect of the property in dispute not redemption of land in possession of the mortgagee as the mortgagee has never being in possession of the mortgaged property at issue. It was the contention of Mr. Mbugha that the cases cited by Mr. Tairo in support of contention that the case was time barred are irrelevant and distinguishable from the facts of the case in hand.

Moreover, Mr. Mbugha submitted that the case was not heard and finally determined by the Court, since the parties were not accorded the

opportunity to be heard, as the same was dismissed on the point of preliminary objection. He contended that under the circumstances the case that was filed by the respondent at the lower court was not *res judicata*. Citing the case of **Gerald Chuchuba Vs Rector, Itaga Seminary 2002 T.L.R, 216**, Mr. Mbugha submitted that one of the elements which has to be fulfilled to render the matter to be *res judicata* is that the same has to be finally determined. He insisted that the respondent's case has never been determined on merit.

In rejoinder, Mr. Tairo, reiterated his submission in chief and went on to argue that the submissions made by Mr. Mbugha show that the respondent is challenging the ruling of this court in Commercial Case No. 59 of 2016, on the ground that this court dismissed the case wrongly on the reason that the plaintiff's case was not for redemption of a land in possession of a mortgagee, but it was for release of Certificate of title in respect of his property situated on. Plot No. 3 ,Block "Y" Kibaoni , Singida Township, CT No. 5227-DLR. He contended that under the circumstances the appropriate legal remedy for the respondent was to appeal against the ruling of this court, not to file a fresh case in the lower court basing on the same cause of action and issues, and between the same parties.

Furthermore, Mr. Tairo submitted that both Commercial Case No. 59 of 2016 and Civil Case No 133 of 2017 were for release the respondent's Certificate of title in respect of the property situated on Plot No. 3 ,Block "Y" Kibaoni, Singida Township, CT No. 5227-DLR. In both cases the respondent attached documents which indicate that the respondent's claim was for the release of his certificate of title aforesaid.

Mr. Tairo, invited this court to take a judicial notice of the ruling of this court in Misc Commercial Application No.106 of 2017, in which the respondent applied for extension of time to file the notice of appeal against the dismissal of Commercial Case No. 59 of 2016 and same was dismissed by Hon Sehel, J as she then was , on the ground that the

respondent failed to show good cause for delay in filing the notice of appeal.

Moreover, Mr. Tairo insisted that the lower Court was not justified to re-open the issues which were determined by this court in Commercial Case No. 59 of 2016, thus it had no powers to make any decision on whether or not the respondent's claim was for redemption of land in possession of the mortgagee and whether or not the respondent's suit is time barred.

Having analyzed the submissions made by the learned advocates, let me proceed with the determination of the grounds based on points of law. First of all, I wish to point out that it is not in dispute that the respondent herein was a party in Commercial Case No. 59 of 2016, in which he sued the appellant herein through a legal representative by using a power of Attorney. I have read the plaint that was filed by the respondent in the said Commercial Case No.59 of 2016, the same shows that the respondent was claiming for release of his title in respect of Plot No. 3, Block "Y" Kibaoni medium density, Singida Township. For ease of reference let me reproduce hereunder the reliefs prayed by the respondent in that case;

- i. A Court Order for discharge of mortgage and return of Certificate of Title No. 5227 Plot No. 3, Block Y, Kibaoni, Singida Municipality.
- ii. Payment of Tshs 100,000,000/= only being the loss of delay of discharge of mortgage and return of Certificate of Title No. 5227 Plot No. 3 Block Y, Kibaoni Singida Municipality.
- iii. Payment of Tshs 10,000,000/= paid as damage for failure to honour terms of contract between Raymond Shauri Nkingo and Valeria Aloyce Kimambo.
- iv. Interest on the (b) above at the rates of 30% per annum from the date which he was supposed to return the Certificate of Title No. 5227 Plot No. 3 Block Y, Kibaoni Singida Municipality.
- v. Costs of this suit.



- vi. Any other relief(s) this court deem appropriate to grant.

In Commercial case No. 133 of 2017, the subject of this appeal, the respondent prayed for the following reliefs;

- i. An order for the unconditional release to the Plaintiff of the original Title Deed NO. 5227 for the property situated on Plot No. 3, block "Y" Kibaoni Medium Density, Singida Township free from encumbrance.
- ii. Refund to the Plaintiff of the sum of TZS 10,000,000/= paid by the Plaintiff as compensation to the purchaser of the property.
- iii. Payment of the sum of TZS 150,000,000/= being compensation for loss of use of the title for two years.
- iv. Interest on the principal sum at the rate of 25% per annum from the date the cause of action arose to the date of filing of this suit.
- v. Interest on the decretal sum at the court's rate from the date of judgment to the date of full payment.
- vi. Payment of general damages to be determined by the court.
- vii. Costs of this suit.
- viii. Any other relief(s) as this Honourable Court may deem just fit to grant.

From the foregoing, it is obvious that claims filed by the respondent in commercial case No 59 of 2016 are the same to the ones filed in Civil Case No.133 of 2017. Also, it is not in dispute that the respondent attempted to appeal against the decision of this court in Commercial Case No.59 of 2016, by making an application for extension of time for filing the notice of Appeal, against the decision of this court in Commercial case No 59 of 2016. The same was dismissed by Hon Sahel, as she then was, on the 15<sup>th</sup> of September 2017. It is evident that the respondent was not satisfied with

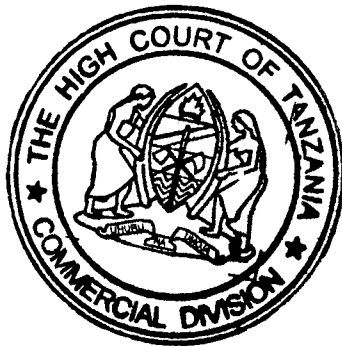
the decision of this court in Commercial Case No. 59 of 2016. As correctly submitted by the learned Advocate Tairo, the remedy was to appeal to the Court of Appeal against that decision.

I have pointed out herein above that the respondent attempted to start a process for lodging his appeal against the decision of this court to the Court of Appeal, but his application for extension of time to lodge the notice of appeal was dismissed. The remedy that was available to the respondent was to appeal to the Court of Appeal against that ruling if at all he was not satisfied with the same, not to institute another suit in the lower court as he did. I am in agreement with Mr. Tairo that Civil case No. 133 of 2017 was wrongly filed in the lower court as the respondent's cause of action in that case is the same to the one that had already been determined by this court in Commercial Case No. 59 of 2016, and this court had held that the same is time barred. It was wrong for the lower court to entertain the said civil case No 133 of 2017. The lower court had no powers to re-open the issues that were determined by this court.

However, Mr. Tairo's argument that Civil Case No 133 of 2017 was *res judicata* is not correct, on the reason that the respondent's claim for release of his certificate of title has not been finally determined. If the respondent manages to secure an order for extension of time to institute his claims pursuant to the provision of Law of Limitation Act, he can institute his claims as the same has not been determined. It is worth noting that, according to the ruling of this court in Commercial case No. 59 of 2016, the respondent's claim is time barred. So, the respondent have two options, either to apply for extension of time for instituting his case or appeal against the ruling of this court to the Court of Appeal, if he believes that this court's order is wrong because the respondent's case is not for redemption of a land under the possession of a mortgagee but is for release of the certificate of title as he has argued in his submission in this appeal. If the Court of Appeal allows his appeal then, the respondent will continue to prosecute his case in this court.

From the foregoing, it is a finding of this court that the lower court erred to overrule the points of preliminary objection raised by the appellant, to wit; That the respondent's case was time barred and that the lower court had no power to re-open the matters that were decided by this court in Commercial case No 59 of 2016. Under the circumstances, I cannot proceed with the determination of the remaining grounds of appeal as my findings herein above do not give me any other option except stopping here. Therefore, this appeal is allowed with costs. The judgment of the lower court is set aside.

Dated at Dar es Salaam this 25<sup>th</sup> day of September, 2020.



  
**B.K.PHILLIP**  
**JUDGE**