

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
(ORIGINAL JURISDICTION)**

LAND CASE NO. 69 OF 2016

1. MATHEW P. CHAWANGA	1ST PLAINTIFF
2. JUMA KWANGAYA	2ND PLAINTIFF
VERSUS	
1. MAJOR TIMOTH MAGEGE	1ST DEFENDANT
2. FAST LOGISTICS	2ND DEFENDANT
3. KCB TANZANIA LIMITED	3RD DEFENDANT
4. ABEL KISUVI SANGA t/a UNYAGALA AUCTION MART & BROKERS	4TH DEFENDANT
5. CRISPIN PROSPERS MWOMBEKI	5TH DEFENDANT
6. MBASI TRADING COMPANY LIMITED	6TH DEFENDANT

Date of Last Order: 03/02/2017

Date of Ruling: 21/03/2017

RULING

FELESHI, J.:

The plaintiffs sue the defendants for nullification of a purported sale of properties by public auction conducted on 03/05/2015 that is, a landed property under Certificate of Title No. 186255, L.O. No. 64949 Plot No. 116 Block 47 located in Kijitonyama within Kinondoni Municipality and properties comprised under Certificate of title No. 26118 L.O. No. 65023 Plot No. 255 Block "A" located in Sinza area within Kinondoni Municipality. They also claim for general damages as will be assessed by this Court, interest, costs of the suit and any other relief(s) as the Court deems fit.

On 26/01/2017, counsel for the 3rd defendant raised a preliminary objection on point of law to wit that- **This Court is functus officio and**

therefore lacks the requisite jurisdiction to hear and determine the matter.

Hearing of the preliminary objection was scheduled to be disposed of by way of written submissions whereas parties complied with the schedule, hence, this Ruling. Arguing for the preliminary objection, the 3rd defendant engaged Trustmark Attorneys whereas the plaintiffs were assisted by the Legal Aid Unit of the University of Dar es Salaam, School of Law.

Addressing the preliminary objection, Counsel for the 3rd defendant submitted that, this Court is functus officio to reopen a matter which has been determined vide Miscellaneous Commercial Application No. 44/2015 and in respect of a settlement order passed on 17/12/2014.

The learned Counsel added, Miscellaneous Commercial Application No. 44/2015 between the plaintiffs and the 3rd defendant is not appealable for no appeal arises from a consent Judgment in terms of section 70(3) of the Civil Procedure Code, [CAP. 33 R.E, 2002]. Reference was made to **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser**, Civil Application No. 33/2012, (Dar es Salaam Registry), (Unreported) where the Court of Appeal quoting Mulla on the Code of Civil Procedure Code (16th Ed. Vol. 1 PP 299, 653 & 1066) underscored that:-

" ... Subsection (3) in so far as it bars an appeal from consent decrees, gives effect to the principle that, a judgment by consent, acts as an estoppel. In the case of a consent decree ... could only be set aside by substantive proceedings appropriate to that particular remedy. A consent decree can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake. This can be done only by a suit and consent decree cannot be set aside by an appeal, review or by a rule obtained on motion. But the Court in its

inherent jurisdiction, may set aside an interlocutory consent order which is not a final order or judgment. ...”.

The same Court in **Mohamed Enterprises (supra)** held that:-

“The only option open to the respondent herein was to file a fresh suit appropriate to that particular remedy”.

In reply, the plaintiffs’ counsel submitted that, a Court become functus officio when it has previously determined the same on merits to finality on the same subject matter. He cited the case of **Kamundi vs. Republic**, (1973) E.A. 540 where the Court of Appeal held to that effect.

It was further submission by the plaintiffs’ counsel that application No. 336 of 2014 between the plaintiffs and the 3rd defendant, the plaintiffs herein agreed to raise funds in satisfaction of an existing debt whereas subsequently, commercial application number 44 of 2015 was lodged by the same parties for extension of time to satisfy the said Court Order.

The plaintiffs’ counsel argued that, the present suit is different from the two referred applications. In the matter under scrutiny, the plaintiffs are challenging the referred Consent Judgment as it was secured under fraud. Besides, the matter at hand involves more parties who were not parties in the former suits/applications. It is from the above the plaintiffs’ counsel urged for the Preliminary Objection to be overruled with costs.

In rejoinder, basically, counsel for the 3rd defendant reiterated what he submitted in chief. Having considered the pleadings and the respective submissions by counsel for the parties, the following are the deliberations of this Court in disposal of the raised Preliminary Objection.

At the outset, a reading of the Preliminary Objection, the gist of it is that the matter under scrutiny is res judicata. But without going into the merits of the objection, notably, parties have referred to matters which this Court is unaware of, that is, matters which have to be brought into attention of this Court through evidence. Being the case, if it is a matter that has to be ascertained through evidence, the question is whether that matter can qualify to be raised as a Preliminary point of Objection in purview of the law?

In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A. 696, the erstwhile East African Court of Appeal observed at page 701 that:-

"A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

It thus follows that, out rightly, the matter ought not to have been raised as a preliminary point of objection for it does not amount into a pure point of law. This matter resembles matters of locus standi which also have to be ascertained. In the case of **Mechmar Corporation (Malaysia) Benhard (In Liquidation) vs. VIP Engineering and Marketing Ltd & 3 others**, Consolidated Civil Applications No. 190 and 206 of 2013, (Dar es Salaam Registry), (Unreported), the Court of Appeal underscored that:-

" ... Obviously, the points raised by the first respondent on the "locus standi" of the applicant being liable for all the liabilities of the 2nd respondent under section 269(1) of the Companies Act are matters which cannot be answered without asking the question why and how. Since the question why and how have to be asked, it means that an inquiry has to be conducted in order to resolve the issue of "locus

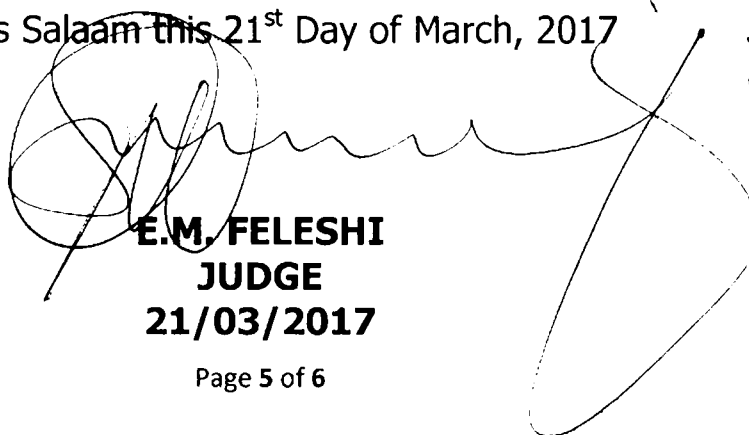
standi” and the two remaining points of objection raised by the first respondent. This means that the Court has to seek for evidence which will enable it to be in a position to resolve the points raised as preliminary objection. By indulging in that process the points raised by the first respondent loses the status of being preliminary objections. ...”.

Addressing a similar matter which was raised by way of preliminary objection but needing proof by evidence in the case of **Olais Loth (Suing as administrator of the estate of the late Loth Kalama) vs. Moshono Village Council**, Civil Appeal No. 95 of 2012, (Arusha Registry), (Unreported) where the Court of Appeal observed that:-

“..... it appears to us that the question of when the 12-year limitation period began to run against the late LOTH KALAMA and his estate which includes the disputed land, still requires further proof and cannot be determined at the preliminary stage as pure point of law. ... This leaves open to proof the allegation of facts contained in the third paragraph of the Plaint”.

Being the case, the purported raised preliminary point of objection is overruled with costs shouldered to the 3rd defendant. This Court enjoins litigants and their respective Counsel that matters raised as preliminary objection are only which are genuinely pure points of law as required by law. The matter should proceed on merits where the raised matters of concern will be ascertained through tendering of evidence as prescribed by law. Order accordingly.

DATED at Dar es Salaam this 21st Day of March, 2017



**E.M. FELESHI
JUDGE
21/03/2017**

COURT: Ruling delivered this 21st day of March, 2017 in presence of Ms.Gerida, Advocate for plaintiffs, Mr.Msengezi, Advocate for 1st and 2nd defendants, Mr.Msuya, Advocate for 3rd and 4th defendants and Ms Glory, Advocate for 5th and 6th defendants.

M.M.SIYANI
DEPUTY REGISTRAR
21/03/2017