

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE NO. 165 OF 2014**

KASTAN MINING PLC.....PLAINTIFF

VERSUS

TANZANIA MORTGAGE COMPANY

LTD t/a T-MORTGAGE.....1ST DEFENDANT

KAISI KALAMBO.....2ND DEFENDANT

RULING

Date of Last Order: 2/10/2019

Date of Ruling: 23/12/2019

S.M. KULITA, J.

While the matter was for continuation of hearing by the 1st witness for the Plaintiff's case on the 2/10/2019 Advocate for the defendants Mr. Dickson Mtogeseewa raised the concern that this court has no jurisdiction to entertain this matter as the same has ever been determined and decided by this court in the Civil Case No. 162/2011. He said that in the said case the suit property was decreed to Colom Investment (T) Limited as it can be referred to at Paras No. 5-10 of the plaint.

On the other hand the Defendant disputed that issue by stating that the said objection has no legal value. He said that he is going to testify about that issue as well in his testimony. He said that during trial the opponent (defendant) will be in a position to cross examine him. The Defendant will also have a chance to prove that allegation. He prayed for the hearing to proceed. Having so heard those arguments

the court ordered the parties to address the court on that issue through written submissions.

From the submissions which were annexed with some documents including the copy of judgment for the Civil Case No. 162/2011 High Court Dar es Salaam Zone I did notice that in the said case the parties were COLOM INVESTMENT (Plaintiff) and TANZANIA MORTGAGE COMPANY LIMITED (DEFENDANT). The decision which was delivered on 30/4/2013 was for the plaintiff. Amongst the orders of the court in the said judgment is that the plaintiff was allowed to sell the mortgaged properties duly assigned to it to recover the advanced and admitted sum of USD 200,000. In alternative to that the defendant was ordered to pay the plaintiff the said advanced and admitted sum of USD 200,000.

According to that Judgment, among the mortgaged properties which were ordered to be sold if the Defendant defaults to settle the debt is the property located on Plot No. 1050, Ras Koronjo Gezaulole, Dar es Salaam, registered in the name of Kastan Mining Limited.

The defendant's Counsel submitted that this matter had ever been determined through a Civil Case No. 167 of 2011, it is therefore Res Judicata. But the defendants denied the allegation stating that the current case is different to the former one. Upon going through the pleadings of the case at hand and the judgment for a Civil Case No. 167 of 2011 I can concur with the defendant that there is no Res Judicata.

I say so because in the current case the plaintiff (Castan Mining) claims that the defendants (T-Mortgage and Kaisi Kalambo) without her (Plaintiff's) consent did use its title deed which was in his (defendant's)

possession as a security for loan to Colom Company. He failed to settle the said loan and decided to file a notice of deposit of certificate of title with the Ministry of lands, housing and Human Settlements Development. The plaintiff claimed that the Defendant did so with malicious intention of creating a frivolous lien thereon. The plaintiff therefore filed this suit claiming for this court to order the Defendants to remove the Notice Deposit Certificate of title with the said Ministry.

In that other case, Civil Case No. 2 of 2011 which was finally determined on 02/5/2013 the plaintiff, Colom sued T-Mortgage for failing to settle the debt of USD 200,000 that she had borrowed from the plaintiff (Colom). Hence the defendant's secured properties which include that located on Plot No 1050 Ras Koronjo, Gezaulole Dar es salaam were ordered by this High Court on that 02/5/2013 to be sold so as to settle the debt. The said property at Ras Koronjo Gezaulole was actually the property of Kastan Mining according to the said judgment but it was secured for the said loan by the defendant (T-Mortgage) through her Director Mr. Kaisi Kalambo.

When you read these two cases in detail you can note that the same subject matter (Plot No. 1050 Ras Koronjo) has been involved but in different ways of which cannot be termed Res Judicata. That, in the previous case the Defendant (T-Mortgage) was alleged to have used the property of Kastan Mining (Title Deed) without consent of the owner to secure loan, as a result the said title deed was either confiscated or sold by the said Colom Company due to the defendant's (T-Mortgage's) default to settle the debt. In the current suit the Plaintiff Castan Mining claims for the restoration of her title deed by the T-Mortgage who is the Defendant. Though the cause of action in both cases arise from the

same subject matter (tittle deed) each case has its own nature of claims.

However, in connection to the aforesaid position I can note some issues in this Civil Case No. 165 of 2014 which have not been clearly pleaded in the plaint and the same can lead to unintended ends of justice to the parties.

The issue that comes into my mind is whether the said tittle is still within the hands of the said Ministry of land, Housing and Settlement Development; or it is within the hands of T-Mortgage who were ordered by the High court in the Civil Case No. 156 of 2011 on 2/5/2013 to sell it together with and other assets in order to recover the advanced, and admitted loan of USD 200,000 issued to T-Mortgage who had defaulted to settle the loan. Otherwise, if the said property was real sold it means the possession of the said tittle deed will be with somebody else and not T-Mortgage (defendant).

These scenarios make this court to take precaution that it might be dealing with the prayer whose performance is impossible. Actually there is no certainly that the document (tittle deed) for the disputable plot is in the defendant's possession as alleged by the plaintiff.

My doubt is that the case may end up with uncertainty on the whereabouts of the disputable tittle deed particularly if it happens that the responsible officers from Colom Company and the Ministry of Lands Housing and Human Settlement Development won't be called to testify on that. A way forward on this situation is to join those two persons in the suit as Defendants. In that sense even the reliefs sought by the plaintiff should be reframed as it may happen that the court may order

the plaintiff to be compensated instead of being granted a specific performance of being restored with the title deed, if the decision will be for her/plaintiff.

That being the case I find this matter needs to be properly framed by the plaintiff before the same being filed, meaning thereby this one should be struck out.

Apart from that reason I have also noticed that the speed truck for this matter (speed truck III), that the case be determined within a period of 12 months, which was fixed by this court in the presence of both parties on the 18/9/2015 and expired since 17/9/2016, but trials continued without extension of time. It was the duty of the parties to remind the court on that if the court was silent. That being the case the matter should be struck out. The plaintiff, if he wishes can re-file the case which will be convenient for the court to try and possible for good ends of justice and the speed truck be considered as well.

The records also show that the last list of additional documents to be relied upon by the plaintiff was filed on 25/2/2019, that is five years after the institution of the case, and it was the 5th list. This implies that the plaintiff did rash to file this case in that august, 2014. In my view re-filing of this suit will enable the plaintiff to collect the lists of documents that he intends to tender to court into one.

The faults that I have observed may cause unnecessary wastage of time and resources for this matter of which can be cured by the plaintiff re-filing the same in a proper mode as stated. Not only that but also the reliefs sought might be impossible to execute, hence the whole task be nugatory. As well the speed truck had expired since 17/9/2016

but hearing proceeded without extension of time. In that sense the matter should be struck out whereby the plaintiff will be at liberty to file a fresh suit by making consideration of the findings observed by the court.

Having so said, I accordingly struck out this suit with no order as to costs.



S.M. Kulita

JUDGE

23/12/2019