

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA

CIVIL CASE No. 33 OF 2022

ESTER JAMES MAGITTA-----PLAINTIFF

VERSUS

CHRISTOPHER MARWA MKAMI-----1st DEFENDANT

BANK OF AFRICA TANZANIA LIMITED-----2nd RESPONDENT

JULIUS MWITA MAKERE-----3rd RESPONDENT

RULING

Last order: 12.10.2022

Ruling date: 20.10.2022

M. MNYUKWA, J.

This is a Ruling in respect of the preliminary point of objection raised by the 2nd defendant. The point of preliminary objection that was raised by his counsel was;

- 1. That, this court has no jurisdiction to entertain the suit which challenges the auction and transfer of the landed property which is located at Tarime, Mara Region.*

In brief, the facts of the case can be retrieved from the Plaint in the following paragraphs:-

5. That, the plaintiff claims from the defendants jointly and severally is for an order that the mortgaged property located at Plot No. 15, Block "C", Nkende Area Tarime Township is null and void abinitio for want of spouse consent and thus the same be discharged/redeemed from mortgage agreement between the 1st and 2nd defendant, order to permanently restrain respondents from transferring or dealing in whatever manner with the disputed property, general damages at the court discretion. Costs of the case and any other reliefs this honourable court deem fit and just to grant.

7. That, upon thorough perusal, the plaintiff discovered that, sometimes on 31st December 2020, the plaintiff entered into a mortgage agreement with 2nd defendant where he secured the sum of Tsh 350,000,000/- and that their matrimonial property located at Plot No. 15, Block C Nkende Area, Tarime Township was placed as the security in the said transactions. Copies of the said mortgage agreement is attached herein and marked as annexure EL1 to form part of the Plaint.

8. That, the plaintiff further discovered that, the 1st Defendant has failed to honour his commitment into the said mortgage agreement and that the same has been auctioned through public auction and sold to the 3^d defendant and has not transferred into his name the said landed property and the said mortgage and auction is tainted with illegality and irregularity and thus I subsequently filed a caveat in that regard. Copies of the



Official search report and caveat shall be produced during the hearing.

When the defendants were served with the plaint, along with filling of the written statement of defence, 2nd defendant raised a point of preliminary objection on jurisdictional issue. On the day when the matter was coming for hearing of the preliminary objection, the plaintiff was represented by Marwa Samwel, the learned counsel who also held brief of the counsel of the 1st defendant, Mr. Inhard Mushongi, the 2nd defendant afforded the legal services of Lubango Shuduki and the 3rd defendant enjoyed the legal services of Agricola Evarist who hold brief of Juvenelis Mutete.

Before the 2nd defendant submitted on the point of preliminary objection, the plaintiff quickly conceded to the preliminary point of objection and averred that, after he had gone through the preliminary objection and the provision of Section 14 of the Civil Procedure Code, Cap. 33 R.E 2022, he found that the objection is meritorious and he prayed the Court to use Order VII Rule 10(1) and (2) of the Civil Procedure Code, Cap. 33 RE: 2019 to return the plaint and be filed to the court which has jurisdiction.

He went on that, for the purposes of serving time and costs, he prayed the court to exercise its power as stated in the case of **Qamara Kwaslema Gwareh vs Anwary Hassan and 2 others**, Civil Appeal

No. 92 of 2015, where the Court of Appeal invoked its power to rectify the decision of this Court to return the Plaint before dismissing it. And last, he prayed for the costs of the case to be waived and each party to bear its own costs and an order for the matter to be returned and filed in the court which has jurisdiction be issued.

Responding, the learned counsel for the 2nd defendant stated that, as the plaintiff had conceded to the point of the preliminary objection raised, the remedy is for the suit to be struck out as returning of the plant is not maintainable. He went on that, the prayer to return the matter to the court which has jurisdiction, is done when there is no objection, and that is when the provision of Order VII Rule 10(1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019 can apply. He added that, the case of **Qamara Kwaslema Gwareh** (supra) stated an Order of returning the Plaint as a passing remark and it was not part of the decision of the case.

He insisted that, this court had no power even to order the Plaint or case to be filed, as that is the responsibility of the plaintiff. He finalized by praying the costs to be awarded because this is not the end of the case as the plaintiff is expecting to continue with the case for the court to determine the rights of the parties.

On his part, the 3rd defendant submitted that, the plaint cannot be returned because there is a preliminary objection which is raised. He also

prayed the matter to be struck out with costs because the litigants have already incurred costs.

Upon hearing the brief submissions of both parties, this court is now placed with an issue as to whether the suit is to be struck out as stated by the 2nd defendant or Plaintiff be ordered to be returned to the proper court which has the jurisdiction to hear and determine it, after the plaintiff has conceded to the point of preliminary of objection raised.

As shown above, the concession of the plaintiff on the preliminary objection is based on the provision of section 14 of the Civil Procedure Code, Cap 33 R.E 2019 which provides that:

"Subject to the pecuniary jurisdiction or other limitation prescribed by any law, suits; -

- (a) for the recovery of the immovable property with or without rent or profit;*
- (b) for the partition of immovable property;*
- (c) for foreclosure, sale or redemption in the case of mortgage of or a charge upon immovable property;***
- (d) for the determination of any other right to, or interest in immovable property;*
- (e) for compensation for a wrong to immovable property or*
- (f) for the recovery of the movable property actually under distraint or attachment*

shall be instituted in the court within the local limit of whose jurisdiction the property is situated:
(emphasis is mine in the bolded words)

As it is conceded by the plaintiff, as the suit property which is the house alleged to be a matrimonial home is situated at Tarime, Mara, was the subject to a mortgage which the plaintiff intended to challenge the legality of its sale, this court has no jurisdiction because the provision of section 14 (c) of the Civil Procedure Act, Cap 33 R.E 2019, requires the suit to be instituted in the court within the local limit of whose jurisdiction the property is situated, which means the suit is to be instituted at Musoma High Court.

The main contention of the parties after the concession of the preliminary objection, is whether the present suit is to be struck out or the plaint has to be returned and filed in the proper court. It has to be noted that, the 2nd defendant's counsel contends that, since the preliminary objection on the issue of jurisdiction was raised and argued, the remedy of ordering the plaint to be returned and filed in the proper court was supposed to be done before the preliminary objection was raised.

It has been the practice of the Court of Appeal that, once a preliminary objection is raised, the same has to be argued and determined so as not to pre-empt the other party who has raised it. In the case of **Method Kimomogoro vs Board of Trustees of TANAPA**, Civil Application No. 01 of 2005, where Court of Appeal stated that:-



"This court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of."

This was also stated in the case of **Meet Singh Bhachu v Gurmit Singh Bhachu**, Civil Application No. 144/02/2018 and the same position was also restated in the case of **Jamal S. Mkumba & Another v Abdallah Issa Namanga**, Civil Application No. 240/01/2019.

In our case at hand, the raised preliminary objection which touches the question of jurisdiction was conceded by the plaintiff, ordering the suit be returned to the proper court vested with jurisdiction is equal to pre-empt the preliminary objection raised to which I am not preparing to do. The order of returning the suit to the proper court could have been ordered if the plaintiff could have prayed before the preliminary objection was raised by the 2nd defendant.

In the event, for the reason stated above, the preliminary objection is sustained, the suit is accordingly struck out with costs.

It is so ordered.



M. MNYUKWA
JUDGE
20/10/2022



Court: Ruling delivered on the 20th day of October, 2022 in the presence of the 1st defendant counsel and in absence of the plaintiff and the 2nd and 3rd deffendants.



M. MNYUKWA
JUDGE
20/10/2022