IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB - REGISTRY OF MWANZA)

AT MWANZA

LAND CASE NO. 06 OF 2020

SADOCK DANIEL JACOB (*Administrator of the estate of the late Rev. Ronald Mlongetcha*) ---------- **PLAINTIFF**

VERSUS

ALEXANDER KAHANA EDWARD----------1st DEFENDANT

JULETI INVESTMENT CO. LTD----------2ND DEFENDANT

KCB BANK TANZANIA LTD----------3RD DEFENDANT

MM AUCTIONEERS &DEBT COLLECTIONS LTD----------4TH DEFENDANT

JUDGMENT

Nov. 21st & Dec. 12th, 2022

Morris, J

In the course of administration of his late father's estate, the plaintiff filed this suit craving for four main reliefs. Firstly, being declared the lawful owner of Plot No. 45 Block 'M' Pasiansi Mwanza (herein, "the suit land"). Secondly, court order to the registrar of titles to rectify the name in certificate of title No. 17488 LR Mwanza to read that of the plaintiff. Thirdly, nullification of all transactions among and between defendants over the suit land. Fourthly, permanent injunction to the defendants and other ancillary reliefs.

The history of this case is straightforward. The plaintiff's father (late Rev. Ronald Mlongetcha) allegedly purchased a suit land on 23/12/1997 from one **Mazula Constantine**. The latter handled over the letter of offer dated 20/02/1990. The buyer did not transfer title to his name. Later, certificate of tittle no. 17488 was issued on 7/3/2007 in the name of **Mazura Constantine**. On 15/1/2008, the 1st defendant filed land application No. 16 of 2008 in the District Land and Housing Tribunal for Mwanza (DLHT) claiming to be lawful owner of the suit land against the plaintiff's father. DLHT decided in favour of the former. The aggrieved plaintiff's father successfully appealed to this Court (Land Appeal No. 76 of 2016).

On 25/02/2008, while the matter at DLHT was still on-going; the 1st respondent was registered as the transferee allegedly after having purchased the suit land from Mazura Constantine. Then, he transferred the same to the 2nd respondent whose registration was done on 6/2/2013. Thereafter, 2nd defendant mortgaged the same to the 3rd defendant on 11/3/2013. All this time, proceedings at DLHT had not been finalized.

The following issues were framed for determination by the Court.

1. Whether the plaintiff is the lawful owner of the house on Plot No. 46 Block 'M', Pasiansi.

2. Whether the mortgage of Plot No. 45 Block 'M' Pasiansi extended by 2nd defendant in favour of the 3rd defendant was lawful.
3. Whether the 3rd defendant was a *bona fide* holder of the security over Plot No. 45 Block 'M' Pasiansi.
4. Whether the 1st defendant was lawful owner of Plot No. 45 Block 'M' Pasiansi.
5. What are the reliefs to the parties.

The 1st and 2nd defendants filed their joint written statement of defence. However, they defaulted appearance and their advocate withdrew his representation. Substituted service of summons was done through *Mwananchi newspaper*. Consequently, the Court on 2/12/2021 ordered the matter to proceed *ex-parte* against them. The plaintiff was represented by advocate Erick Mutta while the 3rd and 4th defendants enjoyed representation from Dr. George Mwaisondola, learned advocate. The plaintiff called one witness. The 3rd and 4th defendants too summoned one witness.

PW1- the plaintiff testified that the late Rev. Ronald Mlongetcha was his father. He also stated that the 1st defendant and his father he had a land dispute over the suit land which was finally determined by this Court [Hon. Gwae J. (exhibit P1)]. The deceased was declared as the lawful

owner of the suit land. He testified further that the 4th defendant intended to sell the suit house under the 3rd defendant's direction due to the unpaid loan by the mortgagor-2nd defendant. According to PW1, the loan was completely unknown to him. He prayed for this Court to order rectification of tittle over the suit land to read his name as administrator of Rev. Ronald Mlongetcha's estate; and to nullify transactions done on the suit land by the defendants singularly and/or jointly.

On being cross examined, PW1 testified that, he not only lives in the disputed plot with his sick mother but also, he is the administrator of his late father's estate though he did not tender the letters of appointment. He made reference to land appeal No. 76/2016 and stated that time for the pending appeal in the Court of Appeal had already expired. He also averred that he refers to the suit land as being at "*mtaa wa Kiseke*" (Kiseke Street) because it is the current name for the location. He maintained that he had the letter of offer in the name of Mazula Constantine.

To him, certificate of tittle (exhibit D1) was issued to Mazura Constantine on 1/10/2006 and registered on 20/3/2007. It later changed hands from Mazura to the 1st defendant (25/2/2008); the 3rd defendant (6/2/2013); and later it was mortgaged to the 3rd defendant (11/3/2013). However, he further testified that the judgement of this Court was

delivered at the time when the title had already passed over to 2nd defendant and thereafter mortgaged. He faulted the bank for failure to discharge its duty of confirming that indeed the plot in dispute faced no encumbrance before the loan was disbursed. To him, had the bank conducted adequate due diligence, it should have discovered that the property was a subject of an ongoing litigation. He also tendered exhibit D1 (Certificate of Occupancy).

On his part, DW1 (Omary Ismail) testified that he was a banker at the 3rd defendant. He testified that the 2nd defendant was the 3rd defendant's client to whom the loan of Tshs. 104,000,000/= was disbursed. He also confirmed that application for loan by the former, was proceed by someone else. He stated that the loan was secured by the suit landed property (exhibit D2) which was officially registered on 11/3/2013. His further testimony was that, before the loan was advanced, the bank conducted necessary due diligence including search, result of which indicated that the suit land was registered in the name of 2nd defendant. He, however, testified that he did not visit the suit land before the loan was issued. Moreover, he stated that the 2nd respondent defaulted on repaying the loan consequent of which a notice of default was issued to him on 28/4/2016.

At closure of hearing, both advocates prayed to file respective final submissions. However, only the advocate for the 3rd and 4th defendants filed his submissions. The Court commends him for such compliance.

In the course of constituting the judgement, the Court observed two critical matters which could not permit delivery of judgement without resolving them first. **One**, it is not disputed by parties in the pleadings and proceedings that after this court delivered its judgement in Land Appeal No. 76/2016 between the Plaintiff herein (Sadock Daniel Jacob) and the 1st Defendant (Alexander Kahana Edward) on 17th February 2017, the 1st Defendant filed a notice of appeal to the Court of Appeal.

Further, during the trial/ cross examination of PW1- the plaintiff, it was testified by him that there is a pending appeal against this Court's decision in the cited appeal. To him, he decided to start afresh on the pretext that "the time to hear the case (appear at Court Appeal) had already lapsed". The Court, thus, observed that the uncontroverted status of proceedings in the superior Court had a significant impact of jurisdiction of this Court.

Two, both the judgement and decree of this court in appeal No. 76/2016 have it unequivocally an order that the suit property subject of this case belongs to late Rev. Ronald Mlongetcha. The plaintiff herein is the administrator of estate of Late Rev. Ronald Mlongetcha and this suit

is predominantly for recovery of land. Hence, there is potential contention on entwinement of this suit and the proceedings from where the appeal stated above crops. That is existence or non-existence of *res judicata*.

I am mindful of the fact that defendants raised the issue of *res judicata* in their respective pleadings. However, they abandoned pursuit of the preliminary objection by not filing necessary written submissions as ordered by this Court on December 2nd, 2021. Consequently, the Court overruled the objections on February 8th, 2022. Thus, the trial continued to the next stage. In purview of the doctrine of *fuctus officio [**Kamundi v R*** (1973)1 EA 540; ***The International Airlines of the United Arab Emirates v Nassor Nassor***, CA Civil Appeal No. 379 of 2019 (unreported); ***Maria Chrysostom Lwekamwa vs. Placid Richard Lwekamwa and another***, CA Civil Application No. 549/17 of 2019 (unreported)], I vacated the Court order (Hon. Ismail, J.) dated February 8th, 2022.

Thereafter, in view of ***God John Ndile v Steven Abraham Ndile and 2 Others,*** HC Land Appeal No. 45 of 2017 (unreported); I invited the parties to address me on the two additional issues, namely;

i. Whether or not this court retains jurisdiction in the pendency of the Notice of Appeal in the Court of Appeal; and

ii. Whether or not after this court's decision in appeal No. 76/2016, this suit is tenable in line with principles of *res judicata*.

Both Counsel for the parties addressed me on the above issues. As the two added issues are points of law, no additional evidence-taking session was important. The judgement comprises analysis of what both sides submitted too. Indeed, this court finds it imperative to begin by determining the two issues for an obvious reason. Determination of either issue constitutes a remarkable bearing on the competence of the Court and/or suit.

The first-added issue interrogates the Court's jurisdiction while the Notice of Appeal is still pending in the Court of Appeal. The Counsel for the plaintiff argued that the Notice of Appeal has no relationship with the present suit whatsoever. To him, it is the 1st Defendant who wanted to challenge the decision of this court in the matter which did not involve the rest of the defendants. However, the defendant who raised the fact about the Notice in the pleadings abandoned the trial. So, this court should not be detained by the contents of the pleadings which have been abandoned by the maker. On his side, Advocate Mwaisondola emphatically submitted that the Court lacks jurisdiction to adjudicate this suit. To him, so long as

all parties acknowledge the existence of the subject Notice; trial should have not proceeded in the first place.

Regarding *res judicata*, the plaintiff's advocate submitted that Appeal No. 76/2016 was between Plaintiff and 1st defendant only. That the appeal relates to the decision about the rightful owner of suit premises. To him, the issue of ownership had been decided fully; and the present suit aims at using such decision to rectify the Title Deed by removing every transaction involving the suit land done by the defendants. Thus, this matter is not *res-judicata* as parties and prayers in two matters are also different. The defence objected to such argument. To the 3rd and 4th defendants, submitted that the present suit is *res judicata* especially as between the plaintiff and 1st defendant. The defence Counsel argued further that if the presents suit is about rectification of register, the plaintiff would not litigate to establish his title over Plot 45 Block "M" Pasiansi-Mwanza. More so, the suit suffers a serious non-joinder of the government authority which would ultimately implement the rectification if the order thereof were to be granted.

In line with parties' submissions, the Court finds that the law is clear that the notice of appeal initiates the appeal to the Court of Appeal. See, for instance, ***Mwanaasha Seheye v Tanzania Ports Corporation***, CA Civil Appeal No. 37 of 2003; and ***David Malili v Mwajuma Ramadhani***,

CA Civil Appeal No. 119 of 2016 (both unreported). The effect of such pronouncements is that proceedings relating to the matter being appealed against are forthwith transmitted to the Court of Appeal.

Further, the Court of Appeal has oftentimes ruled that upon the notice of appeal being filed, the High Court's jurisdiction over the matter is ousted straightaway. I am guided by the holdings in, ***TANESCO v Dowans Holdings SA (Costa Rica) & Another***, CA Civil Application No. 142 of 2012; ***Exaud Gabriel Mmari v Yona Seti Ayo & 9 Others***, CA Civil Appeal No. 91 of 2019; and ***Serenity on the Lake Ltd v Dorcus Martin Nyanda***, CA Civil Revision No.1 of 2019 (all unreported).

Equally important in this connection, is the enquiry whether or not this Court's jurisdiction over the current suit is ousted by the notice of appeal filed in respect of separate proceedings. The counsel for the Plaintiff argued that in spite of the 1st defendant in this suit preferring the appeal against the plaintiff herein in land appeal no. 76 of 2016 over the land subject of the present suit; the prayers in the two sets of proceedings are diametrically distinct. Hence, to him, the notice has no effect to the suit whatsoever.

With necessary respect to the foregoing counsel's view, I find that the two cases herein are sufficiently interwoven. I have reasons for this finding. **Firstly**, the 1st defendant appeals to the Court of Appeal "against

the whole" decision (see Notice of Appeal filed on February 27th, 2017) which includes this Court's holding that the suit land belongs to the plaintiff's late father. **Secondly**, one of the prayers in the current suit is the declaration that the suit land belongs to the plaintiff in his capacity as administrator of estate. **Thirdly**, if this matter is to proceed in its current formulation, the subject matter of contention remains to be the same to that in the Court of Appeal. **Fourthly**, the plaintiff in this matter appreciates that the dispute over ownership of the land between him and the 1st defendant is still pending in the Court of Appeal and he filed the fresh suit out of convenience of time. **Fifthly**, assuming the plaintiff is successful in this suit but fails in the appeal pending in the Court of Appeal, of which useful value will the judgement of this Court in the present suit be.

Furthermore, I am mindful of the rule 91 of the ***Court of Appeal Rules***, 2009 to the effect that a party who lodges a notice of appeal but fails to institute the appeal timely, is considered as having withdrawn his notice of appeal. The notice of appeal under reference was lodged around February 2017. The present suit was filed in 2020. From the face of it, the record indicates a fairly long time has passed between the two dates. However, in the absence of proof that the 1st defendant did not comply with the time-line; or that the notice of appeal was withdrawn; or else,

the appeal was lodged but failed; it is unsafe for this Court to assume any facts. More so, when pleadings of the parties filed over three (3) years later (around September 2020) are categorical that the appeal subsisted then. Consequently, this issue is determined in negation.

I now turn to *res judicata*. This issue is also related to the one that has been discussed above. It is the settled law that for the case to be *res judicata* a number of factors are necessary. **One**, it must be a suit between same parties litigating over same title; **two**, the issue therein must be directly and substantially the same; **three**, the previous suit must have been finally heard and decided; and **four**, by the competent court. Reference is made to ***Nelson Mrema and 413 Others v Kilimanjaro Textile* Corporation** *CA Civil Appeal No. 22 of 2002;* ***Barclays Bank (T) Ltd v Tanzania Pharmaceuticals Industries Ltd*** CA Civil Application No. 231/16 of 2019; ***The Registered Trustees of CCM v Mohamed Ibrahim Versi and Sons & Another*** CA Civil Appeal No 16 of 2008; **AG *v Bonanza Vietnam Co. Ltd*** HC Commercial Case No. 35 of 2018 (unreported); and ***Adluhaman M. Luambano v Idefonse Fuime***, HC Civil Case No. 1 of 2009 (all unreported).

In the present case, the advocate for the plaintiff strongly argued that the issue of ownership had been decided in the previous case between the plaintiff and the 1st defendant. To him, the plaintiff is using

the previous court decision to pursue rectification of the title details in the land registry after nullifying the transactions of the defendants (sale and mortgage). Therefore, he concludes that the present suit does not fall in the wraths of *res judicata*. Respectful to him, I am less invited to agree. The basis of my declination is threefold. **One**, it is not correct that in this case the plaintiff is not pursuing recovery of land. For instance, paragraph 6 and prayer (i) of the plaint are express in this regard. Paragraph 6, partly reads;

> "*That the claims of the plaintiff against defendants is the* ***declaration that the plaintiff is a lawful owner*** *of the disputed house situate on Plot No. 45 Block 'M' Pasiansi Mwanza*"" (bolding for emphasis).

Subsequent to the above, the plaintiff avers in the said pleadings how and when the property in question was acquired, the nature of trespass to title, the dispute between parties and the ailment which prevented the plaintiff's father from transferring title to the said land into his name. In my view, the plaintiff's move is to have this Court pronounce that he is indeed the rightful owner of the land in dispute: the order identical to the one issued by my Learned brother, His Lordship Gwae, J. in Land Appeal No. 76 of 2016. Other sought reliefs are somewhat correspondingly inconsequential.

Two, the argument that parties in the two matters are not the same is also defeasible. It is appreciated that the proceedings breeding the appeal in question are between the plaintiff and the 1st defendant only. However, it is equally undisputed that the other defendants derive their respective interests to the suit land from the 1st defendant. That is, the 2nd defendant is a purchaser from the 1st defendant while the 3rd defendant is the mortgagee thereof. That is, should the title of the 1st defendant be confirmed; the ultimate beneficiaries are the buyer and the mortgagee in that given descendance. *Vice versa* is equally true.

Finally, **three**. The present suit seeks orders against the parties who are not in court. As rightly argued by the defence Counsel, the plaintiff is pursuing orders whose effect is to compel the registrar of titles and/or the Attorney General to alter official government records. The omission on the part of the plaintiff to include the said parties, is proving that the principal objective of this suit to recover land. Challenging transactions between the defendants, as portrayed by Advocate Mutta; is not, in my modest opinion, likely to be fruitful in the absence of the relevant authority/ies which perfected the alleged dispositions.

As I am about to pen off, let me also underscore the rationale of *res judicata*, in brief. Amongst the validations of this doctrine, is assurance of finality in litigation. That is, litigants should be expected to consume justice in its exact taste: bitter, sour, weird or sweet. Lest, court rooms change into battle rooms of endless disputes. Followed in this line of reasoning are cases of the ***Registered Trustees of CCM*** (*supra*); and ***Umoja Garage v NBC Holding Corporation***, CA Civil Appeal No. 3 of 2003 (unreported).

Further, *res judicata* prevents abuse of court process [***Dr. Bhakilana Augustine Mafwere t/a Baklina Animal Care v Annel Godeon Orio & 3 Others***, CA Civil Appeal No. 33 of 2016 (unreported)]. Time and professional skills employed in one set of litigation suffice to serve justice. Those aggrieved by the outcomes of such proceedings have their room at the top in the court hierarchies; when availed by law. Moreover, with *res judicata*, sanity of court proceedings is maintained. Consequently, credibility and predictability of the law, as a science, are attained.

It is with the foregoing findings, analysis and evaluation that I hold the second-added issue in dissent. I appreciate it a fact that these two (additional) issues suffice to have the present determined.

However, the Court finds it imperative to address two more aspects. **Firstly**, is the contention raised by the counsel for the 3rd and 4th defendant that the plaintiff did not attach the letter of appointment as an administrator of the estate of late Rev. Ronald Mlongetcha. So, his *locus standi* is non-existent in this suit. It is true that when a party is suing under representation capacity, failure to plead and attach documents conferring authority renders the suit incompetent. The case of ***Ramadhani Omary Mbuguni (A Legal Representative of the Late Rukia Ndaro) v Ally Ramadhan***, CA Civil Application No. 173/12 of 2021 (unreported) is relevant here.

In the present suit, however, the plaintiff tendered exhibit P1 (Court judgment and decree in Land Appeal No. 76 of 2016) which holds him as administrator. This Court, is thus, duty bound to take judicial notice pursuant to sections 58, 59 (1) (c) and (e) and 89 (1) of the ***Evidence Act***, Cap 6 R.E.2022. Further, the plaintiff pleaded such fact and the defendants, in paragraphs 2 of their respective written statements of defence, did not dispute it. Hence, with necessary respect to the defence Counsel, this issue should have not been raised at this stage.

Secondly, in view of the findings of the Court in respect of the two additional issues above, the plaintiff herein seems to retain two options: to await pursuit of the pending appeal, if any; or to process for the notice

of appeal (if it still subsists while no appeal was lodged) to be struck out. Thereafter, he may proceed with realization of his rights pronounced by this Court in Land Appeal No. 76 of 2016. Further, the 2nd and 3rd defendants, if interested, may consider revisionary remedies to protect their respective lines of equity.

In the upshot, this case is accordingly dismissed. Considering the circumstances surrounding this matter, I make no order as to costs.

C.K.K. Morris

Judge

December 15th, 2022

Judgement delivered in the absence of all parties.

C.K.K. Morris

Judge

December 15th, 2022