IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 620 OF 2021

(Arising from Civil Case No. 152 of 2019)

AMIT DINESH BHIKHA.....1st APPLICANT

BHARAT DHANJI BHIKHA.....2nd APPLICANT

VERSUS

LEO DEVELOPERS LTD.....1st RESPONDENT

AZANIA BANK LTD.....2nd RESPONDENT

B.H LADWA LIMITED.....3rd RESPONDENT

RULING

9th, & 17th February, 2022

ISMAIL, J.

The applicants in this matter claim to be legal heirs and beneficiaries of the estate of the Jyostana Dhanji Bhikha, the deceased. The latter was the owner of the property standing on Plot No. 12 Block 39, Kariakoo, Dar es Salaam, comprised in the Certificate of Title No. 46388. In the applicants' view, this property forms part of the deceased's estate, and it is currently embroiled in a legal tussle pitting the 1st and 3rd respondents on one side, against the 2nd respondent, on the other side. The tussle is in the form of court proceedings i.e. Civil Case No. 152 of 2019, which is pending

in this Court. The issue in the pending case is the regularity or otherwise of the sale of the said property to realize the sum of USD 750,000.00 which was advanced to the 1st respondent by the 2nd respondent.

The applicants intend to join in the proceedings as plaintiffs, alongside the 1st and 3rd respondents and, this application, preferred under Order 1 Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), is intended to move the Court to accede to the joinder. Grounds for the prayer sought are contained in the supporting affidavit, jointly affirmed by the applicants. The applicants' quest to join the proceedings is premised on the contention that the 1st respondent cannot defend the heirs' interests in the suit property, because it is the borrower whose loan is secured by the suit property in a mortgage executed on 13th October, 2015. They contend further that Mr. Keval Dinesh Bhikha who pledged it as a security had not yet become an administrator of the estate of the deceased, who passed away on 13th August, 2016. In short, the applicants intend to challenge the legality of the mortgage.

The 1st respondent filed a counter-affidavit in which it supported the application. This is unlike the 2nd respondent who has fervently opposed the application, through a counter-affidavit which, by and large, dwelt on justifying the legality of the mortgage transaction that involved the suit

property. The 3rd respondent expressed his no opposition to the application.

At the hearing, the applicants were represented by Mr. Novatus Muhangwa, learned counsel, while Ms. Upendo Mmbaga and Habibu Kassim, both learned counsel, represented the 2nd and 3rd respondents, respectively. The 1st respondent did not have any legal representation. Mr. Keval Bhikha, its director and an administrator of the deceased's estate, featured for the 1st respondent.

Submitting in support of the application, Mr. Muhangwa argued that the issue at stake in the pending suit is the question of ownership of the suit property, registered in the name of Jyostana Dhanji Bhikha, the deceased. He stated that the said property was mortgaged to secure a loan from the 2nd respondent, while the 1st respondent was not the owner and the deceased was still alive. He argued that the applicants' quest for joinder is intended to defend interests of the heirs in resolving the question of validity of the mortgage transaction as the same was not endorsed by the heirs or the administrator of the estate. He bolstered his argument by citing the case of ***Maulid Makame Ali v. Kesi Khamis Vuai***, CAT-Civil Appeal No. 100 of 2004 (unreported).

For the 2nd respondent's part, Ms. Mmbaga maintained her valiant opposition to the intended joinder. She argued that, since the applicants' dispute is on the legality of the mortgage, it is clear that this is a claim that does not arise from the same cause of action, as the cause of action in the plaint is breach of contract. She argued that breach of contract and legality of the contract are two distinct causes of action.

Ms. Mmbaga further contended that, while it is not disputed that the applicants are heirs to the estate of the deceased, the court appointed Keval Divesh Bhikha to serve as an administrator of the estate of the deceased. She argued that, alive to this fact, the applicants' claims ought to have been channeled through the administrator who, in this case, is the 1st respondent's director. Learned counsel argued that the available testimony reveals that the said administrator signed all documents relating to the loan as an administrator of the estate of the deceased. Insisting that the applicants are barred from instituting a suit in their personal capacities, Ms. Mmbaga cited the Court's decision in ***Salama Ismail Hanya v. Tunu Ismail Hanya & 2 Others***, HC-Land Appeal No. 88 of 2020 (unreported).

She concluded by urging the Court to resist the applicants' overtures as acceding to the prayer will cause a misjoinder of parties and causes of action.

Mr. Muhangwa was adamant that the application is meritorious. He argued that there is a common question of law and fact which resides in the legality of the mortgage. Drawing a distinction from the case cited by the 2nd respondent's advocate, he argued that this Court is not bound by the said decision which did not dwell on the involvement of the heirs. He maintained that issues revolving around the involvement of Mr. Keval in 2015, while his powers of administration were vested in him in 2018, is what prompts the applicants to join the fray of the pending proceedings.

These rival submissions breed one key question. This is as to whether this is a fit case in respect of which a joinder of parties can be allowed.

As stated by the applicants, joinder of parties is an allowed practice under the provisions of Order I rule 1 of the CPC, which provides as hereunder:

> *"All persons may join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where,* ***if such persons brought separate suits, any common question of law or fact would arise.***" [Emphasis added]

From this excerpt, it is clear that the condition precedent for the joinder of parties is that there should be a common question of law or fact in the matter that the parties are seeking to get involved. This, then, raises a question as to whether, in the pending suit, and given what the applicants have averred in the supporting affidavit, such question exists. In my considered view, the answer to this question is in the negative. This is in view of the fact that the applicants are challenging the legality of the mortgage which is purported to have been executed and surrendered by Keval Dinesh Bhikha (see paragraph 7 of the supporting affidavit). This is in contrast to what is at stake in Civil Case No. 152 of 2019 that is all about the allegation of breach of contract entered between the parties to the pending suit. This striking variance cannot bring the applicants' claims in the same roof with those of the respondents.

Since the common question of law or fact that would serve as a common denominator and a glue to bind the parties is not common in this case, joining the applicants in the matter would, as Ms. Mmbaga rightly contended, bundle the parties who do not share the same 'wave length', thereby causing a misjoinder that would be averted by letting the applicants chart their own way of fighting for what they consider to be their rights.

Mr. Muhango has strenuously argued that the holding in ***Maulid Makame Ali v. Kesi Khamis Vuai*** (supra) provides the applicants with the legitimacy to institute proceedings that touch on the interests in the estate. This is because they, the applicants, are legal heirs. As he did that, he admitted that the applicants are not administrators of the estate of the late Jyostana Dhanji Bhikha. He took cognizance, as well, that Keval Dinesh Bhikha is the administrator of the deceased's estate. What Mr. Muhango fell short of admitting is the fact that the applicant is the only person who is clothed with requisite *locus standi*, enshrined in section 71 of the Probate and Administration of Estates Act, Cap. 352 R.E. 2019, which reads as follows:

> *"After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration shall have been revoked or annulled."*

The cited provision beds well with section 100 of Cap. 352 which provides as hereunder:

> *"An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of*

debts due to him at the time of his death, as the deceased had when living."

Complimenting the cited provisions, is Rule 6 of the 5th Schedule to Magistrates Courts' Act, Cap. 11, which reads:

"An administrator may bring and defend proceedings on behalf of the estate."

The position with respect to the administrators' powers, and right to sue and be sued on matters relating to estates that they administer, has featured in dozens of court proceedings, and the unanimous view is that, where such administrators exist, they take responsibility for all legal proceedings in which interests of the estate are at stake. These include court proceedings, and they do that on behalf of all the heirs and beneficiaries of the respective estates. In the case of ***Omary Yusuph (Legal Representative of the Late Yusuph Haji) vs. Albert Munuo,*** CAT-Civil Appeal No. 12 of 2018 (unreported), the upper Bench had this to say:

"...It is our considered view that the existence of legal rights is an indispensable pre-requisite of initiating any proceedings in a Court of Law. ***In this particular case, since Yusuph Haji had passed away, according to the law it is only the lawful appointed legal***

representative of the deceased who can sue or being sued for or on behalf of the deceased..."
[Emphasis is added]

See also: ***Anthony Leonard Msanze & Another vs. Juliana Elias Msanze & 2 Others***, CAT-Civil Appeal No. 72 of 2012; ***Salama Ismail Hanya*** *(as the Administratix of the Estates of the late ISMAIL OMARY HANYA)* ***& Another vs. TUNU ISMAIL HANYA as the Administratix of the Estates of the late ISMAIL OMARY HANYA & 2 Others*** (supra); ***John Petro vs. Peter Chipaka*** HC-(PC) Civil Appeal No. 81 of 1996; ***Zuleia Katunzi & Others vs. Tanzania Ports/Harbours Authority,*** HC-Civil Appeal No. 123 of 2019 (all unreported).

Worth of a note, as well, is the fact that the decision in ***Maulid Makame Ali v. Kesi Khamis Vuai*** (supra) has been overtaken by new developments spelt out in ***Omary Yusuph (Legal Representative of the Late Yusuph Haji) vs. Albert Munuo*** (supra), the most recent subscription, delivered in October, 2021.

From the totality of the foregoing, it is my settled conviction that the right of the heirs to sue is limited to and only arises where the administrator has wound up his duties and vacated the office. Since Mr. Keval Dinesh Bhikha's tenure in the office of the administrator of estate in

2012; and ***Monica Nyamakare v. Mugeta Bwire Bhakome (as administrator of of the estate of Musiba Reni Jigabha) and Hawa Salum Mengele***, CAT-Civil Application No. 199/01 of 2019, (both unreported). It is simply that the applicants have no *locus standi* to sue on the estate of the deceased.

In the upshot of the foregoing, I hold that the application has failed to meet the requisite threshold for it to succeed. In the event, the same is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 17th day of February, 2022.

M.K. ISMAIL

JUDGE