

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
LAND CASE NO. 17 OF 2020

JACQUILINE DONATH KWEKA ABRAHAMSSON.....PLAINTIFF

VERSUS

EXIM BANK (T) LIMITED.....1ST DEFENDANT

DASCAR LIMITED.....2ND DEFENDANT

JOHAN HARALD CHISTER ABRAHAMSSON.....3RD DEFENDANT

MASS & ASSOCIATES

COMPANY LTD & COURT BROKER.....4TH DEFENDANT

YUSUPH SHABAN MATIMBWA.....5TH DEFENDANT

RULING

1st March, 2022 & 25th March, 2022.

E.E. KAKOLAKI J.

This ruling is in respect of legal issue raise by this court suo motu on 27/01/2022, while preparing to compose the ruling regarding the preliminary objection raised by the 1st Defendant. The legal issue raised by the court is *whether the suit by the plaintiff is properly before this court for complying with the requirements of order XXI Rule 62 of the Civil Procedure Act, [Cap 33 R.E 2019] hereinto referred as CPC.*

In order to properly capture the basis of this legal issue, I find it crucial to narrate, albeit briefly the material facts leading to institution of the instant case. The property of the 3rd Defendant and Plaintiff's husband, subject of this suit was subjected to sale and attachment following the Order of this Court in execution of its decision in Commercial Case No. 51 of 2008, entered in favour of 1st Defendant after the said property was pledged by 3rd Defendant as security to the loan facility advanced to the 2nd Defendant by 1st Defendant, allegedly without consent of the plaintiff. The said court order was effected by the 4th Defendant who sold the said property to the 5th Defendant in a public auction. Before effecting that sale the plaintiff herein unsuccessfully filed an objection proceedings via Misc. Commercial Cause No. 69 of 2017 before this Court (Commercial Division) seeking to lift the attachment order issued by the Court in Commercial Case No. 51 of 2008, in respect of property in Plot No. 16 Jangwani Beach Kinondoni Municipality, registered with CT. No. 43835, as the same was dismissed for want of proof of interest in the said property as a matrimonial property. Following that dismissal of objection proceeding and in her attempt to establish and defend her right, the plaintiff instituted in this court Land Case No. 445 of 2017 and Misc. Application No. 1084 of 2017, for temporary injunction to restrain

auctioning of the said disputed property, the application which ended up being dismissed, before she decided to withdraw the main suit with leave to refile it. Undaunted and subsequent to that, before this court, once again the plaintiff instituted a fresh suit Land Case No. 39 of 2018, but her efforts proved futile as the same was struck out. Hopelessly and having chosen to exhaust her remedy as provided under order XXI Rule 62 of the CPC, the plaintiff filed afresh this suit, claiming against defendant above named jointly and together a declaration that the sale of property situated on Plot No. 16 Jangwani Beach, registered with CT No. 43835, in execution of a court decree is illegal, null and void ab initio on reasons that, the house which was subjected to attachment and sale is solely a residential home where the plaintiff and her family lives. She is armed with the following claims/ prayers:

- (a) The declaration order that, the sale of the suit property is residential home and not liable for attachment and sale.
- (b) The declaration that, the sale of the suit property in the execution of court decree is null and void ab-initio.
- (c) The declaration order of the court that, the suit property be restrained from any mortgage or agreement of whatsoever nature between the 1st, 2nd defendants and the 3rd and 5th defendants

- (d) Perpetual injunction restraining the defendants from making any change and/ or any action whatsoever manner be it by selling mortgaging or disposing it off by way of transfer of whatsoever manner.
- (e) General damages to be assessed by court for mental anguish, economic loss and psychological torture
- (f) Costs of this suit to be borne by the defendants
- (g) Any other relief (s) that this honourable court may deem fit or just to grant.

In response to the filed plaint, the 1st defendant filed his WSD together with the preliminary objection to the effect that, the suit is res- subjudice to Civil Application No. 446/16 of 2018 pending before the Court of Appeal, the objection which was heard by way of written submission. It is now in the course of preparations of the ruling regarding that objection, this Court encountered the above alluded legal issue hence resorted to summoning parties to address it first on the same before resolving the said objection.

When parties were called to address the court on the said legal issue, plaintiff enjoyed the legal services of Mr. Elieza Kileo, learned advocate, while on the adversary parties, Mr. Zacharia Daudi and Mr. Sylvanus Mayenga, both

learned advocates represented the 1st and 5th defendants respectively. By consensus of parties, the matter was disposed by way of written submission though in absence of the 2nd 3rd and 4th Defendants who showed no interest in arguing it.

Submitting on the suo motu raised legal issue, Mr. Kileo for the plaintiff pointed out on how the plaintiff has established cause of action on each defendant in this case, which according to him the same is reflected under paragraph 7 of the plaint. He contended that, the plaintiff has the right to sue the defendants as the 5th defendant who is the buyer of the house (suit property), is in the process of evicting the plaintiff from the disputed property. He thus insisted that, the rights of the plaintiff are clearly stated in the plaintiff's plaint particularly in her the prayers at item a, b, c and d of the reliefs clause. It was his prayer that, this court should not reject the plaint as there are some crucial points of law which need to be determined by the court. To bolster his prayer, he referred the court to the case of **Katikiro of Uganda Vs. Attorney General of Uganda** [1968] EA 765, which observed that, a plaint should not be rejected where there is a serious and important point of law to be determined by the court. On different touch Mr. Kileo further argued that, this is a fresh suit, and it has nothing to do with

the previous objection proceedings where plaintiff was not called to testify and tender exhibits in court to prove her case, thus it should be heard on merits.

On his side, Mr. Zacharias Daudi for the 1st Defendant attacked Mr. Kileo's submission submitting that, the plaintiff misconceived what the court intended the parties to address on. To his understanding, the court intended parties to address it on whether the plaint establishes plaintiff rights which she has over the disputed property as instructed under order XXI rule 62 of CPC. In his view the term "right which he claims to the property" as used in Order XXI rule 62 of CPC requires the plaintiff to show whether such claimed right arises from ownership or interest on the property and not otherwise. He contended that, the plaint does not show which claim of right the plaintiff has against the defendants in respect of the property in dispute, more specifically the first defendant. With all those anomalies in the plaint, Mr. Daudi implored this court to dismiss the suit with costs.

On the other hand, Mr. Sylvanus Mayenga for the 5th Defendant in his reply submission while quoting the provisions of order XXI Rule 62 of CPC submitted that, the nature of the suit to be lodged by the plaintiff should be in consonance with the said provision. He said, the established rights must

be clearly deposed in the pleadings. According to him no rights have been established by plaintiff's plaint and added that, the plaintiff's pleadings ought to have shown that the certificate of title was in her name either by separate title or being added as co-occupancy to the existing title, something which was not done. He concluded that, the suit has been lodged contrary to Order XXI rule 62 of CPC and invited the court to dismiss it in its entirety and award cost to the 5th defendant.

In a short rejoinder Mr. Kileo impressed on court that, the 1st Defendant is misleading the court by providing wrong interpretation of Order XXI Rule 62 of the CPC, as the same does not state anywhere that such rights shall arise from the ownership of the property in dispute, but rather any other right therein. As regard to the 5th defendant's submission, Mr. Kileo had nothing useful to add than reiterating his submission in chief and the prayers thereto. I have carefully considered the rival arguments by both parties on the point argued, as well as thoroughly perused the pleadings. Having so done I am convincingly remained without aorta of doubt that, the instant suit is not in compliance with the provisions of Order XXI Rule 62 of CPC. The reasons am taking this stance are not far-fetched as I shall soon state. **One**, there is no dispute that this case was filed after the objection proceeding (Misc.

Commercial Cause No 69 of 2017) had proved futile followed by unsuccessful subsequent suits and applications. Thus, the plaintiff chose to exercise her rights as a last resort as provided for under order XXI Rule 62 of CPC, by instituting a fresh suit to establish her rights if any on the disputed property. For easy reference order XXI Rule 62 provides that:

*“Where a claim or an objection is preferred, the party against whom an order is made **may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.**” (Emphasis added)*

Applying the above provision to the facts of the present suit, it is clear that, the plaintiff had to establish her rights on the disputed property. Never the less, looking at the plaintiffs requested reliefs from *a* to *d*, as can be depicted from introductory part of this ruling, the same do not seek to establish any plaintiff's right. Further looking at paragraph 7 of the plaint, as claimed by the plaintiff in his submission that the same establishes his rights, it is apparent that the same does not feature plaintiff's allegation as it does not establish any right, rather, in both reliefs and the claims as deposed in paragraph 7 of the plaint, the plaintiff invites this court to grant injunction

to restrain transfer, and make declarations to nullify sale, the orders which under the circumstances of the instant case, this court is incompetent to grant.

Secondly, in her attempt to file a fresh suit under Order XXI rule 62, the plaintiff was expected to file the instant case in the same court that heard the original suit and the objection. In this point, I wish to be backed by the decision of this court which I subscribe to, in the case of **Rosebay Elton Kwakabuli vs Aziza Selemani & Others**, Land case No 57 of 2019, HCT at DSM Land Division (Unreported) where it was stated that;

*The court **that competently determine the objection proceeding is the one competent to determine the fresh suit** filed by the one losing in objection proceedings contemplated under Order XXI Rule 62 of the CPC. This is not the Court that heard the original suit and the objection proceedings, thus not competent to determine a fresh suit filed on the basis of the above provision.*

In the present case, the original suit and the objection proceedings were filed in the High Court commercial division. While invoking the above provision of the law and the cited case which I subscribe to, it is my humble

opinion that, the commercial court being seized with the original proceedings during execution of sale order, the sale which the plaintiff is seeking to displace, stands a better chance to rule on any issue arising out of execution process. Thus, this court is incompetent to determine the present case. The resultant consequence is to struck out the suit for failure of the plaintiff to comply with the requirements of Order XXI rule 62 of the Civil Procedure Code, [Cap. 33 R.E 2019].

I order each party to bear its own costs.

It is so ordered

DATED at Dar es salaam this 25th day of March, 2022.



E. E. KAKOLAKI

JUDGE

25/03/2022.

The Ruling has been delivered at Dar es Salaam today on 25th day of March, 2022 in the presence of Ms. Brooke Montgonery advocate holding brief Mr. Elieza Kileo advocate for the Plaintiff, Mr. Sylvianus Mayenga advocate for the 5th Defendant who is also holding brief for Mr. Zacharia Daudi advocates for the 1st Defendant and Ms. Asha Livanga, Court clerk and in the absence of the 2nd, 3rd and 4th Defendants.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
25/03/2022

