

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 44 OF 2022

NANCY SINAY HUGGINS.....PLAINTIFF

VERSUS

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

MEMSI AUCTIONEERS AND

GENERAL BROKERS LTD.....2ND DEFENDANT

CHARLES FRANCIS MASUBI.....3RD DEFENDANT

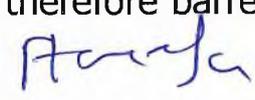
RULING

27/02/2023 & 30/03/2023

MWASEBA, J.

This is the ruling in respect of the Preliminary objections raised by the 1st and 3rd defendants separately. The preliminary Objection raised by the 1st defendant are as follows:

- i. That the suit is bad in law and unmaintainable for being filed without exercising available remedies provided under the law in contravention to Order XXI Rule 87,88 and therefore barred under



Order XXI Rule 90 (1) and (3) of the Civil Procedure Code, Cap 33 R.E 2019;

ii. That the suit is an abuse of the court process.

Whereas the objections raised by the 3rd defendant are as follows:

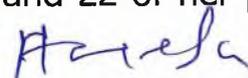
1. That the Plaintiff is precluded by law from instituting fresh suit challenging the sale of Suit property whose order emanating from Decree executed against her as per Order XXI Rule 90 (3) of the Civil Procedure Code, Cap 33 R.E 2019.
2. That, the suit is incompetent for being instituted as a Land Matter. the dispute emanates from Loan/ Credit Facility advanced to the plaintiff by the 1st Defendant in the course of doing business, therefore, any dispute arose therefrom is strictly a Commercial Dispute and hence a Commercial Case as opposed to Land Case.
3. The suit is incompetent for non-Joinder of the following necessary parties:
 - i. **LIPAZ CONSULTANTS LIMITED.** The plaintiff challenges the valuation of the suit property done by her prior the Auction was illegal therefore, she ought to have been joined in as a necessary party in order to answer the said claims.

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- ii. **THE REGISTRAR OF TITLE.** The transfer of Ownership of the suit property from plaintiff to 3rd defendants has been duly registered by the Registrar of Titles on 24th March, 2021 therefore any challenge against the said Registration ought to include the Registrar.
- iii. **THE ATTORNEY GENERAL.** Since the Registrar of Titles is in the Government Authority, then the Attorney general should also be sued alongside the Registrar of Titles as per requirement of Section 6 (30 and (4) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by section 25 of the Written laws (Misc. Amendments) Act No. 1 of 2020.

During the hearing of the Preliminary objections, Mr James Theodory, learned advocate represented the plaintiff whereas Mr Charles Lugalila, learned Advocate appeared for the 1st and 3rd defendants. The hearing proceeded orally.

Supporting the raised objections, Mr Lugalila combined the first grounds of PO from both the 1st and 3rd defendants and argued them jointly. He stated that the plaintiff is barred from instituting this suit as it emanates from Commercial case No. 90 of 2019 where he was a defendant and the same is evidenced under paragraph 14, 15, 16 and 22 of her plaint.



He added that the said decision was decided in favour of the 1st defendant who sold the plaintiff's house to the 3rd defendant after the proclamation for sale which was given by the court. Thus, if the plaintiff was dissatisfied with the said decision she could have invoked **Rule 87 and 88 of Order XXI of the CPC** to challenge the said sale instead of filing a fresh suit. Thus, the plaintiff was barred by **Order XXI Rule 90 (3) of the CPC** to file a new suit against the defendants.

The 2nd point of objection raised by the 1st defendant is that the suit at hand is an abuse of court process. Mr Lugalila told the court that, paragraphs 17, 18 and 19 of the plaint show that after the determination of Commercial case No. 90 of 2019 the plaintiff filed Misc. Commercial Application No. 160 of 2019 which was dismissed by the court. Following the dismissal, the plaintiff filed a notice of appeal to the Court of appeal of Tanzania and there is no evidence that the said notice was withdrawn. Thus, filing a fresh suit in such circumstances is an abuse of the court process as the said appeal could nullify the whole proceedings. His argument was cemented with the case of **Serenity on the Lake Ltd vs Dorcus martin Nyanda**, Civil revision No. 1 of 2019 (CAT-Unreported) where the court held that once a notice of appeal has



been filed then the High Court ceases to have jurisdiction over the matter.

Coming to the 2nd point of objection raised by the 3rd defendant, Mr Lugalila told the court that since the dispute emanates from credit facility then the present suit ought not to be instituted as a land case.

He referred this court to the case of the **National Bank of Commerce Limited vs National Chicks Corporation Ltd and 4 Others**, Civil Appeal No. 129 of 2015 (CAT- Unreported) that any litigation whose cause of action accrued from mortgage transaction or a commercial contract regardless of aftermath to the landed property it is a commercial transaction and a commercial case. Thus, the act of the plaintiff to admit that he acquired loan from the defendant and after default a commercial case was filed and decided in favour of the 1st defendant, then this matter is not a land case but a commercial case.

On the 3rd point of objection raised by the 3rd defendant, it was Mr Lugalila's arguments that since the plaintiff challenges the evaluation report, which was done by Lipaz Consultants Ltd, she ought to have been joined him as a necessary party to answer her allegation. So, failure to call him as a necessary party breached a principle of natural

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justice which is a right to be heard. He prayed for the raised objections to be sustained and the suit be dismissed.

Responding to the first and second points of preliminary objection from both defendants, Mr Theodory stated that they do not qualified to be raised as points of preliminary objection as they call for evidence to ascertain if the cause of action are the same and whether the notice filed to the Court of Appeal was withdrawn or not. Thus, these points lack qualities of being raised as preliminary objections. He supported his argument with the case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited** (1969) EA LR at page 696.

As for the last point of preliminary objection, Mr Theodory stated that, since the plaintiff sought no relief against Lipaz Consultants Ltd then they are not qualified of being called as a necessary party to the suit. He referred this court to the case of **Suryankant Ramji vs Saving and Finance Ltd**, (2002) TLR 121. Thus, he prayed for these points to be dismissed for want of merit.

In brief rejoinder, Mr Lugalila added that what has been raised as a preliminary objection was based on what was submitted by the plaintiff herself. He added that they expected the plaintiff's counsel to answer if

there is a notice of appeal filed to the Court of Appeal or not. Thus, since the parties are bound by their pleadings, he prayed for the preliminary objections to be sustained.

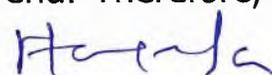
I have gone through the pleadings of the parties as well as the rival submissions from the counsel for the defendant and that of the plaintiff. The issue for determination is whether the raised points of preliminary objection have merit.

Starting with the first Preliminary objection from both defendants the learned counsel for the defendants argued that this case emanates from Commercial Case No. 90 of 2019 hence it was not supposed to be filed as a new case. On his side, the plaintiff's counsel was of the view that this matter has a different cause of action from Commercial Case No. 90 of 2019 hence it is not a commercial case as alleged. He submitted further that this point calls for evidence to prove it hence the same cannot be raised as a preliminary objection as per **Mukisa Biscuit's case** (Supra).

I have gone through the plaint, the plaintiff is complaining the whole proceedings of Commercial Case No. 90 of 2019 and particularly his previous counsel who was negligent in handling Commercial Case No. 90 of 2019. She is also aware that the auction to sale her house emanates

from Commercial Case No. 90 of 2019 as it is pleaded under paragraph 17 of her plaint and that her advocates filed Misc. Commercial Application No. 160 of 2019 to set aside ex-parte judgment of Commercial Case No. 90 of 2019 but the application was dismissed.

Therefore, I concur with Mr Lugalila learned counsel that filing a new case based on the cause of action emanated from Commercial Case No. 90 of 2019 is contrary to **Order XXI, Rule 90 (1) and (3) of the CPC**. Thus, the plaintiff was supposed to proceed with other remedies available to challenge the decision in Commercial Case No. 90 of 2019 and Misc. Commercial Application No. 160 of 2019 instead of filing a new Land Case where an auction was legally allowed by the court. Further to that, entertaining this kind of practice it will lead to multiple cases which will lead to endless litigation as it was held in the case of **Abel Mwamwezi vs Republic**, Criminal Appeal No. 01 of 2013, CAT sitting at Mbeya (Unreported) cited with approval in the case of **Symphorian Kitare vs Resident Director Friedrich Ebert Stiftung** (Misc. Civil Application 284 of 2017) [2018] TZHC 2833 (08 June 2018) (Tanzlii) where the Court of Appeal underscored the principle that public policy requires that litigation must come to an end. Therefore, the first



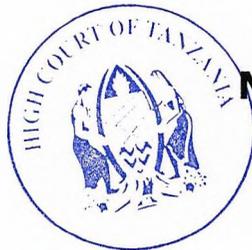
points of preliminary objection raised by the defendants separately are meritorious.

As the 1st points of objection disposes of the whole matter there is no need to deal with the remaining points of objection as it will be just an academic exercise.

For the reasons stated herein, this court finds merit on the raised preliminary objections and sustain it. Consequently, the suit is dismissed with costs.

It is so ordered.

DATED at **ARUSHA** this 30th day of March 2023



N.R. Mwaseba

N.R. MWASEBA

JUDGE