

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO. 143 OF 2021

ABLA ESTATE DEVELOPERS & AGENCY COMPANY LIMITED PLAINTIFF

VERSUS

CRDB BANK PLC DEFENDANT

RULING

27th April & 16th June, 2023

KISANYA, J.:

Abla Estate Developers & Agency Company Limited (the plaintiff) instituted a suit seeking for judgment and decree against the defendant as follows;

- (a) declaration that the Defendant's use of police force in conducting the valuation on Plot No. 20 Regent Estate Kinondoni was improper and are illegal;*
- (b) an order of permanent injunction stopping the defendant from conducting unilateral valuation until the Plaintiff is asked to participate in appointing a joint valuer by both the defendant and Plaintiff;*
- (c) an order that since the decree in Land Case No. 52 of 2017 did not give time limit as to when the three months computation was to start as to warrant the plaintiff's failure to deposing the business premises,*

the defendant cannot dictate the time until the court has clearly ruled so;

- (d) an order declaring the letter dated 4th March 2021 from the ministry to be a binding government directive on the defendant;*
- (e) an order for payment of special damages of Tanzanian Shillings Ten Billion (TZS 10,000,000,000.00) as loss occasioned by the Defendant;*
- (f) payment of general damages of Tanzanian Shillings Three Billion (TZS 3,000,000,000.00);*
- (g) An order of a written unconditional apology;*
- (h) Costs of the suit; and*
- (i) Any other order (s) or relief(s) the Hon. Court may deem just and fit to grant in the circumstances.*

In order to appreciate the gist of the plaintiff's claim, a brief background facts to the matter is quite apposite. Pursuant to the Plaint, the Plaintiff owns a piece of land with 40 apartments on Plot No. 20, Regent Estates, Kinondoni Dar es es Salaam (henceforth "the business premises"). In 2017, the Plaintiff filed a suit in this Court (Land Case No. 52 of 2017) praying for the following reliefs against the Defendant; permanent injunctive order restraining order restraining the defendant from sale or interfering with the business premises; payment of TZS 100,000,000 as

general damages, costs of the suit; and any other relief as the Court deemed just and fit to grant.

Following a settlement recorded in terms of Order XXIII Rule 3 of the Civil Procedure Code, Cap. 33, R.E. 2002, now R.E. 2019 (the CPC), the said Civil Case No. 52 of 2017 was marked settled, on 13th August, 2018, on the following terms:

- i. That the plaintiff is given three months during which period to seek and find a buyer and thereafter to cooperate with the defendant through a tripartite agreement to dispose of Plot No. 20 Regent Estate, Kinondoni, Dar es Salaam. The proceeds of sale so obtained will first clear the outstanding loan and any remaining balance will be paid to the plaintiff. Cooperation here means the bank assure the buyer of the bank's consent to the disposition and to discharge the mortgage.*
- ii. In the event the plaintiff fails to get a buyer during the three months, the defendant shall have the right to dispose of the property to liquidate the outstanding loan without further notice to the plaintiff. The disposition shall be proceeded with valuation by Government approved valuer at costs of the plaintiff.*

- iii. Within a period of seven days from the date of this settlement the bank and the plaintiff shall inspect the building and prepare a joint report on the status of the building.*
- iv. After sale by the plaintiff or the bank, the plaintiff must grant vacant possession to the purchaser within third days from the auction date.*
- v. Each party to bear its own costs.*

In October, 2018, the Ministry of Land and Housing Settlement conducted valuation of the business premises, at the instance of the plaintiff. According to the said valuation, the business premises was valued at TZS 12,000,000,000. A month later, on 27th November, 2018, Prolaty Consult Ltd, which was engaged by the defendant to conduct valuation of the business premises prepared a valuation report in which the business premises was valued at TZS 7,010,000,000 as market price and TZS 5,258,000,000 as force sale value.

Upon noticing defects in the valuation report prepared at the instance of the defendant and different amount on the same business premises, the Ministry of Land and Housing Settlement (henceforth "the Ministry"), through its letter dated 4th March, 2021, advised parties herein to find a valuer to conduct a fresh valuation. Further to this, parties were

assured that the Chief Government Valuer would cooperate with the valuer to be appointed by the plaintiff and defendant.

Now, it is the plaintiff's case that the defendant refused to comply with the Ministry's directive. According to her, on 23rd July, 2021, the defendant's staff and or agents accompanied with a guard escort of armed police men ambushed the business premises for purposes of conducting valuation by force. The plaintiff claims that the invasion led to cancelation of some of her customers, embarrassment, panicking and shock toward her employee, tenants and other customers. She thus, filed this suit for the above stated reliefs.

In response, the Defendant filed a written statement of defence in which she contested the plaintiff's claim. Before the final pre-trial conference could commence, the Defendant lodged a notice of preliminary objection on the following point of law:

- i. To the extent that the Plaintiff seeks this Court to order that Decree in Land Case No. 52 of 2017 did not give time as to when the three months computation was to start to warrant Plaintiff's failure to dispose the suit property, and to the extent as a general rule this court, like any other court, has no jurisdiction to relitigate its own decision, in terms of the Court of Appeal decision*

in Scolastica Benedict vs Martin Benedict [1993]
TLR, this Court is functus officio."

With order of the Court, the preliminary objection was disposed of by way of written submissions. Mr. Elly Musyangi learned advocate appeared for the plaintiff while, Messrs Godwin Nyaisa and Elisa Abel Msuya, learned advocate, represented the defendant.

Arguing in support of the preliminary objection, the defence counsel submitted that the term "*functus officio*" is defined by **Black's Law Dictionary**, 9th Edition at page 743 in the following terms:

"Having performed his or her office (of an officer or official body") without further authority or legal competency because the duties and function of the original Commission have been full accomplished."

In view of the above definition, it was argued that, having issued a decree in respect of the business premises and between the parties herein, this Court is *functus officio*. This argument was based on the contention that, this Court has already determined the dispute and issued a decree in Land Case No. 52 of 2017. That being the case, the learned counsel held the view that this Court is estopped by the doctrine of *functus officio* from considering the instant case. To support this assertion, the learned counsel cited the cases of **Scolastica Benedict** (supra) and **Bibi Kisoko Medard**

vs Minister for Lands, Housing and Urban Development and Another [1993] TLR 251. In the former case, the Court of Appeal held that:

"As a general rule, a primary court, like all other courts, has no jurisdiction to overturn or set aside its own decisions as it becomes functus officio after making its decisions."

The learned counsel went on referring this Court to its decree in Civil Case No. 52 of 2017. Referring further to paragraph 3 of the plaint, the learned counsel argued that the cause of action and/or reliefs sought in this case either, seek to reopen what has already been decided in Land Case No. 52 of 2017 and hence, *functus officio*; or are a resultant of enforcement of the said decree and thus fit to be determined by the executing court and not by a separate suit. To expound this, argument, the learned counsel pointed out as follows:

One, with regard to the first relief for, a declaration that the defendant's use of police force in conducting the valuation on Plot No. 20, Regent Estate Kinondoni (business premises) was improper and are illegal, the learned counsel submitted order (ii) of the decree in Land Case No. 52 of 2017 allowed the defendant to dispose of the business premise without further notice to the plaintiff. It was their contention that, by entering the

business premises to conduct the valuation before disposing the same, the defendant was complying with the decree of this Court. In that respect, the learned counsel were of the view that, if the plaintiff was aggrieved with the manner the defendant enforced the decree, the proper cause was to register her complaint with the executing court under section 38 (1) of the CPC. To cement that argument, the learned counsel cited the case of **Hassan Twaibu Ngonyani vs Tazama Pipeline Limited**, Civil Case No. 201 of 2018 (unreported).

Two, the defendant's counsel submitted that the second relief for an order of permanent injunction stopping the defendant from conducting unilateral valuation until the Plaintiff is asked to participate in appointing a joint valuer by both the defendant and Plaintiff was one of the prayers in Land Case No. 52 of 2017. Referring further to order number (ii) of the decree in Land Case No. 52 of 2017, the learned counsel argued that this Court has already allowed the defendant to conduct valuation and dispose the security without notice to the plaintiff. In view of the case of **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser**, Civil Application No. 33 of 2013, the learned counsel maintained their argument that the doctrine of *functus officio* bars this Court from reopening the matter.

Three, it was submitted that the third relief for an order that, since the decree in Land Case No. 52 of 2017 did not give time limit as to when the three months computation was to start as to warrant the plaintiff's failure to disposing the business premises gives rise to the issue as to when the time of three months started to run and thus, related to interpretation on the discharge or satisfaction of the decree. In view of section 38(1) of the CPC, the learned counsel argued that the mandate to determine the said issue is the court executing the decree and that remedy is not to institute a separate suit. In bid to expound this argument, the learned counsel referred the Court to the case of **Hassan Twaibu Ngonyani** (supra).

Four, as regards the fourth relief for an order declaring the letter dated 4th March 2021 from the ministry to be a binding government's directive on the defendant, the learned counsel submitted that this Court has already decreed that the defendant may dispose the security (business premises) after conducting its valuation. It was further submitted that, much what was decreed in Land Case No. 52 of 2017 remains unchallenged, this Court is *functus officio*. Furthermore, the learned counsel argued that the said issue cannot be reopen on ground of an administrative letter that came after the decree was pronounced. It was

also argued that doing otherwise shall amount to belittling the decree of the Court.

Fifth, as for the reliefs for special damages, general damages and an order for unconditional apology, the learned counsel argued that the defendant entered the business premises when she was complying with the court decree that required him to conduct valuation before disposing the same. It was argued that if the plaintiff was aggrieved by the manner the defendant enforced the decree to the extent of suffering damages, the remedy is to register the complaint with the executing court pursuant to section 38 (1) of the CPC.

In conclusion, the learned counsel submitted that the preliminary objection raised constitute pure point of law and thus, in line with the position stated in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited** [1969] EA 96 and **Ali Shaban and 48 Others vs Tanzania National Roads Agency (TANROADS)**, Civil Appeal No. 261 of 2020. That said, the Court was asked to dismiss the suit with costs on the ground that it has no jurisdiction to determine the same for being *functus officio*.

In reply, Mr. Musyangi submitted that the suit before this Court is for redress for business loss suffered as a result of the defendant's forceful

and unlawful interference on the plaintiff's business premises contrary to the directive of the Ministry, which directed the plaintiff and defendant to nominate the joint valuer.

Mr. Musyangi was of the view that the issue is whether this Court is *functus officio* to Land Case No. 52 of 2017 in which decree was entered on 13th August, 2018. Responding to that issue, he started by listing the reliefs sought in Land Case No. 52 of 2017. The learned counsel went on arguing that for the court to declared *functus officio*, and ultimately *res-judicata*, the following conditions must co-exist; the matter must be direct and substantially the same in both costs; the matter must be between the same parties; parties must have litigated under the same title, the matter must be before a competent court; and the matter must have been heard and finally determined. To fortify his argument, he cited the cases of **Simply Fresh (Tanzania) Limited vs Kevin Stander and 2 Others**, Commercial Case No. 34 of 2022, HCT Commercial Division at DSM and **John Mtawali Kitundu vs Asia Haji Kimbunga**, PC Appeal No. 36 of 2021, HCT at DSM (both unprestred).

Mr. Musyangi further submitted that the facts and circumstances of this case differ from Land Case No. 52 of 2017. Referring this Court to the case of **Hamza Byarushengo vs Mwanga Hakika Microfinance Bank**

Limited, Land Case No. 45 of 2019, HCT at DSM (unreported) he contended that this is not the first time when the Court is faced with a cause of action which arises after issuance of a decree. It was his further contention that the cases cited by the defendant's counsel are distinguishable from the circumstances of this case and that the said cases have been overtaken by events due to existence of more recent decisions of 2021 and 2022 referred to in the reply submission.

Mr. Musyangi went on to submit that the issue of invasion of business pleaded in paragraph 17 of the plaint suggests that the defendant's conduct amounted to trespass to land. That being the case, he argued that the plaintiff is entitled to be compensated. To reinforce his argument, he cited the case of **Avit Thadeus Massawe vs Isdory Assenga**, Civil Appeal No. 6 of 2017. In the end, the learned counsel submitted that the defendant's counsel had failed to relate the present matter with the former suit. He thus, prayed for the Court to dismiss the preliminary objection for want of merit.

Having considered the arguments raised by the learned counsel for both parties, it is appropriate to determine whether the preliminary objection is meritorious. I am mindful of the position of law underlined in a number of cases, including **Mukisa Biscuits** (supra) that, for a preliminary

objection to be upheld, it should be capable of disposing of the matter without requiring evidence. However, as rightly submitted by the learned counsel for the defendant, it is also a settled law, as stated in **Ali Shaban** (supra), that, no preliminary objection will be taken from abstracts without reference to examination of any other evidence. That being the position, I will make reference to the facts deposed in the plaint and the documents appended to the plaint to supplement the facts averred thereto.

As alluded to herein, the preliminary objection and argument in support of the objection are to the effect that this Court has no jurisdiction to entertain the cause of action and/or reliefs sought for being *functus officio*.

It is trite law that, the court becomes *functus officio* after making its decision and that the court has no mandate to reverse or set aside its own decision. There is a list of authorities stating that position. Some of them are the cases of **Scolastica Benedict** (supra), **Bibi Kisoko Medard** (supra), **Hassan Twaibu Ngonyani** (supra) and **Mohamed Enterprises (T) Ltd** (supra) cited the by the learned counsel for the defendant. For instance, in the latter case of **Mohamed Enterprises (T) Ltd (supra)**, the Court of Appeal emphasized that:

"Once judgment and decree are issued by a given court, judges (or magistrate) of that court becomes functus officio" in so far as that matter is concerned."

In our case, paragraph 7 of the plaint shows that the plaintiff instituted Civil Case No. 52 of 2017 against the defendant and that she prayed, among others, for an order of restraining the defendant from selling the business premises. The plaintiff further deposed that the said Civil Case No. 52 of 2017 was amicably settled by a decree dated 13th August, 2018. Reading from the decree referred to in paragraph 7 of the plaint and appended thereto, it is clear that this Court has already made a decision on the business premises which led to the present suit. Some of the decisions deduced from the first two orders in Civil Case No. 52 of 2017 are to the effect that: **First**, the plaintiff was given three months within which period to seek and find a buyer and thereafter to cooperate with the defendant through a tripartite agreement **to dispose of** Plot No. 20 Regent Estate, Kinondoni, Dar es Salaam (the business premises). **Second**, the sale proceeds obtained will first clear the outstanding loan and any remaining balance will be paid to the plaintiff. **Third**, in the event the plaintiff was unable to get a buyer during the three months, the defendant was given the right to dispose of the business premises to liquidate the outstanding loan without further notice to the plaintiff.

Fourth, the disposition of the business premises by defendant under the preceding decision was to be proceed after valuation by Government approved valuer at costs of the plaintiff.

The plaintiff does state to have found the buyer within the period of three months from 13th August, 2018. She states that this Court did not state the time within which the three months period would start to run. The plaintiff further states in paragraph 10 of the plaint that, the defendant made valuation of the business premises on 27th November, 2017 while, paragraphs 12 and 13 of the plaint show that the said valuation was found with anomalies. Be as it may, it is clear that this suit is also found on paragraph 17 of the plaint in which the plaintiff stated:

"They having refused to comply with any of the ministry's directive as above explained, on 23rd July, 2021, without any notice to Plaintiff, the defendant's staff and or its agents accompanied with a guard escort of armed police ambushed the Plaintiff's business premises and apartments for purposes of conducting valuation by force."

As it can be glanced from the above paragraph, the plaintiff is aware that the alleged invasion by the defendant was for purposes of conducting valuation of the business premises. Given the fact this Court had decided that the defendant is entitled to dispose of the business premises to

liquidate the outstanding loan without further notice to the plaintiff but after valuation made by Government approved valuer, I agree with the defendant's counsel that, she (the defendant) was implementing the decree of this Court.

It should be noted that the order of this Court required the valuation to be conducted by Government approved valuer. Thus, the role the Government Valuer, if any, was to approve the valuer to conduct the valuation report. In that respect, the suit at hand cannot decide that the said valuation should be conducted by a valuer appointed the plaintiff and defendant as prayed by the plaintiff.

In the event, I entirely agree with the defendant's counsel that the plaintiff's cause of action and reliefs are premised on the manner the decree of this Court Civil Case No. 52 of 2017 was executed by the defendant. It is the argument by the defendant's counsel that the proper cause was to refer the matter to the executing court and not to institute a separate suit. As alluded to herein, Mr. Musyangi did not respond to that argument.

Reading from the provisions of section 38(1) of the CPC, I am at one with the defendant's counsel that, the mandate to deal with any question relating to execution, discharge and satisfaction is vested in the executing

court. Further to this, section 38(2) of the CPC is to the effect that the executing court is enjoined to turn the execution proceedings into a suit upon being satisfied that any of the questions requires ascertainment of controversial issues. See also the case of **Hassan Twaibu Ngonyani** (supra) where similar stance was stated.

Therefore, if the questions as to when the three months period started to run so as to warrant the plaintiff's failure to dispose the business premises; and whether the valuation was to be conducted by the valuer appointed jointly by the plaintiff and defendant were not stated in the decree of this Court in Civil Case No. 52 of 2017, they are required to be dealt with by the executing court in lieu of this separate suit. I am also fortified by the case of **Karata Ernest and Others vs Attorney General**, Civil Revision No. 10 of 2010 (unreported) in which the Court of Appeal had this to say on section 38(1) of the CPC:

"Although ordinarily the trial court has a duty to determine the quantum which the judgment debtor is bound to pay under the decree, where it has left out that question open for consideration subsequently, the executing court has jurisdiction to determine the quantum under this section on the issue."

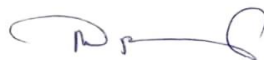
It is also my considered opinion that, the issues whether the defendant's use of force in conducting the valuation, and whether the

defendant is entitled to damages arising from the defendant's use of force in conducting the valuation are related to the manner the defendant complied or executed the decree of this Court. On that account, those issues are required to be placed before the executing court. Otherwise, it is the executing court which is enjoined to ascertain whether the said issues are required to be determined by a separate suit, and make an order to such effect. Mr. Musyangi's argument was based on the ground that this matter is not *res-judicata* and thus not relevant to the point raised by the defendant.

For the foregoing reasons, the preliminary objection raised by the defendants is hereby upheld. I agree with the defendant's counsel that, basing on section 38(1) and (2) of the CPC, this Court has no mandate to entertain it. Consequently, this suit is struck out with costs for being incompetent before this Court.

DATED at DAR ES SALAAM this 16th day of June, 2023.




S.E. KISANYA
JUDGE