

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT
DAR-ES-SALAAM**

COMMERCIAL CASE NO. 14 OF 2022

OXLEY LIMITED..... PLAINTIFF

VERSUS

NYARUGUSU MINE CO. LTD..... 1st DEFENDANT

FERRANTI PROCESSING LTD..... 2nd DEFENDANT

Date of the Last order: 11/5/2022

Delivery of the Ruling: 17/06/2022

RULING

NANGELA, J.:

I find it apposite to preface this ruling by setting out some facts regarding this suit's background as are gathered from the pleadings. In the year 2019, the Plaintiff filed a suit in this Court; **Commercial Case No.4 of 2019**. The suit was against the 2nd Defendant, **FERRANTI PROCESSING LTD.** His Lordship Magoiga, J., heard and successfully determined the suit in favour of the Plaintiff on 11th day of October 2019.

Armed with the Judgement and Decree obtained from this Court, the Plaintiff marched on seeking to execute the said

Decree by way of attachment and sale of properties, and, accordingly, sought for attachment orders of this Court in respect of various assets belonging to the 2nd Defendant herein.

That respective application for execution by way of attachment was granted on the 09th of March 2021 and, a Court Broker, in the name of **S.L. ISANGI AUCTION MART & COURT BROKER**, was duly appointed to attach and auction all listed assets which were purported to belong to the 2nd Defendant.

When the process of attachment commenced, the 1st Defendant herein filed **Misc. Commercial Application No.04 of 2021** in this Court (as the executing Court). She moved the executing Court to investigate and hold that, the 1st Defendant herein is the lawful owner of the assets subjected to the attachment process by the Plaintiff as part of execution of this **Court's Decree in Commercial Case No.04 of 2019.**

The said **Misc. Commercial Application No.04 of 2021** was granted by this Court (Mkeha, J.) on 10th of December 2021. In that application, this Court made an order which had the effect of releasing the properties/assets which had already been subjected to an intended auction process by the Plaintiff's appointed Court Broker.

Aggrieved by the decision of this Court in Misc. Commercial Case No.04 of 2021, the Plaintiff, acting under Order XXI Rule 62 of the Civil Procedure Code, Cap.33 R.E 2019, instituted this instant suit, seeking to establish the rights

she claims from the released assets. In particular, the Plaintiff sues the Defendants jointly and severally and prays for Judgment and Decree against them as follows:

1. For a declaratory order that, the 2nd Defendant is the lawful owner of all equipment composing (forming) the mineral processing plant which is located at Nyarugusu Mineral processing site (Nyarugusu Mine).
2. For a declaratory order, that, all equipment forming the above named mineral processing plant being the lawful assets (property) of the 2nd Defendant, may be attached by the Plaintiff in lieu of recovery of the Decretal amount, accruing interests, as well as any other costs incidental to and incurred in the effort to execute the decree of this Court in Commercial Case No.4 of 2019.
3. For an order of attachment and sale of equipment forming the above named mineral processing plant in lieu of recovering the decretal sum, accruing interests, as well as any other cost incidental to and incurred in the effort to execute the decree of

this Court in Commercial Case No.04 of 2019.

4. For declaratory order against the 1st Defendant, her agents, affiliates, subsidiaries or any other person capable of drawing instruction from the 1st Defendant, from intermeddling, transferring, and/ or tempering in any way whatsoever, selling or mortgaging the equipment forming the Mineral Processing Plant situated at Nyarugusu Mining Site.
5. Payment of TZS 100,000,000/- being general damages for obstructing the Plaintiff from enjoying the fruits of her decree.
6. For order of payments of Costs of this suit to the Plaintiff and her advocates.
7. Any other reliefs that this Court deems fit and just to grant.

On 2nd March 2022 the Defendants filed their written statements of Defence. Apart from contesting the suit, both Defendants filed notices of preliminary objection and raised a number of objections. Upon giving a look at them, I find that they are essentially similar.

For clarity purposes, the Defendants have specifically raised the following points of law with a view to suffocate the hearing and determination of this suit:

1. That the Court lacks Jurisdiction to hear and determine the suit on the grounds, that:
 - (a) the cause of action is not a commercial dispute;
 - (b) the suit was filed without considering the place of suing rule;
 - (c) the Court cannot determine and grant orders of attachment and sale of the disputed properties to satisfy decree in Commercial Case No.4 of 2019.
2. The Court is "*functus officio*" to hear and grant prayers number 1, 2 and 3 as prayed by the Plaintiff in the Plaint filed in Court.
3. The Plaintiff has no legal capacity to sue over a claim resulting from action of objection proceedings. To that extent, the Plaintiff has no *locus standi* to institute the suit.
4. The Plaint does not disclose a cause of action.

In terms of representations, the parties enjoyed legal services of a number of advocates. As for the Plaintiff Mr

Denice Tumaini, Michael Mihayo and Ms Geraldina Paul, learned advocates appeared in Court at different times while Mr Akram Adam and Mr Hermi Chagula appeared for the 1st Defendant. Ms Susan Gisabu, learned counsel as well, appeared for the 2nd Defendant.

On the 29th day of March 2022, the parties agreed to dispose of the preliminary objections by way of written submissions. A schedule of filing was given and, dutifully, all parties have complied with it. I will, therefore, sum up the parties submissions here below. Submitting in support of the 1st Preliminary Objections, Mr Akram contended that, this Court cannot exercise its jurisdiction over the suit because, this suit, is not a commercial dispute and, that, the Court cannot determine and grant orders of attachment and sale of the disputed properties to satisfy the decree in **Commercial Case No.04 of 2019**.

The reasons advanced in support of that point are pegged on Rules 3 and 5 of the High Court (Commercial Division) Procedure Rules, G.N No.250 of 2012 as amended in 2019, in respect of what constitutes a commercial case. To further support his submissions, Mr Akram referred to this Court the cases of **ETG INPUTS vs. Dominic Logistics (T) Ltd**, Civil Case No.184 of 2020, (HC) (unreported) and **Michael Ngaleku Shirima vs. African Banking Corp. (T) Ltd**, Comm. Case. No.54 of 2016 (unreported).

Mr Akram contended that, on the basis of the above authorities, the claim by the Defendant is that, this suit does not possess the elements of being a commercial case to allow this Court exercise its jurisdiction. He contended further, that, the Plaintiff's plea that the 2nd Defendant be declared the lawful owner of the Mineral Processing Plant and equipment therein and, that, the same be attached to satisfy the decree in **Commercial Case No.04 of 2019** is not a cause of action that can be said to have arisen out of transaction of trade and/or commerce or a business activity to move the Court to exercise its jurisdiction in terms of Rule 5 of GN. No. 250 of 2012 as amended by GN.No.107 of 2019.

As regards the 2nd point on jurisdiction; it was Mr Akram's submission that, this Court cannot determine and grant Orders of attachment and sale of the disputed properties to satisfy the decree in Commercial Case No.4 of 2019. According to him, this Court is currently entertaining a separate suit altogether and, hence, should deal with only matters arising from it and not give reliefs on matters already determined in **Commercial case No.4 of 2019**. He submitted that, such a possibility could have only been doable if this Court was to sit as an executing Court.

In view of the above, Mr Akram urged this Court to be guided by what **section 38 of the Civil Procedure Code, Cap.33 R.E 2019** provides. He surmised that, going by that provision, this Court will find that, it cannot, in this fresh suit,

deal with matters which were dealt with by the same Court in the **Commercial Case No.4 of 2019**. He also contended that, the 1st Defendant was not a party to that case, i.e., Commercial Case No.04 of 2019 and, for that matter, cannot be condemned to satisfy a decree where no rights or liabilities in respect of the 1st Defendant were ever established.

As for her part, Ms Susan Gisabu, the learned counsel for the 2nd Defendant, commenced her submissions regarding the issue of jurisdiction by asserting that, the various objections raised by the 2nd Defendant are pure matters of law. She relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696 where the Court, Law, J.A was of the view that, one of the examples of what constitutes a preliminary objection is an objection in relation to the jurisdiction of this Court.

She also invited this Court to consider and be persuaded by the case of **Owners of the Motor Vessel "Lilia S" vs. Caltex Oil (K) Ltd** [1989] KLR, 1. In that case, the Kenyan Court of Appeal stated that, jurisdiction is everything without which the Court cannot make one more step ahead. In my view, it is certain indeed that, the position expressed by the Kenyan Court of Appeal marks a fundamental proposition regarding the issue of jurisdiction across the various jurisdictional divide and remains an undisputed. In fact, we do not even need to go outside our own jurisdiction to fetch for any support regarding that point.

The authoritative decisions of our own Court of Appeal in the case of **Fanuel Mantiri Ng'unda vs. Herman M Ngunda**, Civil Appeal No. 8 of 1995, (CAT) (unreported) and **Consolidated Holding Corporation Ltd vs. Rajani Industries Ltd and Bank of Tanzania**, Civil Appeal No. 2 of 2003, CAT (unreported), point to that similar conclusion regarding how basic is an issue regarding a Court's jurisdiction.

In her submission, as well, Ms Gisabu contended that, a Court cannot vest jurisdiction on itself. In my view, that is also a correct position of the law since it is trite that jurisdiction is a creature of statute. See the case of **Shyam Thanki and Others vs. New Palace Hotel** [1972] HCD n. 92 and **Desai vs. Warsma** [1967] EA 351. According to Ms Gisabu, the 2nd Defendant's point is that, there has already been **Commercial Case No.4 of 2019** which this Court determined in favour of the Plaintiff. As such, she contended that, the present case is trying to make this Court a second Court avenue having the same jurisdiction but in a different Court's registry, the first case, i.e., **Commercial Case No.4 of 2019**, having been filed in this same Court at Mwanza.

Ms Gisabu contended that, this second suit does not qualify as an independent suit. She relied further on the case of **Ahmed Ismail vs. Juma Rajabu**, [1985] TLR 204, to support her arguments. She surmised that, this latter case which was re-filed at the Dar-es-Salaam registry has been mistakenly filed in a wrong Commercial registry of the Court and the Court as

well lacks jurisdiction to entertain it. In her submission, and relying on the case of **Tanzania Electricity Supply Company (TANESCO) vs. Independent Power Tanzania Limited (IPTL)** [2000] TLR 324, she was also of the view that, the parties cannot confer jurisdiction to the Court. That is indeed a correct position of the law.

In reply to the above submissions on the first ground of objection, the learned counsel for the Plaintiff, Mr Denice Tumaini, filed reply submissions to counter those filed by each of the learned counsel for the Defendants. He made it clear that, generally all objections were erroneously brought out of ignorance of **Order XXI Rule 62** of the Civil Procedure Code, Cap.33 R.E 2019 and the Landmark decision of the Court of Appeal in the case of **National Bank of Commerce Ltd vs. National Chicks Corporation Ltd and Others**, Civil Appeal No.129 of 2015 (unreported).

In Mr Tumaini's views, this Court, under Order XXI Rule 62 of the CPC, is fully vested with powers to entertain the current suit. He argued that, the said provision of Order XXI of the Code avails an aggrieved party with an opportunity to file a fresh suit to establish the right she claims in the released properties. Besides, he was of the view as the crux of the matter, that, this suit has its origin from a commercial suit which was successfully prosecuted in this Court. As such, he concluded that, the suit is interwoven with matters which are of commercial significance.

In view of the above, Mr Tumaini contended that, the Rules 3 and 5 of the High Court (Commercial Division) Procedure Rules, which were cited by the learned counsel for the 1st Defendant, are inapplicable in their use in this case at hand because, the circumstances under the current facts of the case are suited to the applicability of Order XXI Rule 62 of the CPC and not otherwise.

Mr Tumaini submitted further that, since this suit is "*coming as an appeal*" and "*not a fresh suit*" the test relied upon by the Counsel for the 1st Defendant is not the correct one and, that, the cited cases of **ETG Inputs (supra)** and **Michael Ngaleku (supra)** are distinguishable on the basis of the fact that, the same address fresh suits being filed to this Court as fresh suits but not falling under the suits that can be filed under Order XXI Rule 62 of the Civil Procedure Code, Cap.33 R.E 2019.

Before I proceed further, I think there is a need to comment on the above line of thinking by Mr Tumaini, albeit on one aspect which seems to disturb my mind. That fact is whether this suit is "*an appeal* and *not a fresh suit*". In essence, this suit cannot be "*an appeal*" since, even if it is claimed to be based on an earlier decision of this same Court, this same Court cannot sit as an appellate Court to examine correctness or otherwise of its own earlier decision.

Therefore, and to that extent only, I find that Mr Tumaini's submission is unfounded as this is a fresh suit and

not an appeal. No appeal is instituted by way of a Plaint. Having stated so, let me go ahead, in connection with the rest of his submissions, to summarise what Mr Tumaini has to say in his submissions.

In his further effort to fault the 1st Defendant's submissions, Mr Tumaini contended that, the views of Mr Akram seems to be contradicting the authority already established by the Court of Appeal in the case of **National Bank of Commerce Ltd vs. National Chicks Corporation Ltd and Others**, Civil Appeal No.129 of 2015 (unreported). In his view, the Court of Appeal's findings in that case make the argument that the current is not a "*commercial dispute*" for which this Court's jurisdiction may be applied untenable. He relied on other decisions of this Court which I see no need to reproduce here.

In short, the point which Mr Tumaini seems to make in his reply to the submissions made on the first ground is that, what is before this Court is a suit premised under Order XXI Rule 62 of the CPC after the Plaintiff failed to put into play the remedies obtainable under Order XXI Rule 57 of the CPC. He contended, that, what the Plaintiff is seeking to establish, is the rights which she has in the assets released from the attachment Order by the Court. For that matter, he urged me to dismiss the first objection because it is misconceived.

In a brief rejoinder submission, both counsels for the Defendants have reiterated their earlier submissions in chief. In

particular, Mr Akram submitted that, although he is well aware of Order XXI Rule 62 of the CPC and the decision of the Court of Appeal in the case of **NBC vs. National Chicks** (supra) that decision is in applicable in the circumstances of the case at hand and the rest of the cases cited by the Plaintiff's counsel are distinguishable.

I have carefully considered the above contending submissions for and against by the learned counsel for the parties. The first objection is pegged on whether this Court has jurisdiction to entertain the suit and, essentially, what I am called upon to address or respond to is whether this preliminary objection should be upheld or dismissed for lacking merit in them. I will be brief and to the point in addressing it.

In the first place, the argument has been that, the suit is not one falling under the kind of suits which may be filed in this Court, for it is not a commercial dispute. The first Defendant has even invoked Rules 3 and 5 of the High Court (Commercial Division) Procedure Rules, G.N No.250 of 2012 as amended in 2019, in respect of what constitutes a commercial case. As such, while the Defendants have vociferously argued that this Court lacks such jurisdiction, the Plaintiff has submitted that the Court has such requisite jurisdiction.

As correctly submitted by Mr Tumaini, the genesis of this suit is **Commercial Case No.04 of 2019** whose Decree gave birth, upon execution, to objection proceedings, i.e., **Misc. Commercial Appl. No. 04 of 2021**. As such, it is indeed a

suit which is somehow interwoven with matters which were of commercial significance.

In my view, therefore, I do not even need to venture to what Rule 3 or 5 of the Procedural Rules guiding this Court provide because such rules have been looked upon and an authoritative decision regarding them pronounced by the Court of Appeal in the case of **National Bank of Commerce Ltd vs. National Chicks Corporation Ltd and Others**, (Supra).

In that case, since the Court of Appeal was considering a land related matter, made it clear that there is nothing in law that "*precluded the High Court (Commercial Division) from enjoying jurisdiction over land matters.*" The Court did state as well, and I will quote *in extenso*, that:

"It needs no overemphasis that the High Court and its mandate are a creature of the Constitution of the United Republic of Tanzania, 1977 as amended (the Constitution). It is established under Article 108 of the Constitution..... More so, section 5 of the Judicature and Application of Laws Act, Cap. 358 R. E. 2002 (The JALA), It is manifest that the High Court is one in this country and it derives its jurisdiction or mandate from either the Constitution or any law to that effect. It is also absolutely clear that it has unlimited

jurisdiction and judges of the High Court are mandated to exercise all or any part of the powers conferred on the High Court. We find nothing express or implied in the above Rule to the effect that the High Court (Commercial Division) is a distinct and independent court from the High Court. That, in our view, means that it is equally part of the High Court. It enjoys and exercises the jurisdiction and mandate as stipulated by the Constitution and the Judges presiding over cases thereat, like any other Judges of the High Court, exercise the powers as stipulated in the JALA. However, as that court is designated to hear cases of a commercial nature only, then the judges thereat try those cases only because other categories of cases are not registered (lodged or filed) there. In view of the above, one may be prompted to ask an obvious question whether the High Court (Commercial Division) has jurisdiction to adjudicate on matters other than commercial matters. It is obvious that as part of the High Court it has jurisdiction because its

substantive mandate is provided by the Constitution. Besides, we are also fortified in this finding by the Court's finding in the case of Morogoro Hunting Safaris vs. Halima Mohamed Mamuya, Civil Appeal No.117 of 2011 (Unreported). In that case, ... [a]fter we had appreciated that the procedure followed in establishing the Commercial Division of the High Court is as above explained and the fact that it was designated to deal with the proceedings of commercial nature as are stipulated under Rule 3 of those Rules, we observed that:- "Our careful reading of Rule 3 of those Rules entices us to agree ...that the High Court Registry Rules (HCRR) did not take away the powers of a single judge to adjudicate on matters falling within the jurisdiction of the Commercial Division of the High Court, but were merely intended to streamline the administrative functions of that court, especially the timely disposal of cases, for reasons we are about to assign... Secondly, while we think that a judge cannot normally rely on the general

jurisdiction under Article 108 (2) of the Constitution to assert jurisdiction when faced with the issues whether or not he has the requisite jurisdiction to hear and determine a particular matter before him because there are normally specific other laws granting jurisdiction to that effect; we nevertheless find that a single judge of the High Court may exercise jurisdiction to hear and determine a claim not strictly of commercial significance where it may be interwoven with matters which are of commercial significance under powers conferred on such a judge under section 5 of the JALO. As already pointed out, the list provided under Rule 3 of the High Court Registry Rules in respect of the kind of claims which may be heard and determined by a judge in the High Court (Commercial Division) is not exhaustive..... It is plain that while the High Court is a creature of the Constitution, the registries and divisions of it are a creature of Rules and the provisions of the Rules cannot override the provisions of the Constitution. That said, we have

found ourselves constrained to differ with Mr. Kamara's forceful submission that the Commercial Court has no jurisdiction to adjudicate land matters."

As I consider the parties' submissions in light of the above authoritative decision of the Court of Appeal, I find, in its totality, and as correctly argued by Mr Tumaini that, the first objection cannot stand. It has no merit and must be overruled. I thus hereby proceed to overrule it.

The second objection related to the issue of "***functus officio***." The issue is whether this Court is "***functus officio***". Both counsels for the Defendants have fielded submissions in support of that objection. For his party, Mr Akram submitted that, this Court cannot hear, determine and grant prayers number 1, 2 and 3 as prayed by the Plaintiff in the Plaint. In his view, such inability is based on the fact that, the same prayer was sought for and granted by this Court (**Phillip, J.,**) in course of execution of its judgement in **Commercial Case No.04 of 2019**. As such, he maintained that, the same Court cannot sit to do what the executing Court did.

In furtherance of his submission, Mr Akram submitted that, if anything different is to be done, the only option available is for the Plaintiff to approach the executing Court to show why the first attempt to execute the Decree failed and obtain the necessary orders. Indeed, that could be an option but not the only option as I shall discuss herein afterwards. Mr

Akram has relied on the case of **Didacus Wilson Chacha vs. Republic**, Misc. Criminal Application No.168 of 2021 (HC) (DSM) (unreported) to buttress his submissions and, contends that, currently this Court is "***functus officio***" and cannot grant the same orders it granted as an executing Court in this fresh suit.

It was a further submission by Mr Akram that, the genesis of this suit is the Order of this Court (**Mkeha, J.,**) in Misc. Commercial Appl. No.04 of 2021 (Objection Proceedings) in which this Court ruled in favour of the 1st Defendant herein, being an objector to the execution proceedings which were before this Court. Relying on **Order XXI Rule 62 of the Civil Procedure Code, Cap.33 R.E 2019**, he argued that, the present suit falls short of the conditions set out in that **Order XXI Rule 62** of the Code. In particular, Mr Akram contended that, the suit is instituted to establish, not the right of the Plaintiff over the disputed property, but the right of the 2nd Defendant.

For her part, Ms Gisabu the learned counsel for the 2nd Defendant was equally vocal. She submitted that, under the doctrine of "***functus officio***", the Court is barred from revisit a matter in a metric-based-engagement once it issues its judgement and decree. To support her contention, she relied on the case of **Telkom Kenya Ltd vs. John Ochanda**, (2014) eKLR where the Court of Appeal of Kenya held a view that, a final decision of the Court cannot be re-opened by itself.

Indeed that is a correct general legal position upon which the doctrine of "***functus officio***" is pegged.

Ms Gisabu contended further that, this Court, having pronounced its judgment and issued its decree in the previous suit, **Commercial Case No.4 of 2019** which the same Court decided with finality, cannot be asked to re-engage itself and establish the rights of the so-called "Plaintiff" as doing so goes contrary to the doctrine of Court being "***functus officio***", unless the Court is called upon to correct clerical errors or is engaged in consequential proceedings like execution proceedings.

Ms Gisabu submitted that, what ought to be done was to engage the executing Court instead of filing this fresh suit. As I stated here above, that could indeed be an option but not the only one. Relying on the Court of Appeal's decision in **Aero Helicopter (T) Ltd vs. F.N. Jansen** [1990] TLR 142, Ms Gisabu has submitted further that, the inherent powers of this Court under section 95 of the CPC cannot as well be invoked at will since such powers are invoked in a situation where the Civil Procedure Code has made no provision governing a particular matter at hand.

Besides, I should say that, that is absolutely a correct position of the law, and, if I may add, in exercising such powers under section 95 of the CPC, the Court is required to be cautious, and has to exercise them sparingly depending entirely on the facts and circumstances of each case.

premised under Order XXI Rule 62 of the CPC. A suit based on that provision of Order XXI Rule 62 of the CPC is altogether a fresh suit which the law has allowed that it be filed by a party against whom an order was made under Order XXI Rule 59 or Rule 60 of the CPC.

Essentially, Rule 57 to 62 of Order XXI of the Civil Procedure Code, Cap.33, R.E 2019 is a kind of Rules falling under one heading title, namely: "*Investigation of Claims and Objections*". Under such provisions, and in particular under Rules 57 to 61 of Order XXI of the CPC, the executing Court is entitled to make a summary enquiry so that the execution proceedings may not be unnecessarily delayed it being left to the parties concerned to have their rights determined by way of a regular suit.

Consequently, if a property is sought to be attached and a person claims to be in possession of it under a 'bona fide' claim of title, the court has to be satisfied that he has such a 'bona fide' claim. That is what this Court did in Misc. Commercial Appl. No. 04 of 2021.

On the other hand, if the investigating Court decides in favour of the objector, the decree-holder or the judgment-debtor will have to file a suit under Order XXI, Rule 62 to establish his claim that the judgment-debtor has an interest in the property. Rule 62 of Order XXI of the CPC provides that:

"Where a claim or an objection is preferred, the party against whom

an order in 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."

One of the cases which discussed Order XXI Rule 62 as the remedy available to a party be he the judgement-debtor or the third party objector is the case of **Kezia Violet Mato vs. National Bank of Commerce and 30Others**, Civil Appl. No.127 of 2005, (CAT) (Unreported). In that case, the Court of Appeal stated that:

".... where a claim or an objection is preferred, the party against whom an order is made has no right of appeal but may institute a suit to establish the right which he claims to the property in dispute, as provided for under Order XXI Rule 62 of the Civil Procedure Code. This position was also reiterated by the Court in the case of the Bank of Tanzania v. Devram P. Valambhia – Civil Reference No. 4 of 2003 (unreported)." (Emphasis added).

The recent decision of the Court of Appeal, in the case of **Hamis Bushiri Pazi and Others vs. Saul Henry Amon and Others**, Civil Appeal No.166 of 2019 (CAT) (DSM) (issued on 13th April 2022) did also made mention of Order XXI Rule 62 of

the CPC and the case of **Bank of Tanzania vs. Devram Vallambhia** (supra). In that later case, it was stated that:

".....it is abundantly dear to me that there is no right of appeal to the court once an objection to the attachment has been adjudicated upon. **The remedy open to the objector is to file a suit to establish the objection to the claim of the property in dispute.**"

(Emphasis added)

From the foregoing discussion, it follows that, the argument and objection that this suit is untenable as the Court is "***functus officio***" is misconceived and should as well be dismissed. In view of that, the same is hereby dismissed for lacking merits. Let me proceed to the 3rd and the 4th grounds of objections.

As regards the 3rd and the 4th objections, the learned Counsels for the Defendants have submitted that, the Plaintiff lacks "***locus standi***" to institute this suit and that, he lacks cause of action against the 2nd Defendant. For his part, Mr Akram contended that, according to paragraphs 4 and 5 of the Plaint, the Plaintiff's intention when she instituted this suit is to establish that the 2nd Defendant is the lawful owner of the properties in dispute, meaning that, the Plaintiff is establishing the rights of the 2nd Defendant over the disputed properties.

He submitted that, the 2nd Defendant has never authorised or granted any legal authority to the Plaintiff to make a claim over the ownership of the disputed properties on behalf of the 2nd Defendant. Relying on the case of **Khanan Said Aljabry vs. Nevumba Salum Mhando**, Land Case No.81 of 2021 (unreported), he concluded that, the Plaintiff lacks "**locus standi**" to institute this case.

For her part, Ms Gisabu approached the 3rd issue differently. According to her, the Decree referred to in this suit originated from the **Commercial Case No.4 of 2019** which was finally decided by this Court. She submitted that, under **Order XXI Rule 9 of the Civil Procedure Code, Cap.33 R.E 2019**, nowhere has the law stated that, should one fail to execute the decree the holder of it shall institute a fresh suit before the Court of inherent original jurisdiction to re-sit as an executing Court.

Citing the case of **John Mwombeki Byombalirwa** (supra) she was of the view that, the Plaintiff does not have sufficient interest in this second suit as the prayers sought in the Plaint fall short of establishing that interest. She also relied on the case of **The District Commissioner, Kiambu vs. R and Others, Ex-parte Ethan Njau** [1961] EA 109 where the Court expressed doubts regarding whether there had been clear demand for the relief sought. In view of all such cases, she maintained a view, therefore, that, the Plaintiff lacks "**locus standi**" given that, the success in the objection

proceedings filed by the 1st Defendant does not entitle any legal right and/or grant her qualifications to bring legal action against the 2nd Defendant seeking for the relief(s) sought in the Plaintiff.

As regards the **fourth objection**, which is about lack of cause of action against the 2nd Defendant, Mr Akram submitted that, the Plaintiff, in paragraphs 4, 5, 6, 7, 8, 11, 14, 15, 16, 17, and 18 thereof, reveals facts touching on the 2nd Defendant whom the Plaintiff wants be declared the owner of the properties as well as facts about the Decree in **Commercial Case No.04 of 2019** all of which are to the extent that the Plaintiff wants to attach those properties. In his views, all such stated facts do not disclose any cause of action in relation to the claim that the 2nd Defendant be declared the lawful owner of the properties in dispute.

He relied on the case of **John Byombalira vs. Agency Maritime International** [1983] TLR 1, at page 4, to expound on what a cause of action is all about and, submitted that, in all those facts pleaded by the Plaintiff, the same can only be proved by the 2nd Defendant and not the Plaintiff. Essentially, what Mr Akram is arguing is that, those pleaded facts can only be proved by the Plaintiff if the 2nd Defendant acknowledges them. Besides, he contended that, the facts regarding **Commercial Case No.04 of 2019** cannot be material or essential facts against the 1st Defendant who was never made a party to the said suit, i.e., **Commercial Case No.04 of 2019**.

Responding to the Defendants submission on those last two objections, Mr Tumaini submitted that, the Plaintiff has sufficient standing since the matters before the Court arose from objection proceedings. He submitted, that, the matters for consideration at hand are based on the right provided for under Order XXI Rule 62 of the CPC, and, that, whether the conditions set out under that provision have been satisfied or not are matters of evidence and cannot be adjudged at this stage.

In view of that, Mr Tumaini maintained that, all the arguments made in support of these objections were misconceived and the case of **Khanan Said Aljabry vs. Nevumba Salum Mhando** (supra) referred to in support of the objections was erroneously applied. He urged this Court to dismiss them with costs.

The Defendants counsels made rejoinder submissions on the last two objections as well reiterating their submissions in chief. In addition, Ms Gisabu submitted that, the present suit is attracting different remedies altogether against the 2nd Defendant and not claims on the released assets. Besides, she rejoined that, the decision made by this Court in Misc. Commercial Application No.04 of 2021 was procedurally and substantively fair and this suit should be dismissed as the Plaintiff has no capacity to sue the 2nd Defendant.

I have given a careful consideration on the last two objections as well. In my view, they both lacks merit and must

be overruled with costs. I hold so given that, the matters for consideration at hand are based on the right provided for under Order XXI Rule 62 of the CPC. As such, the Plaintiff being a party who is aggrieved by the Orders of this Court made under Rule 59 of the Order XXI of the Civil Procedure Code, Cap.33 R.E 2019, is entitled to file a suit by virtue of that provision. Besides, and, as correctly stated by the learned counsel for the Plaintiff, whether the conditions set out under that provision have been satisfied or not, those are indeed, matters of evidence which cannot be adjudged at this stage.

When all is said and done, this Court finds that, all preliminary objections raised by the Defendants are without merit and I hereby dismiss them with costs. The parties herein are ordered to proceed with the main suit on the date and time to be notified to them by the Court.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 17TH DAY OF JUNE 2022



HON. DEO JOHN NANGELA

JUDGE

17/06/2022