

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO 104 OF 2021**

**MEXONS ENERGY LIMITED.....PLAINTIFF**

**Versus**

**NMB BANK PLC.....DEFENDANT**

**RULING**

*Date of Last Order: 06<sup>TH</sup> June, 2022*

*Date of Ruling: 30<sup>TH</sup> September, 2022*

**NDUNGURU, J.**

This ruling is the result of the points of preliminary objections raised by Mr. Malimi the learned advocate representing the Defendant herein. As it stands, the learned advocate for the Plaintiff, Mr. Welwel had filed a suit against the Defendant for a breach of contract for sale and/or specific performance for handing over property on Plot No. 230, Block A, Mafinga Urban Area, L.O 128291, CT No. 2889-MBYLR, which was sold by way of auction.

The preliminary objections as raised by the learned advocate for the Defendant, Mr. Malimi, are as hereunder;

1. The suit is being premised on the alleged breach of contract for sale and/or specific performance for handing over of property on Plot No. 230, Block A, Mafinga Urban Area, L.O 128291, CT. No. 2889-MBYLR. Whereas the property is the subject of Court proceedings in Civil Appeal No. 332 of 2017

2. That the suit is premature for its subject matter is subject of Court proceedings in Civil Appeal No. 332 of 2017.

Mr. Malimi in his submission supporting the points of preliminary objections stated that, this suit is not maintainable in that its subject matter was a subject of litigation in another suit which was concluded and now is in the Court of Appeal of Tanzania vide Civil Appeal No. 332 of 2019 and in that regard, he added, that this honorable court cannot entertain this suit in that the same matter is being at the Court of Appeal in Iringa.

The learned advocated submitted furtherly that, it is clear that the Plaintiff is seeking enforcement or rather deliverance of vacant possession of landed property on Plot No. 230, Block A, Mafinga Urban Area, L.O No. 128291, CT No. 2889 MBYLR (landed property) bought from a public auction and an agreement thereto.

However, he added, the very landed property was the subject matter of

litigation in Land Case No. 08 of 2017 (Land Case) at the High Court of Tanzania at Iringa between **Hussein Amran Kangesa T/A Kangesa Service Station and the National Microfinance Bank Limited** (whereon the name was changed to NMB Bank Plc) the Defendant in the current suit. In the said litigation, he continued, the Plaintiff thereof successfully challenged the auction of the landed property as the High Court, Iringa Registry in its judgement declared the auction a nullity, and that the landed property still is the property of the Plaintiff therein. Mr. Malimi proceeded that, the Defendant therein (NMB Bank Plc) was aggrieved and appealed to the Court of Appeal of Tanzania Iringa Sub Registry where it was registered as Civil Appeal No. 332 of 2019, the Appeal which is still pending at the Court of Appeal.

It is Mr. Malimi's submission that, the Defendant has nothing to sell to the Plaintiff herein considering the outcome of the aforesaid Land Case as the auction was declared a nullity. At this juncture, he added, there is no any contractual sell between the Plaintiff and the Defendant, and that any declaration to be issued by this Honorable Court such as the Defendant to deliver vacant possession to the Plaintiff of the landed property as pleaded in the plaint will be a nullity too.

However, Mr. Malimi concedes that the Plaintiff was not a party to the

said Land Case No. 08 of 2017, but as long as the subject matter was the landed property purchased from the Defendant herein by way of auction, then the Land Case binds the Plaintiff herein. The excuse brought forthwith that, the Plaintiff had all along claimed not to be aware of the proceedings and judgement in the said Land Case, plus the appeal thereof, Mr. Malimi insisted that the proper step was for the Plaintiff to stay within the context of the Land Case and or appeal but not to open a new suit for it is barred by res judicata. Therefore, the Plaintiff who was a necessary party in the Land Case ought to have been joined or be impleaded in the proceedings before its determination, Said Mr. Malimi as he referred this Court to the Case of **Constantine B. Assenga vs Elizabeth Peter & 4 Others, Civil Appeal No. 70 of 2019, CAT at Dar Es Salaam** (Unreported). He added that, as the Plaintiff is interested in pursuing its rights, then has to seek revision of the judgement of the Land Case, again Mr. Malimi referred this Court to the case of **Victoria Real Estate Development Limited vs Tanzania Investment Bank & Others, Civil Revision No. 175 of 2015, CAT at Dar Es Salaam**. (Unreported)

Conclusively, Mr. Malimi submitted that this suit be stayed pending the determination of the Civil Appeal, considering that the Plaintiff has no locus

stand to sue the Defendant in this suit at hand as long as the auction was declared a nullity. He then answered by citing Section 8 of the Civil Procedure Code, Cap 33 R.E 2019 that this suit cannot be stayed as the Land Case was already determined and the results of the Civil Appeal has various possibilities in its determination which could make this suit in hand a res judicata, and he urged me to see the case of **Peniel Lotta vs Gabriel Tanaki & Others [2003] T.L.R 312**. He submitted that, if the Defendant is successful in the Civil Appeal, then the auction will be reinstated and the Plaintiff will be the purchaser of the landed property or highest bidder, but such eventuality cannot be predicted by this Court in this suit and also the extent of the success. Even worse, it is the other side of the coin that if the Defendant loses the Civil Appeal which will eventually maintain the judgement in the Land Case and effectively close the doors for the Plaintiff to enforce its alleged claims as a purchaser of the landed property. Therefore, Mr. Malimi laid his submissions by insisting that in view of the uncertainties of the end result of the Civil Appeal, to stay this suit will be an academic endeavor and will serve no practical purpose, therefore he prays for the objections to be sustained and this suit to be struck out with costs.

In responding to the submissions made by the advocate for the

Defendant, Mr. Welwel the learned advocate representing the Plaintiff submitted that, the suit filed in this Court is neither a res judicata nor a res sub judice. He insisted that it has not been filed prematurely too and that it is the Plaintiff's case that the Defendant is in breach of the contract for sale by refusing and/or neglecting to give vacant possession of the suit property to the Plaintiff, and that this suit seeks specific performance of the contract for sale and payment of damages.

Regarding this suit not being res judicata, Mr. Welwel referred this Court to the case of **Peniel Lotta vs Gabriel Tanaki & Others [2003] TLR 312** where the Court of Appeal had discussed Section 9 of the CPC and made a landmark decision on page 319, where he went ahead and quoted the said decision as follows;

*"The scheme of Section 9, therefore, contemplates five conditions which, when co-existent will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit (iv) the Court which decided the former suit must have been*

*competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."*

Mr. Welwel insisted that, the Plaintiff was not party in the Land Case and still it is not party to the Civil Appeal of which it is not disputed. He added, the Defendant's argument is that the Plaintiff is covered by the phrase "*.....or any of them claim litigating under the same title....*" Whereas, he submits that the Plaintiff and the Defendant have separate and distinguished interests and rights, and that for one to be litigating under the same title it has to be established that they both have "*common interest in the subject matter*".

The learned counsel submitted further that the rights of the Plaintiff herein are those of a *bona fide* purchaser for value, and that the Defendant in the Land Case was not litigating *bona fide*, it is the Plaintiff's case that the Defendant was at all material time operating in bad faith. Mr. Welwel added that it is beyond rationale that the sale auction took place before the Land Case was filed, that at the time of filing, the Plaintiff was (and remains) the owner of the Landed Property, and to that effect, the Defendant had no title to defend and therefore, it cannot be said that the Plaintiff and the Defendant were suing under the same title as claimed by the Defendant, whereby, when a necessary party is not joined, that action is unlawful. He insisted that it is

impossible to adjudge rights of the Plaintiff over the suit property in suit in which it was not made a party, that, such proceedings are a nullity since the right to be heard is natural, inalienable and constitutionally guaranteed by Article 13(6)(a) of the Constitution of the URT, 1977.

Mr. Welwel submitted that in preferring this PO the Defendant desires to benefit from its own wrong doing. That, it fraudulently concealed the Land Case from the Plaintiff whilst fully aware that it sold the landed property to the Plaintiff well before the said land case was filed, and that the land case was incompetent *ab initio* as such, he insists that this case is not *res judicata*.

In addition to that, Mr. Welwel in dealing with the PO that this suit is res sub judice/pre mature, he submitted that for suit to be pre mature, the Defendant must show that there are certain conditions that the Plaintiff was required by law or contract to have met. That, a suit without meeting those pre conditions will be pre mature. He added, that in the Defendant's submissions there is no argument for any conditions that the Plaintiff did not meet for the suit to be ripe, in the absence of those conditions, he believes this limb of objection should be rejected, and he referred this Court to the case of **Kawe Apartments Limited vs Exim Bank of Tanzania Limited, Land Case No. 146 of 2020 HC, (Unreported)**.



Mr. Welwel continued that the pending Civil Appeal case may have results with bearing on the Plaintiff's rights. He submitted that it is their submission that the Plaintiff is not a party to both the proceedings in the High Court and the pending appeal, as a result its rights cannot be affected since it is not heard. He proceeded that, it is not argued that the Plaintiff is the owner of the landed property, therefore this suit is for specific performance and payment of damages, whereas both of these matters are not the subject of the Civil Appeal No. 332 of 2019 as the Plaintiff is not a party to the said Appeal and the proceedings under it, therefore the instant suit is neither res sub judice nor res judicata.

In winding up, Mr. Welwel submitted that this is a fresh suit and has not been determined by any court, and not an academic endeavor due to the uncertainties of the end result of the Civil Appeal case as submitted by the Defendant. He added that, his side has repeatedly shown that the Plaintiff is not a party to the proceedings forming basis of the Preliminary Objection that they have shown the law that any proceedings purporting to determine the Plaintiff's rights without joining the Plaintiff is a futile exercise whose outcome is certainly a nullity, in other words where a party is condemned unheard, that condemnation is a nullity, nothing less, nothing more. Therefore, Mr. Welwel

prays for the objections to be rejected and the Plaintiff be awarded costs of defending these unfounded preliminary objections raised mischievously.

In rejoinder, Mr. Malimi submitted that the Plaintiff has referred the relationship between the parties herein as a contractual one based on the sale by way of public auction of the property in dispute. He added, as they submitted in their submission in chief, the said contractual relationship has already been terminated by a decree of this Court at Iringa via Land Case No. 08 of 2017 for being nullified, he insisted that any claims arising from that public auction, are legally a nullity notwithstanding any execution of conveyance of documents.

Mr. Malimi furtherly submitted that it is not disputed that as the instance of the Defendant, a public auction was held in respect of the landed property in dispute, whereas he added, the gist of these objections is the existence of the judgement in Land Case No. 08 of 2017 which nullified the auction of the landed property in dispute.

In responding to this suit neither being a *res judicata* nor a *res sub judice*, Mr. Malimi mostly reiterated what he had submitted in chief. He however submitted additionally that the test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of

action which was the foundation of the former suit or proceedings. He continued that, the cause of action in the Land Case was the disposal of the landed property in dispute, similarly in this suit at hand that the same cause of action is being sought to be litigated upon. That, they humbly submit that the suit be held *res judicata* and referred this court to this High Court Case of Felician Gredo Simwela vs. Quamara Massoud Battez & Another, DC Civil Appeal No. 10 of 2020.

The learned counsel concluded that it is not correct to argue that the Land Case No. 08 of 2017 was incompetent *ab initio*. He also submitted that this court is not a proper forum to adjudicate again matters that have been dealt with in the Land Case. These matters, he said could easily been dealt by this Court in Iringa if moved by the Plaintiff and not for a fresh suit and asking the court to overlook its own decision. He insisted that, this is premature because this Court at Iringa in the Land Case declared the contract giving rise to this suit as nullity *ab initio*, whereas the said decision is subject of an appeal which is still pending at the Court of Appeal of Tanzania. The learned counsel added that the Defendant's appeal is premised on the legality of the contract which is also the basis of the Plaintiff's suit in this honorable court, whereas the Court of Appeal decides either way, parties or any person claiming

litigation on that title will have to wait for the determination of the appeal before initiating any other litigation over the said contract, and that this suit is prematurely being preferred before this court hence ought to be struck out with costs.

After reading the submissions from both sides, the main **determinant issue here is whether this suit has been prematurely filed in this Court.** This issue tallies with the second point of objection as raised by the Defendant herein, therefore that point alone suffices to calm down this battle and would not take much of this Court's precious time.

Indeed, the **subject matter** is the landed property on Plot No. 230, Block A, Mafinga Urban Area, L.O 128291, CT. No. 2889-MBYLR. Whereas, both camps in this suit do not dispute that the Plaintiff herein had bought the plot by way of auction which was conducted by the Defendant. Again, both camps do not dispute that ever since the Plaintiff bought the said plot, was never handed over vacant possession of the same and hence this suit in this Court. In addition to that, both camps also do not deny that there was a Land Case No. 08 of 2017 at the High Court at Iringa and the parties were one **Hussein Amran Kangesa T/A Kangesa Service Station vs The National Microfinance Bank Limited** (whereon the name was changed to NMB Bank

Plc), whereas the decision challenged the auction done by the Defendant therein and the Plaintiff therein was successful. Lastly, both camps do not deny that there is a pending case at the Court of Appeal Iringa Registry, filed by the Defendant (NMB Bank PLC).

Nevertheless, the Plaintiff insists that she was not a party in those litigations and that the reliefs sought by the parties in those litigations, are not the reliefs she seeks in this suit at hand, and therefore the preliminary objections as raised should be dismissed.

I am fortified to keenly read the provision of Section 9 of the Civil Procedure Code, Cap 33 R. E. 2019 whereas upon reading it, I found best to reproduce it as here under that;

*"No court shall try any suit or issue in which the matter directly and substantially in issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

Through the captioned citation, the property on Plot No. 230, Block A, Mafinga Urban Area, L.O 128291, CT No. 2889-MBYLR is the subject matter in the case at hand, meaning the Plaintiff seeks for vacant possession and payment of damages for her failure to possess the subject matter as early as possible, and that the Plaintiff sues the Defendant because, the latter sold to the former the subject matter by way of auction.

Nevertheless, the Defendant herein had been sued for illegal auction by another party litigating under the same title of possessing the subject matter, whereas the Defendant herein lost the suit and hence appealed to the Court of Appeal of Tanzania, in the case registered as Civil Appeal No. 332 of 2019 and it is still pending as of now.

Moreover, the outcomes of litigations are well known, if in the said Appeal, the Defendant loses again, means that it has no property to offer the Plaintiff herein vacant possession, but if she succeeds, means that vacant possession of the subject matter could be offered to the Plaintiff herein *inter alia*.

In view of the above reasoning, I find that the best approach the Plaintiff could have opted for, is being made part of the litigations specifically the Land Case No. 08 of 2017 which was directly affecting his rights of

possessing the subject matter rather than filing this suit in this court. Whereas, if the Plaintiff succeeds in this suit, the Defendant would have no property to grant vacant possession for as it stands, the decision of Land Case No. 08 of 2017 has nullified the auction and maintained that the other party to that suit is still the rightful owner, and the appeal to that decision is still pending in the Court of Appeal.

As it was held by my dear learned brother **Nangela J**, in the case of **Jovet Tanzania Ltd vs Bavaria N.V (Misc. Commercial Cause 39 of 2019)** Unreported, that;

*"The Petition has rather come before this Court prematurely and should be struck out."*

Nevertheless, the Court that nullified the auction and restored possession of the Landed Property to **Hussein Amran Kangesa T/A Kangesa Service Station**, has concurrent jurisdiction with this Court. I am inclined to remind litigants that this Court being a Division of the High Court, is just one of the several Divisions that were established to provide positive climate of confidence to litigants. It is noted that, the Commercial Court is intended to resolve disputes of a commercial nature expediently, effectively and efficiently. To that effect, amendments were made to the High Court

Registries Rules in 1999, by virtue of GN 141 of 1999. Rule 5A of the said Rules provides as follows: -

*"There shall be a Commercial Division of the High Court within the registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief Justice in which proceedings concerning commercial cases may be instituted."*

From the above analysis, I am in full agreement with the learned counsel for the Defendant, Mr. Malimi, that, this suit has been prematurely filed in this Court. The consequence thereof is for it to be struck out. Therefore, I sustain the Defendant's second point of preliminary objection by declaring it meritorious.

In view of that, this suit is hereby struck out. I make no orders as to costs.

It is so Ordered.



*D. B. Ndunguru*  
**D. B. NDUNGURU**

**JUDGE**

**30/09/2022**