

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 120 OF 2017**

**GRACE FURAHA LUGOE.....PLAINTIFF**

**VERSUS**

**FURAHA NGEREGERE LUGOE.....1<sup>ST</sup> DEFENDANT**

**INTERSALES (T) LIMITED.....2<sup>ND</sup> DEFENDANT**

**ECOBANK TANZANIA LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**KALUNDE, J**

The plaintiff, filed a suit against the defendants, claim for orders nullifying the Mortgage Deed and subsequent Deed of Settlement entered between the defendants. The 3<sup>rd</sup> defendant filed their written statement of defence and logged a Notice of Preliminary Objection on which I am called upon to determine in this ruling.

The 3<sup>rd</sup> respondent's notice of preliminary objection is couched in the following word:

*"(a) That the honourable Court lacks jurisdiction to try the plaintiff's claims."*

By consent the court received arguments for and against the Preliminary objections by way of written submission the substance of which will be considered in the course of this ruling.

For a better understanding and appreciation of the essence issue, I find necessary to narrate the factual background albeit briefly. Between various dates in 2011, the 2<sup>nd</sup> defendant secured various credit facilities in the form of short-term loans from the 3<sup>rd</sup> defendants. The first facility of the equivalent amount of Tshs. 200,000,000.00 was issued by a Facility Letter-Stock Inventory Financing dated 05<sup>th</sup> February 2011, it was followed by a credit facility dated 17<sup>th</sup> August 2011 for an equivalent amount of Tshs. 80,000,000.00 (outstanding from the Facility Letter dated 05<sup>th</sup> February 2011) and a new Facility Letter valued at Tshs. 210,000,000.00. Subsequently, on 16<sup>th</sup> September 2011 another facility letter was issued for an equivalent amount of Tshs. 210,000,000.00. (outstanding from the Facility Letter dated 16<sup>th</sup> September 2011) and a new Facility Letter valued at Tshs. 370,000,000.00. Both facilities were secured, *inter alia*, by a first ranking legal mortgage in favour of the Bank over the property with CT. No. 88824 located on Plot. No. 1314, Block B, Ubungo South Area, Kinondoni Municipality in Dar es Salaam, which was registered in the names of Ephraim Samwel Magula (1<sup>st</sup> Defendant) and Happy Kaitira Magula as joint owners.

The 2<sup>nd</sup> defendant (principal obligor) failed to honor her the obligations under the facility letters; it would appear that the 3<sup>rd</sup> defendant issued a demand notice to the 2<sup>nd</sup> defendant (the principal obligor) and 1<sup>st</sup> defendant (the guarantor) on 21<sup>st</sup> February 2013. On the 17<sup>th</sup> May, 2013 the 2<sup>nd</sup> defendant filed a civil case against the 3<sup>rd</sup> defendants at the High Court of Tanzania, Dar es Salaam, Registry which was registered as **Civil Case No. 97 of 2013**, seeking, *inter alia*, for order of appointment of an independent auditor to carryout account reconciliation in view of determining the actual amount which the plaintiff owes the 3<sup>rd</sup> defendant.

On 01<sup>st</sup> March 2016, before the conclusion of the trial in **civil case No. 97 of 2013**, the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendants settled the case and signed a Deed of Settlement which was filed to before the court on 04<sup>th</sup> March 2016. The 2<sup>nd</sup> defendant failed to implement the terms of the Deed of Settlement as a result the 3<sup>rd</sup> defendant was left with no option than to file for Application for Execution of the said Deed of Settlement which was allegedly recorded as a decree of the Court. Aggrieved by the Deed of Settlement which had included an allegedly matrimonial house located at plot No. 433, Block A, Makongo Area, Kinondoni Municipality, Dar es Salaam with CT. No. 78482 in the names of Furaha Ngeregere Lugoe, the plaintiff herein filed a land case, before this Court, against the defendants which was registered at Land Case No. 120 of 2017, seeking the orders I have already referred to above.

The substance of the defendant's submissions through Mr. HERIELI MUNISI, learned Advocate is that the this Court lacks jurisdiction to try the

Plaintiffs' Claims in the presence of the Decree of the High Court of Tanzania, Dar es Salaam Registry in Civil Case No. 97 of 2013 allegedly issued by **Hon. Prof. Ruhangisa J** on 5<sup>th</sup> April 2016. He argued that it was the deed of settlement signed between the defendants which was included in the deed of settlement that resulted into the Court decree. He wanted this Court to take a judicial notice of the said decree. Citing the authority in **MEIS Industries Ltd vs Mohamed Enterprise & 2 others, Civil Reference No.2/2011 at pg. 5&6 [unreported]**, Mr. Munisi argued that this Court cannot nullify or overrule a decree of the Court of the same level adding that the Court cannot issue or grant any order as prayed by the Plaintiff.

In bolstering his argument, Mr. Munisi submitted that once a deed of settlement has been recorded by a Court under O. XXIII r. 3 of **Civil Procedure Code Cap. 33 RE 2019**, an aggrieved party cannot challenge the decree by filing a separate fresh case in the same Court. He referred us to the Court of Appeal decision in **Arusha Planters and Traders Ltd. & 2 Others vs Euro African Bank (T) Ltd., Civil Appeal No 78 of 2001 pg. 15 & 16 (unreported)**. In his opinion the plaintiff should have filed objection proceedings to challenge the decree citing the case of **Ephrahim Samwal Mangula vs. Intersale (T) Ltd & 2 other by Hon. I. C Mugeta J at Pg 4 (unreported)**. He concluded by praying that the application be dismissed.

On his part, Mr. SAMUEL SHADRACK NTABALIBA learned Advocate for the Plaintiff anchored his submissions on the premise that the Plaintiff was not a party to the purported Civil Case No. 97 of 2013. He added further that

the purported deed of settlement which allowed her house to be sold in case of default was procured by fraud. Citing the Court of Appeal decision in **Said Salim Bakhressa & Co. Ltd vs VIP Engineering and Marketing Ltd. (1996) 309 (unreported)**, Mr. Ntabaliba implored that a decree that followed was not a decree properly called and as such could be challenged by a separate suit. Distinguishing the decisions in **MEIS Industries Ltd vs Mohamed Enterprises (supra)** and **Arusha Planters & Traders Ltd & 2 Others vs. Euro African Bank (supra)**, Mr. Ntabaliba argued that while the decisions in the cases cited above were legal, the present case involved a decree procured by fraud. He invited the Court to dismiss the objection on the ground that the Deed of Settlement entered between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was illegal and the only way to challenge it was instituting a fresh suit now that he was not a party to the said proceedings.

In rejoinder, Mr. Munisi, reiterated his submission in chief and added that, not being a party in the Civil Case No.97 of 2013, the plaintiff had an opportunity to challenge the decree by filing objection proceedings at High Court of Tanzania, Dar es Salaam District Registry. He also added that there were particulars pleaded or submitted on the alleged fraud. In distinguishing **Said Salim Bakhressa vs VIP Engineering (supra)** he argued that the context in that case were distinguishable from the issue at hand. He reiterated his prayer that the matter be dismissed.

Having examined the rival submissions by the counsels for the defendant and plaintiff, let me now turn to the merit of the submissions. I agree with Mr. Munisi that, the position in our jurisdiction is settled once a

deed of settlement has been recorded by the Court under Order XXIII Rule 3 of Civil Procedure Code one cannot challenge the same by instituting a fresh suit in the same Court as that would not augur with good administration of justice. I am inspired in this view by the binding wisdom of **Hon. Kija, JA** in **Arusha Planters and Traders Ltd. & 2 Others vs Euro African Bank (supra)** where the Court of Appeal said:

*"...for a Commercial Division of the High Court to declare a consent settlement recorded by the Main Registry of the High Court null and void thereby vacating it as prayed for in prayers (a) and (b), would not augur with good administration of justice as it would give a false impression that a Commercial Division of the High Court can overrule a decision made by the High Court Main Registry, For the foregoing reasons, we agree with Prof. Mwaikusa that in the circumstances of the instant case, **it was not proper to challenge the consent judgment by way of instituting a separate suit.**" [emphasis mine]*

In the present case, there is no dispute that the plaintiff was not a party to Civil Case No.97 of 2013 nor was she, certainly, a party to the deed settlement that allegedly placed her matrimonial home as security. The plaintiff has also never disputed the fact that there was decree issued on the 5<sup>th</sup> March, 2016, upon which the 3<sup>rd</sup> respondent filed an application for execution of decree under Order XXI Rule 9 and 10 (2) of CPC which was filed at High Court of Tanzania, Dar es Salaam District Registry on 16<sup>th</sup> December, 2016. Her only argument is that the deed settlement and the subsequent decree was procured by fraud. However, the plaintiff has never pleaded or submitted any particulars on the alleged fraud. Her main case is anchored on paragraph 10 of the plaint where she states, *"That the Deed of*

*Settlement was entered without involving the plaintiff who is the legal owner of the house subject to the said Deed of Settlement". It is settled in our law that, where the issue involved is whether the property was or was not, at the time of attachment, in the possession of the judgement debtor or some person in trust for him, or that being in the possession of the judgement debtor at that time, it was so in possession, not on his own account or as his own property but on account of or in trust of some other person, the proper forum to resolve the issue to file an application under Order XXI Rule 57 (1) of CPC. I am unmoved with this line of argument.*

Assuming there was fraud, which as I have held none was established, I am not convinced that the High Court of Tanzania, Dar es Salaam District Registry was precluded from making such finding and making the necessary orders in terms of the powers under Order XXI Rule 57 (1) of CPC. The provision reads:

*"57.-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, **the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:**" [Emphasis Mine]*

In view of the provisions of under Order XXI Rule 57 (1) of the CPC, the plaintiff could have still filed objection proceedings at the High Court of Tanzania, Dar es Salaam where as an objector she was supposed to "*adduce evidence to show that at the date of attachment had an interest in, or was possessed of the property attached*" as was held in **Nyanza Distributors**

**Co. Ltd. vs. Geita General Stores and 5 Others (1977) LRT No. 2.** The Court could have made an investigation of the claims as if the plaintiff was a party to that suit.

It must be underlined at this juncture that, having discovered that there was a decree of this Court, and execution proceedings were commenced, in accordance with Order XXI Rule 57 (1) of CPC, any person, including the plaintiff, who had some interest in, or was possessed of, the property sought to be attached, could have filed, in the same Court, an application objecting to the attachment. In **Kangaulu Mussa vs Mpunghati Mchodo [1984] TLR 348, Lugakingira, J** (as he then was) held that

*"The statutory rule is that **any person aggrieved by the execution of a decree may object to the court which passed the decree and that covers the plaintiff.** There should also be some order and sanity in the institution of proceedings. Where a matter has started in one court it is proper for that matter and the resultant effects to be concluded in that court."* [emphasis mine]

Mindful of the above position, I must say that good administration of justice dictates that there must, indeed, subsist some level of order and sanity in the institution of proceedings. Where the law requires that a matter has to be started and concluded in one court it is proper for that matter and the resultant effects to be concluded in that court. In this case, instead of instituting a fresh suit at this Court, the plaintiff ought to have filed objection proceedings at the High Court Dar es Salaam.



For all the reasons set out above, I agree with Mr. Ntabaliba that this Court is *functus officio*. I uphold the preliminary objection.

I accordingly dismiss the suit with costs.

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**S. M. KALUNDE**

**JUDGE**

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**09/04/2020**