

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 389 OF 2017

1. METTEUS CAESAR

**2. METTERPLAN INTERNATIONAL
COMPANY LIMITED** } **PLAINTIFFS**

VERSUS

1. SAFINA HUSSEIN MSUYA


2. STANBICK BANK (T) LIMITED
3. ADILI AUCTION MART LTD } **DEFENDANTS**

RULING

S.M KALUNDE, J:-

This ruling relates to preliminary objection on points of law raised by the counsel for the 1st defendant. The preliminary objections were that:

- (a) The Court has no jurisdiction to entertain the suit in view of **section 38 (1) of the Civil Procedure Code, Cap. 33 of R.E. 2019;** and
- (b) In view of Land Application No. 109 of 2014, the present suit is ***res judicata***.

The merits or otherwise of the preliminary objections was argued through written submissions, which were dully filed in 

compliance with Court orders. Submissions of the 1st defendant were drawn and filed by **Mr. Makubi Kunju Makubi**, learned advocate and those of the plaintiff were drawn and filed by **Mr. Samwel S. Nyari**, learned advocate.

In support of the first limb of the preliminary objection, Mr. Makubi argued that looking at the plaint, particularly paragraphs 14, 15, 16, 17, 18 and 19, the plaintiff appeared to be challenging the execution proceedings in **Misc. Application No. 424 of 2017** which was executing **Land Application No. 109 of 2014**, both of which were determined by the District Land and Housing Tribunal for Kinondoni at Mwananyamala ("**the Tribunal**"). In accordance with Mr. Makubi, the plaintiff appeared to be distressed by the auctioning of **Plot No. 302 Block B, Bahari Beach** in execution of Misc. Application No. 424 of 2017. As such, the counsel reasoned that, the Court has no jurisdiction to entertain the matter since the appropriate cause of action for the plaintiff was to challenge the execution before the Tribunal.

To bolster his view he cited **section 38 (1)** of the Civil Procedure Code, Cap. 33 of R.E. 2019 ("**the CPC**") and unreported decision of this Court decision in **Mkono and Company Advocates vs. Baobab Properties Ltd and 2 Others**, Land Case No. 165 of 2019. Further to that, Mr. Makundi referred this Court to a textbook titled **Civil Procedure, 5th Edition, 2003** at page 450. by **C.K. Thakwani** where the author explained section 47 of the



Indian Civil Procedure Code which is *parimateria* to **section 38 (1)** of the CPC.

In the second point of objection, Mr. Makubi argued that the same subject matter and the same parties were involved in **Misc. Application No. 424 of 2017** which was executing **Land Application No. 109 of 2014** at the Tribunal. He added that the suit at the tribunal was finally determined and according to section 9 of the CPC no court is allowed to try the matter. To support his view he referred the Court to the case of **George Shambwe v Tanzania Italian Petroleum Co. Ltd.** () [1994] TZHC 9; (21 July 1994 TANZLII) where this Court (**Hon. Chua, J** as he then was) held:

"I should reiterate that for res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties, but it must also be shown that the matter was finally heard and determined by a competent court."

Mr. Makubi added that upon default in honoring the settlement in Land Application No. 109 of 2014, an application for execution registered as Misc. Application No. 424 of 2017 was filed to execute the said decision. He reasoned that having finally determined the matter to its finality, the present suit was thus filed in contravention of section 9 of the CPC. Mr. Makumbi added that

section 9 of the CPC intended to put an end to litigations and bar parties from re-opening cases that have been finally determined by courts of competent jurisdiction. To support this view, he cited the case of **Paniel Lotta v Gabriel Tanaki and Others** [2003] T.L.R 312 and **Karshe v Uganda Transport Co.** [1997] EA 774 Pg 777.

On account of the above two points of objection, the counsel invited the Court to dismiss the suit with costs.

Responding to the first point of objection Mr. Nyari submitted that the counsel for the 1st defendant failed to identify an exact point of law to be determined in the first point of objection. He reasoned that an examination of the contents of the plaint meant that this point required proof and courts analysis for its determination. To support his view he cited the case of **Mukisa Biscuits Manufacturing Company LTD vs. West End Distributors LTD** (1969) EA 696. At page 700 whereby **Law J.A** observed as follows:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."

Further to that, at page 701 the president of the defunct East Africa Court of Appeal, **Sir Charles Newbold P.** had this to say:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."


In relation to the question of *res judicata*, Mr. Nyari argued that the counsel for the 1st defendant failed to establish whether Land Application No. 109 of 2014 at the Tribunal involved the same parties, litigating under the same capacities over the same subject matter involved in the present suit. He argued that, if the 1st defendant wanted to prove that the present suit is *res judicata* to Land Application No. 109 of 2014 at the Tribunal, they should have presented a copy of the decision of the Tribunal. The counsel reasoned that what the counsel for the 1st defendant did was to raise mere allegation and not a point of law. He concluded that the point did not meet the requisite criteria of a preliminary objections on a point of law as enumerated in **Mukisa Biscuits** (supra).

Further to that, Mr. Nyari submitted Civil Case No. 242 of 2016 at the Tribunal did not involve the 1st and 3rd defendants as it was filed against the plaintiffs and 2nd defendant only. He argued that the subject matter involved was different from the one involved in the present case. to that end, he argued that the requirements of re

judicata under section 9 of the CPC were not present in the present case. By way of conclusion Mr. Nyari prayed that the preliminary objections on points of law be overruled with costs.

On 25th November, 2020, when parties appeared before the Court for necessary orders, I brought to the attention of the parties whether the plaint filed by the plaintiff had complied with the requirements of Order VII rule 1 (e) of the CPC. On that note, I invited the counsel for the parties to address the Court on the subject. I made that order so that the compliance or non-compliance of the mandatory provisions of o. VII r. 1 (e) should be considered in the composition of the ruling. I did so in consideration of the fact that the present suit was an old and that it was pertinent to determine all the issues between the parties in the earliest possible time so as to meet the ends of justice and serving the time and cost of the parties as well as the Court.

Upon deliberation in Mr. Nyali was quick to admit that the plaint lacked facts necessary to disclose the cause of action. He went further to make a prayer for the withdrawal of the suit without costs under o. XXIII r. 1 (2) of the CPC. On the other hand, Mr. Makubi objected to the prayer for withdrawal of the suit citing that there were authorities that restricted amendment of pleadings after mediation. However, none of the authorities were presented before the Court. In the alternative, Mr. Makubi argued that the should the suit be withdrawn, he should be awarded costs. He cited the provisions of o. XXIII r. 1 (2) of the CPC. Mr. David, counsel for the




2nd defendant, also objected to the prayer for withdrawal, instead he insisted the suit be struck out with costs on the basis of the two points of the objections raised by the 1st defendant.

Rejoining on the subject, Mr. Nyali argued that, the plaintiff prayer was not to withdraw the suit with a view to amend, his view was that the prayer was made under o. XXIII r. 1 (2) of the CPC which allowed the suit to be withdrawn with liberty to refile. He thus insisted the matter be withdrawn.

I have dispassionately considered the submissions made by the parties, I will now proceed to determine on the merits or otherwise of the same. Since the jurisdiction of the Court has been called into question, I propose to start with that issue.

Indeed section 38 (1) of the CPC requires that all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree. Further to that, the section bars other the issues to be treated in a separate suit. The said section reads:

*"All **questions** arising between **the parties** to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."* [Emphasis mine]

The rationale of this section is highlighted by **Sir Dinshaw Fardunji Mulla**, in his book **The Code of Civil Procedure** 

Nineteenth Edition, Volume 1 where the at page 651 the author was explaining section 47 of **the Code of Civil Procedure** which is *parimateria* to section 38 (1) of the CPC. The author states:

"It is well settled that no suit will lie on an executable judgment. The only remedy on such a judgment is by way of execution. The section prohibits any relief being granted in a separate suit which will interfere with the conduct of proceedings by the court executing the decree. The section lays down the principle that matters relating to the execution, discharge or satisfaction of a decree and arising between the parties including the purchaser of a sale in execution should be determined in execution proceedings and not by a separate suit. It matters not whether such a question arises before or after the decree has been executed. The object of the section is to provide a cheap and expeditious procedure for the trial of such a questions without recourse to a separate suit and to check litigation."

In accordance with **Mulla** (supra) for section 38 (1) to apply two conditions must be met. First, there must **"questions"** arising from the execution, discharge, or satisfaction of the decree. **"The parties"** involved in the question must be the parties to the suit or their representatives. In relation to that the author states, at page 651



*"On the other hand , **the conditions which bar a separate suit must not be lost sight of.** This conditions refers:*

(a) to the questions; and

(b) to the parties.

The questions must relate to the execution , discharge , or satisfaction of the decree. The parties must be the parties to the suit or their representatives. If both these conditions are fulfilled, the question must be determined in execution proceedings and a separate suit will be barred."
[Emphasis mine]

Mindful of that distinction, the issue for my determination under this point is whether the two conditions have been met, that is to say, whether there are "**the questions**" relating to execution, discharge or satisfaction of the decree passed in **Land Application No. 109 of 2014**; and that present "**the parties**" are similar to those in **Land Application No. 109 of 2014**.

Before examining the whether there are "**the questions**" relating to execution, discharge or satisfaction of the decree, I think it would be worth to reproduce the substance of the plaintiff claim as established in his plaint. For ease of reference I will start with paragraphs 8 through to 18 of the plaint:

"8. That, sometimes in 2014 the second plaintiff mortgaged the house registered in the name of the first plaintiff to secure a loan of Tshs. 60,000,000 from the 2nd Defendant with

conditions that the loan should furnish within three years.

- 9. That, until last year the loan secured plus interest accrued to the tune of Tshs. 80,000,000.*
- 10. That, the second plaintiff furnished a loan every month without fail as it was agreed with the 2nd Defendant. Until April this year the second plaintiff managed to repay the loan to the tune of Tshs. 52,000,000/=.*
- 11. That, upon payment of the said loan, the first Plaintiff encountered financial problem whereby they notified the 2nd defendant about the situation.*
- 12. The 2nd Defendant agreed to be patient for a while as the second Plaintiff was working hard to seek an alternative way of furnishing the debt as it was agreed.*
- 13. That, sometimes in June 2016 the 2nd Defendant threatened the first Plaintiff to sale the mortgaged house despite the fact that there was an agreement with Plaintiffs on having a grace period to solve the financial problems which they encountered before the resume to furnish the loan.*
- 14. That, upon the threat to sell the mortgaged property by the 2nd Defendant, the plaintiffs instituted a case No. 242/2016 against the 2nd Defendant at District Land and Housing Tribunal for Kinondoni at Mwananyamala whereupon the parties ended on setting the matter out of Court by signing a Deed of Settlement which was duly signed and registered as a decree of the Court.*
- 15. That, after signing and registering the Deed of Settlement in District Land and Housing*

Tribunal for Kinondoni at Mwananyamala, the plaintiffs resumed furnishing their loan as it was agreed in the Deed of Settlement. Attached hereto collectively marked as annexure CKN – 2 are copies of Bank slips which show the amount deposited by the Plaintiffs after signing, the Deed of Settlement which leave of this Honourable Court as craved for same form part of this Plaint.

- 16. That, surprisingly 2nd Defendant filed execution case No. 424/2017 before District Land and Housing Tribunal praying to execute the Deed of Settlement which was registered as a decree of the Court claiming that the Plaintiffs have failed to fulfil their obligations, the claim which was not true.*
- 17. That, after the hearing of the above said execution case; the judgment was delivered in favour of the 2nd Defendant whereby the 3rd Defendant was appointed as the Court Broker to auction the house in dispute as per requirement of law.*
- 18. That, whilst application for revision is pending, before this Honourable Court the third defendant has issued a certificate of sale of house to the first defendant. Attached hereto and marked as annexure CKN – 3 is a Photostat copy of certificate of sale which indicates that the first has purchased the suit property.*

From the above excerpt, there is no dispute that that the plaintiff, herein, was part of the proceedings in Land Application No. 109 of 2014. There Is also no dispute that Land Application No. 109 of 2014 was concluded by a Deed of Settlement entered between

the parties and recorded as decree of the Court in terms of Order XXIII Rule 3 of the CPC.

It is also apparent from the records that, upon default by the plaintiff to make monthly installments as agreed in the settlement deed as recorded as decree of the Court, the 2nd defendant instituted execution proceedings against the plaintiff. The execution proceedings concluded in favour of the 2nd defendant and the 3rd defendant was appointed as a Court Broker to auction the suit property. It would appear that the auction was subsequently carried out and a certificate of sale was issued to the successful bidder, who is the 1st defendant in this suit.

I will apply that knowledge in the present case. in the present case, the substance of the plaintiff's claim is to be found under paragraphs 19 and 20. For clarity the respective paragraphs states:

*19. That, **there has never been any auction** conducted to sale the house located at Plot No. 302 Block B, Tegeta Area Dar es salaam, property of the first plaintiff.*

*20. That, **the first defendant is purported to purchase the property in the absence of the auction** conducted. [Emphasis mine]*

Looking at paragraphs 19 and 20, it is clear that, the plaintiff is complaining that there was no auction conducted by the 3rd defendant sufficient for the property to be transferred to the 1st defendant. Further to that in his prayers the plaintiff sought for declaratory orders that the sale of the suit property was illegal and ~~void~~

nullification of the certificate of sale. He also prayed that the 2nd plaintiff be declared the lawful owner of the suit property. From reading paragraphs 19 and 20 and prayers sought by the plaintiff, I am convinced that the questions whether the auction was conducted or not or whether the 1st defendant bought the suit in auction or not is pure a question that arises from execution, discharge or satisfaction of the decree passed in **Land Application No. 109 of 2014.**

I will now turn to the question whether the parties involved in the present questions are the same with those involved in **Land Application No. 109 of 2014.** It is apparent from records that the plaintiffs and the 2nd defendant were parties in the proceedings at the Tribunal in **Land Application No. 109 of 2014.** The question now is whether the 1st defendant and bonafide purchaser of the mortgaged property and the 3rd defendant the auctioneers are parties to the suit or may be termed as representatives for purposes of s. 38 (1) to apply. The answer to this issue is straightforward; and it is in the positive.

In my considered view the term "representative" under s. 38 (1) of the CPC should be widely construed to include any person to whom any portion of the interest of the decree-holder or of the judgment-debtor which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in that person. Since title had passed to the 1st defendant through a certificate of sale he/she then becomes a successor to the rights of ~~the~~

the decree holder and hence a representative in terms of s. 38 (1) of the CPC.

I am also persuaded by the position adopted in the Indian Civil Procedure Code, where ***Explanation II*** to section 47 of the Indian Civil Procedure Code which is *parimateria* to our section 38 (1), clearly states that for purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed. The explanation further states that all questions relating to the delivery of such property to the purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of the section.

If find no valid reason to depart from the above highly persuasive position of the law. That said, I hold that the 1st defendant as well as the 3rd defendant are constructively parties to **Land Application No. 109 of 2014** for purposes of section 38 (1) of the CPC.

Having found that the questions raised by the plaintiff in the present case relate to the execution , discharge , or satisfaction of the decree in **Land Application No. 109 of 2014** as executed through **Misc. Application No. 424 of 2017**; upon holding that the parties must be the parties to the suit or their representatives are the same, I find that the two conditions for the applicability of section 38 (1) of the CPC have been met and hence the said ~~50~~

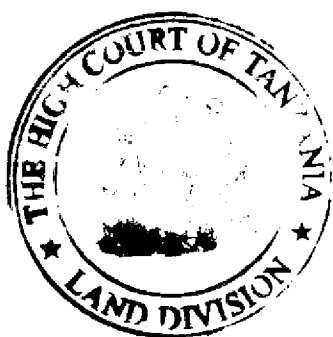
questions ought to be determined by the court executing the decree and not by a separate suit before this Court.

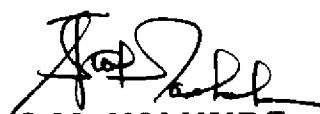
From the above analysis, I agree with the counsel for the 1st defendant that, this Court has no jurisdiction to entertain the present suit as the questions for determination raised by the plaintiffs ought to be determined by the executing court in terms of section 38 (1) of the CPC. I say so because, in accordance with the said section the plaintiff is precluded from instituting a separate issue for purposes of determining the issues raised in his plaint. Since this issue alone is sufficient to dispose of the case, I will not labour into the determination of the remaining legal issues highlighted above.

Having said so, I sustain the first legal point of the preliminary objection raised by the 1st defendant, consequently, the suit is struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of APRIL, 2021.




S.M. KALUNDE
JUDGE