IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.132 OF 2020

KURINGE REAL ESTATE LTD ..... PLAINTIFF

VERSUS

NMB BANK PLC ..... 1ST DEFENDANT
BANK OF AFRICA (T) LTD ..... 2ND DEFENDANT

MR CHARLES K. SENGO t/a CDJ

CLASSIC GROUP LTD ..... 3RD DEFENDANT

RULING

MAIGE, J

The dispute at hand pertains to the validity and legality of the of the attachment and intended sale of the **suit property** in execution of the decree of the High Court, Commercial Division in Commercial Case No. 18 of 2016 between the second defendant as a decree holder and Wilson Simon Ngui as the judgment debtor.

The plaintiff claims that, the attachment and the intended sale is not valid because she is the lawful owner of the suit property having purchased it from the first defendant through the third defendant on a public auction conducted on 3rd day of April 2018. The sale was in realization of a mortgage executed between the first defendant and one Wilson Saimon Ngui t/a Meku Spare Parts. The plaintiff claims to have duly performed his contractual obligation and that the **suit property** is already registered in his name.

It is suggestive in the plaint that soon upon becoming aware of the attachment and intended sale of the **suit property**, the plaintiff instituted an objection proceedings in Misc. Commercial Application No. 81 of 2020. The said objection proceedings, it is further alleged, was struck out on account that the plaintiff had earlier on filed an objection proceeding which he withdrew without a liberty to refile.

In her written statement of defense, the second defendant has, by way of preliminary objection, doubted the jurisdiction of the Court on account that the objection proceedings which was the precondition for the institution of the instant suit was withdrawn without a liberty to refile. In the second place, the second defendant has attacked the suit for being a mere abuse of the Court process. He has therefore urged the Court to strike out the same with costs.

The arguments for and against the preliminary objections were made by written submissions. Mr. Bwana, learned advocate, presented the written submissions in support of the preliminary objection whereas his learned friend Francis Mkoka for the plaintiff. I recommend the counsel for their very informative submissions which have been very instrumental in my decision.

The submissions of Mr. Bwana on the first point is based on two propositions. First, withdrawal of a matter without a leave to refile bars institution of a fresh proceeding. Two, the suit is premature for want of exhaustion of the remedy Order XXI Rule (1) of the CPC. In relation to the first proposition, it was the submissions for the second defendant that, since it is irrefutable that the plaintiff did withdraw his earlier objection proceedings without a liberty

to refile, the institution of this suit is barred. He cited numerous authorities including the decision of my learned sister Judge Maghimbi in **EMMANUEL ELIAZRY VS. EZIRONK K. NYAKABARI, LAND APPEAL NO. 56 OF 2018, HIGH COURT LAND DIVISION, UNREPORTED** where it was held as follows:-

> *From the provisions of the law, leave to refile under Order XXIII Rule 2 simply refer to a leeway for a party who had withdrawn a matter pending in court, to refile the same matter without it being subject to the doctrine of res judicata. Leave to refile emanate as a cure to an effect to withdraw the matter where a party may be intending to refile the same matter but ought to withdraw the current one for reasons of incompetence or otherwise. This is simply because the effect of withdrawing the matter finalize the matter and if leave is not granted, then the party is barred from instituting the matter again.*

In relation to the second proposition, it was the submissions for the second defendant that, in order for a party to enjoy the right to file a fresh suit in terms of order XXI rule 62 of the CPC, the proceeding under rule 57(1) might have been determined on merit. He placed reliance on the authority of the Court of Appeal in **KATIBU MKUU AMANI FRESH SPORTS CLUB VS. DODO UBWA MAMBOYA AND ANOTHER, CIVIL APPEAL NO. 88 OF 2002, CAT, UNREPORTED.**

He submits therefore that, the right under rule 62 will not be available to a party who willingly and without adducing any reason, decide to withdraw his objection proceedings as that, in his view, would be tantamount to abusing the procedure. He submits further basing on the authority in **ULC (TANZANIA) LTD VS THE NATIONAL INSURANCE CORPORATION AND ANOTHER (2003) TLR 212,** that the entertaining a fresh suit on the

same subject matter which is before another Court without allowing the same to make investigation into the claim would lead of there being conflicting court decisions on the same subject matter.

In his submissions in rebuttal, Mr. Makota while is in agreement that a matter withdrawn without a liberty to refile cannot be filed again, he is of the view that, under the express provision of order XXIII Rule 4 of the CPC, the estoppel in question does not apply to any order arising from execution proceedings. In his view therefore, the first proposition is based on an incorrect understanding of the bar under the respective provision.

On the second proposition, he is of the view that the right under order XXI rule 62 arises if a party has been aggrieved by any order arising from objection proceedings. In his view, the wordings of the provision of the respective provision does not discriminated between termination of objection proceedings on merit and on technicality. He has placed reliance on the authority of the Court of Appeal in **KEZIA VIOLET MATO VS. NATIONAL BANK OF COMMERCE AND OTHERS, CIVIL APPLICATION NO. 127 OF 2005** and reproduced the following statement therefrom;

> *There is no dispute that the application before us originated from the decision in the objection proceedings. The decision which held that an application for objection proceedings was time barred and had no merit. There is also no dispute that , where a claim or 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 XI Rule 62 of the Civil Procedure Code.*

In addition, the counsel referred the Court to the authority of the Court of Appeal in **AMOUR HABIB VS. HUSSEIN BAFAGI, CIVIL APPLICATION NO. 76 OF 2010** where the Court of Appeal observed as follows:

> *Having given due consideration to the matter before us and being mindful of the provision of order XXI rule 62 of the Civil Procedure Code...the learned High Court Judge acted without jurisdiction when he entertained the appeal which was against the decision given pursuant to the determination of he objection proceeding. The law is quite clear. An order which is given in determination of objection proceeding is conclusive. A party who is aggrieved thereby and intends to pursue the matter further has no right to appeal. The course that is open to him or her is to file the suit to establish the right he/she claims to the property.*

I have considered the rival submissions, on the first proposition, I am in agreement that the institution of the instant suit is not barred under order XXIII Rule 1(3) of the CPC in as much as what was withdrawn was an objection proceedings while what is before the Court is a suit. That suffice to reject the first proposition. In view of the order of the Commercial Court refusing the second application for objection proceeding, I do not think that I am a right person to make a comment on the import of the exception under rule (4) of order XXIII.

This takes me to the second proposition. In my reading, the same raises one pertinent issue which is what is the scope of the order envisaged in rule 62

of order XXI of the CPC. Is it limited to an order determining the objection proceeding as claimed by the counsel for the second defendant or does it cover any order arising from objection proceeding as proposed by the counsel for the plaintiff.

In his submissions, Mr. Makota has referred the Court to two decisions of the Court of Appeal which in his view support his position. I have read the two binding authorities with extra care. With respect to the counsel, neither of them deal with the scope of the application of the order envisaged in rule 62. Instead, they deal with undisputable fact that an appeal does not lie against an order arising from objection proceedings.

In **KEZIE VIOLET CASE,** the facts are very clear. As stated at page three of the judgment, the objection proceedings at the trial court was dismissed "on the ground that it was time barred, and that it lacked merits". The Court of Appeal was saying in that in as long as the objection was dismissed, the appropriate wayward to the applicant was not to appeal neither to apply for revision. Instead, he was to file a fresh suit under rule 62. In the circumstance, the authority does not apply in the instant matter and it cannot assist the plaintiff to rescue his case.

In **AMOUR CASE**, the subject of dispute was the decision of the High Court reversing the decision of the resident magistrate court on objection proceedings. The Court of Appeal was saying that; under rule 62 of order XXI of the CPC the High Court had no jurisdiction to entertain the appeal. Mr. Makota is quite wrong in associating this decision with his proposition that the order under discussion covers any order. There is contrary suggestion from the decision where the Court of Appeal stated that "'An order which is given in a determination of Objection Proceedings is conclusive". The words "in determination of objection proceedings" in my view, entail either grant or dismissal of the objection proceedings. It does not, applies in a situation, like the instant one where the same is withdrawn at the instant of the applicant or struck out for being incompetent. It would perhaps apply if the objection proceeding is dismissed for being time barred because the order thereon is conclusive.

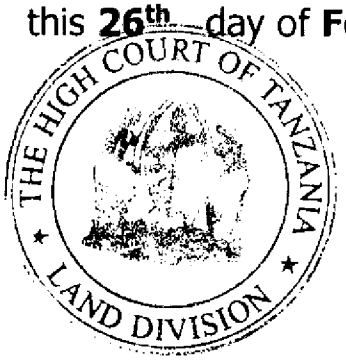
In **KHELI SAID OMARI (as a *Legal Personal Representative of the Maulid Bakari Kionga) VS.* AAPEL PETROLIUM LTD AND OTHERS, LAND CASE NO. 77 /2018, HIGH COURT, LAND DIVISION, UNREPORTED,** I faced more or less the same issue. The plaintiff filed a fresh suit after his application for objection proceeding being struck out on technical ground. Upon an objection being raised at the instant of the first

defendant, I strake the suit out for being premature. In reaching to such I decision, I made the following remarks which I still subscribe to:

> *In view of the foregoing discussions therefore, I entirely agree with Mr. Emmanuel that, unless an objection proceeding at the Commercial Court is determined on merit, any attempt by this Court to determine the legality of the attachment of the* ***suit property*** *would have the effect of interfering with the decision of the Commercial Court.*

Since in this case the initial objection proceeding was, for the reason not in pleading, withdrawn by the plaintiff without a leave to refile and in so far as the second application was struck for being incompetent, it cannot be said that an order under rule 62 has been issued by the executing court. In the circumstance therefore, this suit is premature and consequently the Court has no jurisdiction to entertain the same. It is therefore, struck out with costs for want of jurisdiction.

Dated this **26th** day of **February 2021.**



I. MAIGE
JUDGE
26/02/2021