

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 576 OF 2020

NAWAL MASSAWE.....APPLICANT

VERSUS

**INTERNATIONAL COMMERCIAL
BANK (TANZANIA) LTD.....1st DEFENDANT**

NAWAB ABDULRAHMAN MULLA.....2nd DEFENDANT

CRISPIN JOSEPH SEMAKULA.....3rd DEFENDANT

RULING

14/07/2021 & 03/09/2021

Masoud, J.

Two preliminary points of objection were raised by the first and third defendants challenging the competence of the present application for temporary injunction. The first point of objection was that the court is functus officio to entertain the instant application, and the second is that the application is misconceived. The points were separately argued in writing by the counsel for the first and second defendant, namely, Mr Zacharia Daudi, and Mr Ahmed S. El-Maamry.

The thrust of the arguments made in relation to the first point was that there was similar application for injunction previously filed by the

plaintiff. It was Misc. Land Case Application No. 33 of 2018 arising from Land Case No. 9 of 2018. It was on the same subject matter as is the present application and against the same parties, serve for the third defendant. The application was dismissed for want of prosecution. It was thus submitted that the applicant is precluded from filing a similar application seeking the same orders in this court as the court became *functus officio*. The court was on this argument referred to **Bibi Kisoko Medard vs Minister for Lands, Housing and Urban Development and Another**, Civil Application No. 10 of 1982 [1983] TLR 250.

In reply to the submissions on the first point, the counsel for the plaintiff was of the view that the principle of a court being *functus officio* is not applicable in the present application. It was in his view not applicable because the previous case which was dismissed by Hon. Maige J (as he then was) for want of prosecution was not determined on merit. In addition, it was argued that the present matter was completely new application as the third respondent was not part to the previous application. Heavy reliance was made on **Kagel Fahrzeugwerke vs Liberty Transcargo Ltd**, Misc. Commercial Application No. 288 of 2015 (HC)(unreported) in which the term *functus officio* was elaborated. The court in that authority had it that no court when it has signed its

judgment or final order disposing of a case shall alter or review the same save for correction of a clerical or arithmetical error.

The other case in which heavy reliance was sought by the counsel for the plaintiff was **Blue Star Service Station vs Jackson Musseti t/a Musetti Enterprises** [1999] TLR 80. In this case, the Court of Appeal had it that where the application is dismissed not on merits but for lack of the appropriate decree, it would be proper to subsequently file a fresh application subject to the requirement of the law of limitation.

The thrust of the arguments and submissions in respect of the second point was on the principle of the law that an injunctive relief cannot be granted against the execution of decree as such undertaking amount to misapplication or misuse of an injunctive relief. The context within which the arguments and submissions were made was that there is a decree of this court (Commercial Division) in Commercial Case No. 106 of 2017 relating to the subject matters falling within the scope of the present application, namely, properties comprised in Title No. 13996 and Title No. 13997, Plot No. 1 and 2 Block C Jakaranda Road, Mbeya Municipality. The same are in respect of satisfaction of the decree in the

event the defendant (the 2nd Respondent) defaulted to pay the judgment debtor as agreed.

Reliance was accordingly made on the case of **National Housing Corporation vs Peter Kassidi and Another**, Civil Application No. 243 of 2016 (at page 18), where the Court of Appeal stated and I hereby quote:

"Put differently, the Court is being moved to issue that order to injunct a judicial process of enforcement of a decree. To us this course amounts to a misapplication or misuse of an injunctive reliefs."

The Court of Appeal went on to hold that and I hereby quote:

"In fine, we are of the firm mind that this application is misconceived. In consequence, we are constrained to dismiss it as we hereby do."

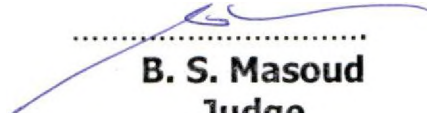
On my part, I was quick to find that there was no dispute as to the existence of the decree of the court in Commercial Case No. 106 of 2017 between the first respondent and the second respondent herein as the plaintiff and the defendant respectively. The decree related to the properties which are subject matters of this application. These are

properties comprised in Title No. 13996 and Title No. 13997, Plot No. 1 and 2 Block C Jakaranda Road, Mbeya Municipality.

Agreeably, if this court were to grant the injunction sought, the order would undoubtedly amount to injuncting the execution process in the execution of the relevant decree. This risk is exactly what the principle emerging from the authorities referred to this court by the first and third respondent seeks to address and avoid. I was told by the counsel for the plaintiff that the point of objection relating to the decree was not a pure point of law as it requires factual proof. I disagree as what was brought to the attention of the court is a court order which the court is in any event required to take judicial notice.

In the upshot of the foregoing and for the given reasons, the application is misconceived and unmaintainable. It is forthwith struck out with costs. With this consequence, I need not labour any further on the other point of objection.

Dated and Delivered at Dar es Salaam this 3rd day of September 2021.


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B. S. Masoud
Judge

