

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 27 OF 2018

**MAUREEN GEORGE MBOWE JILIWA 1ST PLAINTIFF
MAUREEN GEORGE MBOWE (As Guardian of Barick Beckam Jiliwa
and Barack George Jiliwa Minors) 2ND PLAINTIFF**

VERSUS

**TWIGA BANCORP LTD 1ST DEFENDANT
SAIDI MUSA MSWAKI 2ND DEFENDANT
NONDO KALOMBOLA t/a N. J. PETROLEUM S. P. R. I. 3RD DEFENDANT
AMAN ETCHA 4TH DEFENDANT
A. K. MAMBA t/a MAMBA AUCTION MART CO. LTD 5TH DEFENDANT
SUDI KHAMIS SUDI 6TH DEFENDANT**

Date of last Order: 15/07/2022

Date of Ruling: 30/08/2022

RULING

I. ARUFANI, J

This ruling is for the points of preliminary objection raised by the third, fourth and sixth defendants against the plaintiffs' suit. Initially the mentioned defendants had raised about eleven points of preliminary objections but before hearing of the preliminary objections the counsel for the mentioned defendants prayed to abandon some of the points of preliminary objection and argued the preliminary objection listed hereunder: -

- 1. That the honourable court does not have jurisdiction to entertain the matter as the suit is time barred.*
- 2. That the plaintiffs do not have locus standi to initiate the present suit as ruled by the High Court (Commercial Division) in Misc. Commercial Application No. 60 of 2017.*
- 3. That the suit is misconceived and bad in law for infringing section 38 (1) of the Civil Procedure Code, Cap 33, R.E 2002;*
- 4. That this suit is misconceived and bad in law for being an abuse of court process as the plaintiffs should have appealed against the decision of the Commercial Court in Misc. Commercial Application No. 60 of 2017.*

At the hearing of the above points of preliminary objections the plaintiffs were represented by Mr. Kephass Simon Mayenje, learned advocate and while the first defendant was represented by Mr, Emmanuel Mwakyembe, learned advocate the third and fourth defendants were represented by Mr. Roman Masumbuko, learned advocate and the fifth and sixth defendants were represented by Mr. Kelly Mwitasi, learned advocate. As for the second defendant the court ordered hearing of the matter to proceed ex parte against him after being served and failed to appear in the court.

In supporting the afore stated points of preliminary objection Mr. Roman Masumbuko told the court in relation to the first point of preliminary objection that, the present suit was filed in the court after the

auction conducted by the High Court Commercial Division and subsequent eviction order issued by the same court. He stated that paragraph 18 of the plaint states clearly that the suit property was subject to the auction conducted through proclamation of sale issued in Commercial Case No. 59 of 2013 of the High Court Commercial Division.

He referred the court to Rule 92 of Order XXI of the Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred in short as the CPC) and section 6 of the Law of Limitation Act, Cap 89 R.E 2019 (hereinafter referred in short as LLA) together with item 5 of Part 1 of the Schedule to the LLA. He and argued that, the plaintiffs' suit was supposed to be instituted in the court within two years from the date when the order of selling the suit property by auction was made. He argued that, the suit at hand was filed in the court on 2nd March, 2018 while it was supposed to be filed in the court not more than 14th November, 2017 as the sale became absolute on 15th November, 2015. He argued that, counting from when the sale became absolute to when the present matter was filed in the court about four years hand elapsed.

He referred the court to the case of **Zaidi Baraka & Two Others V. Exim Bank (T) Limited**, Civil Appeal No. 194 of 2016 CAT at DSM (unreported) where the issue of limitation of time to challenge execution made by way of auction the judgment debtor's property was considered

and stated the suit filed in the court out of time must be dismissed unless there is an order of the Minister for Legal Affairs sought pursuant to section 44 of the LLA to extend the time. He submitted that as there is nowhere stated in the present suit that extension of time to file the present suit in the court was sought from the Minister and granted the suit should be dismissed with costs under section 3 (1) of the LLA.

He argued in relation to the third point of preliminary objection that, the suit at hand infringes section 38 (1) of the CPC. He argued that, if you read paragraphs 17, 18, 19, 20, 21 and 23 of the plaint filed in this court by the plaintiffs you will find the suit relates to the execution of matter pending in the High Court Commercial Division at Dar es Salaam. He submitted that, the above cited provision of the law prohibits determination of any matter relating to execution pending in one court by another court with the same jurisdiction or subordinate to the court where execution proceeding is pending. He argued that filing of the proceeding relating to the matter pending execution in a certain court to another court may result into conflicting decisions.

To support his argument, he referred the court to the case of **Tanzania Port Authority V. Leighton Offshore PTE Ltd Tanzania Branch & Another**, Misc. Commercial Revision No. 5 of 2016, HC Commercial Division at DSM (unreported) where it was stated that any

question arising from execution of a decree is supposed to be determined by the court executing the decree. He argued that, if the plaintiffs found there was a need to file a separate suit, they were supposed to go to the same court executing the decree pursuant to section 38 (2) of the CPC and not to file the suit in this court. He prayed the court to base on the above stated point of law to dismiss the plaintiffs' suit.

He argued in relation to the fourth point of preliminary objection that, the present suit is an abuse of court process as the plaintiffs were supposed to appeal to the Court of Appeal of Tanzania against the decision of the High Court Commercial Division delivered in Misc. Commercial Application No. 60 of 2017. He argued that, the plaintiffs were trying to set aside the sale made by order of the High Court Commercial Division but the application was dismissed. He argued that, instead of the plaintiffs to appeal to the Court of Appeal or institute a suit in the same court which is executing the decree he has come to this court and they have not stated anything in relation to the said execution proceedings.

He prayed the court to take cognizance that, the plaintiffs filed Civil Application No. 584 of 2016 of 2018 in the Court of Appeal of Tanzania to challenge the decision of the High Court Commercial Division while they had filed Misc. Commercial Application No. 60 of 2017 in the High Court Commercial Division and they have filed the present matter in this court

which shows that is an abuse of court process. He referred the court to the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported) where it was stated it is an abuse of court process for a judge to set aside a judgment and decree issued by judge of the same court.

He argued that, the order the plaintiffs are seeking from the court of declaring them the lawful owner of the suit premises and to declare the auction conducted by the fifth defendant is illegal and ineffectual is to invite the court to set aside the judgment made by the judge of the High Court Commercial Division. He submitted that, there is no way the court can grant the sought orders that is why they are arguing the present suit is an abuse of court process as is inviting the court go contrary to what was decided by the judge of the High Court Commercial Division.

Mr. Kelly Mwitasi, counsel for the sixth defendant subscribed to what was submitted by the counsel for the third and fourth defendants in relation to the first, third and fourth points of preliminary objections and prayed the court sustain them and dismissed the plaintiffs' suit. He argued the second point of preliminary objection which states the plaintiffs have no locus standi to institute the present suit in this court and stated it is illegal and is not allowed by the law. He argued that, paragraph 11 and 12 of the plaint states the suit premises was sold to one Alvin Jiliwa who

is not a party in the suit at hand. He stated further that, paragraph 13 of the plaint states after Alvin Jiliwa bought the suit property, he directed the house be registered in the names of the plaintiffs.

He argued that, there is no evidence to establish the said Alvin Jiliwa was registered as the owner of the suit property. He submitted that, as the said Alvin Jiliwa was not registered as the lawful owner of the suit property the plaintiffs cannot be heard to say they are the owner of the suit premises. He referred the court to the case of **Lujuna Shubi Ballonzi, Senior V. Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 which was well interpreted in Misc. Commercial Application No. 60 of 2017 where the court declare the plaintiffs had no locus standi to institute the suit in the court as they were not the purchaser of the suit property.

He argued that, although the plaintiffs have annexed a certificate of title with their plaint to show they are the owner of the suit premises but the said certificate of title was nullified after being found it was mistakenly issued. He invited the court to rely on section 59 of the Evidence Act, Cap 6 R.E 2019 to take judicial notice of the entry made in the Register of the Registrar of Title on 16th February, 2018 at 11:42 hours which changed the ownership of the suit premises from the plaintiffs. He prayed to produce to the court the documents showing the plaintiffs are not owners

of the suit premises and prayed the point of objection he has argued be upheld and the plaintiffs' suit be dismissed with costs.

In his reply the counsel for the plaintiffs stated the points of preliminary objections raised by the counsel for the third, fourth and sixth defendants are misplaced and totally devoid of merit. He said they neither constituting preliminary objections nor pass the test of preliminary objection properly so called. To support his argument he referred the court to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] EA 696 where what constitute preliminary objection was defined and stated preliminary objection must be a pure point of law and not fact. It was stated preliminary objection is raised when all facts are certain and no evidence is required to prove the point raised as a preliminary objection.

He also referred the court to the case of **Cotwo (T) OTTU Union & Another V. Hon. Iddi Simba Minister for Trade and & Another**, [2002] TLR 88 where it was stated that, preliminary objection should be capable of disposing of the case and if not, it cannot be a preliminary objection. He prayed the court to base on the above stated reasons to dismiss the preliminary objections raised by the third, fourth and sixth defendants with costs.

He started to respond to the point of locus standi raised by the sixth defendant which in this ruling is a second point of preliminary objection. He stated that, the counsel for the sixth defendant has referred to the paragraphs of the plaint and documents annexed thereto and tendered some documents to support his submission which cannot be entertained at this stage of the suit. He stated that will require the court to go to the merit of the plaint and documents annexed thereto which cannot be entertained at this state of the suit.

He stated that, the applicants filed application in the High Court Commercial Division to challenge the sale of the suit premises and not a suit like the one before the court. He stated that, what was deposed in the affidavit supporting the said application was different from what is averred in the plaint filed in the present suit. He said under that circumstance it cannot be said the plaintiffs have no locus standi to institute the present suit in this court. He stated the court held in the said application that, as the sale had already become absolute the applicants were supposed to commence a separate suit as provided under Order XXI Rule 101 of the CPC. He stated if the plaintiffs were not entitled to institute a separate suit the honourable judge would have not given such an advice.

He argued that, the facts pleaded in the present suit and contained in the documents annexed to the plaint are different from the facts deposed in the application filed in the High Court Commercial Division which caused the court to find the applicants who are plaintiffs in the present suit had no locus standi to institute the said application in the mentioned court. He argued that, this court cannot base on the decision made in the mentioned application to find the plaintiffs in the present suit have no locus standi to institute the instant suit in the court because the facts in the present suit and facts in the mentioned application are quite different.

He argued that, in order to be able to determine whether the plaintiffs have locus standi to institute the suit at hand in this court, the court is required to examine what is pleaded in the application filed in the Commercial Court and what is pleaded in the matter filed in this court by the plaintiffs which is contrary to the meaning of preliminary objection. He stated to examine the documents of the suit at this stage of the suit will defeat the purpose of the preliminary objection as it will cause the court to go into the merit of the matter while that is not the purpose of preliminary objection.

He went on informing the court that, the issue of locus standi of the plaintiff to institute the matter in the court has already been determined

by Honourable Mzuna, J in the Ruling he delivered on 8th June, 2018 in Misc, Land Application No. 100 of 2018. He stated the learned judge stated that, the points of preliminary objection that a party has no locus standi or the matter is res judicata are no longer points of preliminary objection. He submitted that, as the learned judge has already decided the issue of locus standi of the plaintiffs to institute the suit in court, this court cannot decide contrary to what was decided by the mentioned learned judge. He prayed the court to refuse to receive the documents the counsel for the sixth defendant prayed to be used to determine the matter as it is contrary to the meaning of preliminary objection. He argued to receive those documents and use them to determine the matter is to go contrary to the rules governing determination of preliminary objection.

He argued in relation to the first preliminary objection that, the court has jurisdiction to entertain the present suit and the suit was filed in the court within the time. He argued that, the claim of the plaintiffs in the present suit is about ownership of the suit land. He submitted that, although it is true that the sale became absolute on 15th November, 2015 but that does not bar other people who are not judgment debtor to claim for ownership of the land in dispute. He stated that, Misc. Commercial Application No. 60 of 2017 arose from Commercial Case No. 59 of 2013

and the judgment debtor in the mentioned matters are not parties in the present suit.

He argued that, section 6 (b) of the LLA does not relate to the claims of the plaintiffs in the present suit and stated the plaintiffs have never instituted any objection proceeding in any court. He argued it cannot be said the plaintiffs' claims accrued on 15th November, 2015 when the sale became absolute as they are not judgment debtor in the mentioned Commercial Case No. 59 of 2013. He stated what is averred in paragraphs 17 and 18 of the plaint are facts which need to be proved. He argued that, objection proceedings as referred under section 6 of the CPC and setting aside sale are two different things and stated the limitation of time stated in the referred provision of the law is not applicable in the present suit.

He invited the court to take note of the decision by Hon. Mzuna, J which dismissed the similar point of preliminary objection and stated that, the court has no jurisdiction to re-determine the point of preliminary objection which has already been determined by judge of the same court. To support his argument, he referred the court to the case of **Mohamed Enterprises Limited** (supra) where it was stated that, there is no room for a judge of the same court to overrule a decision of his fellow judge of the same jurisdiction. He prayed the court to dismiss the first point of preliminary objection.

He argued in relation to the third preliminary objection that, if you read the marginal note of section 38 (1) of the CPC argued it has been infringed by the plaintiffs' suit you will find it is about question to be determined by court executing a decree. He stated that, as the plaintiffs are not parties in Commercial Case No. 59 of 2013 in which the decree was passed and executed, the plaintiffs are not bound by limitation of time provided under section 38 (1) of the CPC. He argued that, the plaintiffs in the present suit are claiming for ownership of the land in dispute and they are not challenging execution of the decree issued in Commercial Case No. 59 of 2013. He submitted that makes the case of **Tanzania Port Authority** cited by the counsel for the third and fourth defendants to be completely not applicable in the case at hand as the TPA was a party in the execution proceeding.

He argued the similar preliminary objection was dismissed by Hon. Mzuna, J in Miscellaneous Land Application No. 100 of 2018 filed in this court. He argued that while referring to section 38 (1) of the CPC the honourable judge stated the plaintiffs are not challenging execution but ownership of the suit land. He submitted that, the third preliminary objection has already been determined by the court and it cannot be redetermined.

As for the for the fourth preliminary objection the counsel for the plaintiffs argued that, Hon. Mzuna has already ruled out that an abuse of court process is not a point of law. He stated that the point of locus standi and abuse of court process are based on factual finding which makes them to lack qualification of being determined as preliminary objections. At the end he prayed the preliminary objections raised by the third, fourth and sixth defendants be overruled with costs.

In his rejoinder the counsel for the third and fourth defendants stated that, in the issue of limitation we considered what is provided in the LLA which states when the time starts to accrue to the time of filing a suit in the court and stated the counsel for the plaintiff has not responded to the said point. He submitted that, the cause of action of this matter is built on Commercial Case No. 59 of 2013 and is not the suit basing purely on ownership of land. He said even the prayer asked in this court is a declaration that the auction conducted by Commercial Court to sale the suit land is illegal.

He submitted that, the argument that the preliminary objection raised in the present matter has already been determined by the court is not true because the decision was made in another matter which was Miscellaneous Land Application No. 100 of 2018 and not in the present suit. He argued that, if you will go through the said ruling you will find all

preliminary objections were about the afore mentioned application and not the present suit. He stated there is nowhere in the said ruling the judge stated the issue of sale of a suit property provided under section 6 (b) of the LLA cannot be determined in the main suit. He argued that, the said ruling was challenged in the Court of Appeal through Miscellaneous Civil Application No. 362/17 of 2018 but it was stated what was dismissed were preliminary objection and not the application. He stated the case of **Mohamed Enterprises** (supra) was well within the points of preliminary objections raised.

He stated in relation to section 38 (1) of the CPC that, the case of **Tanzania Port Authority** (supra) is relevant to the present matter because all issues relating to execution must be determined by the court executing the decree. He argued the applicants are quite aware of existence of Commercial case No. 59 of 2013 as they filed Misc. Commercial case No. 60 of 2017 at the High Court Commercial Division. He submitted that, under that circumstances the present case was supposed to be filed in the High Court Commercial Division and not in this court. He stated that, if the court will make any decision, it will be difficult because it is not known where the decision will be executed. He prayed the court to direct the plaintiffs to file their claims in the High Court Commercial Court.

As for the argument that the matter was determined by Hon. Mzuna, J and that under section 38 (1) of the CPC the issue of ownership to the land cannot be determined in executing court, he argued the Court of Appeal stated the preliminary objections determined were not raised in the main suit but in the application. As for the issue of abuse of court process he argued that, as stated in the case of **Mohamed Enterprises Ltd** (supra) it is not proper for one court to make a decision and the same decision overruled by the court in another case. He stated the counsel for the plaintiffs has not responded to his argument that they were supposed to appeal to the Court of Appeal against the decision made in Misc. Commercial Case No. 60 of 2017 of the High Court Commercial Division.

He also stated the counsel for the plaintiff has not told the court there is Civil Revision No. 584 of 2016 pending in the Court of Appeal. He referred the Court to the Case of **Yara Tanzania Limited V. DP Shapriya & Co. Ltd**, Civil Appeal No. 244 of 2018 (unreported) where it was held an advocate has a duty to assist the court to reach to a just decision. He said the preliminary objection determined by Hon. Mzuna, J in the application and not in this main suit. He insisted that the court should not keep its eye closed blind that there is a case pending in the Court of Appeal. At the end he prayed the preliminary objections be upheld and the plaintiffs' suit be struck out.

On his side Mr. Kelly Mwitasi stated by way of rejoinder that, the preliminary objection they have raised and argued are well recognized by the law. He submitted that, the argument that the preliminary objection will require evidence to determine the same is not true as all preliminary objections come from the pleadings and not from vacuum. He stated that, the argument that the preliminary objections were determined by Hon. Mzuna, J is devoid of merit as he has not seen anywhere stated preliminary determined in an application cannot be determined in a main suit. He reiterated his submission in chief that the suit at hand is not maintainable for want of locus standi. He submitted further that, as there is point of limitation of time, he is praying the suit be dismissed with costs.

Having keenly considered the submissions from the counsel for the parties the court has found proper to determine the preliminary objections as argued by the counsel for the parties. I will start with the first point of preliminary objection which states the suit is time barred. The court has found the objection is based on the argument that, the suit was filed in the court after auction of the suit property be conducted and eviction order being issued by the High Court Commercial Division in Commercial Case No. 59 of 2013.

The court has found it was argued by the counsel for the defendants that, as eviction order was issued after the auction being conducted then

under Order XXI Rule 92 of the CPC read together with section 6 (b) of the LLA and item 5 of Part I of the schedule to the LLA the present suit was supposed to be filed in the court within two years from when the order which resulted into auctioning of the suit premises was issued. The court has carefully read the above cited provision of the law and find there is no dispute that Rule 92 of Order XXI of the CPC provides that, after the sale became absolute the court is required to issue a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser.

The court has found section 6 (b) (i) of the LLA provides for accrue of right of action for a person wish to initiate an objection proceeding following attachment of a property in execution of a decree. As argued by the counsel for the plaintiffs, the plaintiffs have never instituted an objection proceeding in the court executing the decree. Since the suit filed in the court is not an objection proceeding the above cited provision of the law is not applicable in the matter at hand. Coming to section 6 (b) (ii) of the LLA the court has found it provides for accrue of rights of action for a person against who an order made under the CPC relating to execution of a decree involving an immovable property has been issued. For clarity purpose section 6 (b) (ii) of the LLA read as follows: -

In the case of a suit by a person against whom an order has been made under the Civil Procedure Code-

"On an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery or possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree holder or purchaser."

As provided under item 5 of Part I of the schedule to the LLA, proceedings mentioned under section 6 (b) of the LLA referred herein above to claim for rights to the property affected by an order issued by the court under the CPC is supposed to be lodged in the court within two years from the date on which the order was made. The question to determine here is whether the suit filed in the court by the plaintiffs is falling under any of the proceedings mentioned in the above quoted provision of the law.

My reading of the above quoted provision of section 6 (b) (ii) of the LLA caused the court to find the provision is covering limitation of time for three types of persons to initiate a proceeding in court in respect of an order made by the court against him in execution of a decree involving an immovable property. The court has found the first person is the holder of a decree being executed by the court, the second is a purchaser of

such property and third is any person dispossessed of such property in the delivery of possession thereof.

The court has found that, although it can be said the plaintiffs in the matter at hand are falling under the third category of the persons who are required to be governed by section 6 (b) (ii) of the LLA but the court has found the present suit is not one of the suits which its limitation of time is supposed to be governed by the cited provision of the law. The court has come to the above finding after being of the view that, the cited provision of the law was intended to cover proceedings filed in the court issuing an order of execution of a decree. It was not intended to cover even proceedings instituted in other courts like the one filed in other court by the plaintiffs.

The court has come to the stated view after seeing that, section 6 (b) (i) of the LLA is providing for accrue of right of action for filing in a court an objection proceeding in respect of an order of attachment of property issued by the court in execution of a decree which normally is filed in the court executing the decree. The court has also been of the view that, the application intended to be governed by section 6 (b) (ii) of the LLA for any person who is neither a decree holder nor a purchaser is an application to be filed in court executing a decree by any person to challenge an order of the court executing a decree which dispossessed of

such a person a property while that person is neither a decree holder nor a purchaser of such a property.

To the view of this court the application covered under the cited provision of the law is the one to be filed in the court executing a decree which resulted into dispossession of the stated property and not the suit filed in a different court like the one filed in this court by the plaintiffs. The court has come to the above finding after seeing it was stated in the case **Tanzania Port Authority** (supra) that all question arising from execution of a decree are supposed to be determined by the court executing a decree and not by a different court.

The court has found that, as the order of execution of the decree caused the plaintiffs to be dispossessed of the suit property was issued by Commercial Court and not this court, and the plaintiffs in the suit at hand are urging the court to declare them lawful owner of the suit property, the limitation of time for the plaintiffs to institute their suit in this court is not governed by section 6 (b) of the LLA read together with item 5 of Part I of the schedule to the same law. The suit is supposed to be governed by other provision of the law governing claim of ownership to a land.

The court has come to the above view after seeing that, although it is true that the plaintiffs are urging the court to declare the auction

conducted by the fifth defendant to be illegal and ineffectual but granting or refusing the sought reliefs will depend on the evidence to be received from the parties to see why the plaintiffs are urging the court declare the said auction illegal and ineffectual. The court has also found that, the plaintiffs are not only praying for the sale to be declared illegal and ineffectual but also be declare lawful owner of the suit property which to the view of this court is a claim of ownership to the land. If the plaintiffs are seeking to be declared lawful owner to the land the court with competent jurisdiction to do so is this court. The above stated finding caused the court to think the case of **Zaidi Baraka** cited by the counsel for the respondents is distinguishable from the present case because it was dealing with action which is different from the plaintiffs' suit. In the premises the court has found the first point of preliminary objection is devoid of merit.

Coming to the second point of preliminary objection which states the plaintiffs have no locus standi to institute the present suit in this court, the court has found it was argued by the counsel for the sixth defendants that, it is averred at paragraphs 11, 12 and 13 of the plaint that the suit property was purchased by one Alvin Jiliwa from the auction conducted on 21st June, 2015. It is averred further that, after purchasing the suit

property the purchaser directed the suit property be registered in the names of the plaintiffs.

The court has found the argument by the counsel for sixth defendant that the plaintiffs have no locus standi to institute the suit in the court is based in the fact that there is no evidence to prove the purchaser transferred the suit property to the plaintiffs. He argued that, although it is stated at paragraph 13 of the plaint that the suit land was transferred to the names of the plaintiffs and copy of certificate of title is annexed to the plaint but the said certificate was nullified after being found it was mistakenly issued.

After considering the argument made to the court by the counsel for the sixth defendant the court has found that, as rightly argued by the counsel for the plaintiffs the issue as to whether the plaintiffs have locus standi to institute the present suit in this court does not qualify to be a point of preliminary pursuant to the definition of the term preliminary objection given in the case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) which has been referred by our courts in several cases. The definition given in the cited case read as follows: -

"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 if what is sought is the exercise of judicial discretion."[Emphasis added].

From the wording of the definition of the term preliminary objection given in the above cited case it is crystal clear that a point of law which need evidence to ascertain the same cannot be raised as a preliminary objection. While being guided by the said definition the court has found that, the argument raised by the counsel for the sixth defendant that there is no evidence to establish the suit property was transferred to the purchaser; that the purchaser had no power to transfer the same to the plaintiffs and the argument that the certificate of title issued to the plaintiffs has already been nullified are facts which need evidence to prove them. They cannot be determined without requiring evidence to be adduced in the court.

The court has considered the invitation made by the counsel for the sixth defendant for the court to take judicial notice under section 59 of the Evidence Act, of the entry made in the Register of the Registrar of Title on 16th February, 2018 at 11:42 hours which he stated it changed the ownership of the suit premises from the plaintiffs but found that is not a matter which the court can take judicial notice to determine the preliminary objection he has raised.

To the view of this court the facts stated by the counsel for the sixth defendant and even the documents he sought to be received by the court for the purpose of using the same to determine the second point of preliminary objection are documents which are supposed to be adduced in the court to disprove the plaintiffs have no locus standi to institute the present suit in the court. In the premises the court has found the second point of preliminary objection is meritless.

As for the third point of preliminary objection which states the suit is misconceived and bad in law for infringing section 38 (1) of the CPC the court has found this point is basing on the argument that, as paragraphs 17 to 23 of the plaint shows the plaintiffs are challenging the order of eviction issued by the High Court Commercial Division in execution of the decree issued in Commercial Case No. 59 of 2013 then the plaintiffs ought to have instituted their claims in the High Court Commercial Division and not to file a fresh suit in this court. The court has found that, although it is true that the plaintiffs have extensively referred the mentioned case in their plaint as the cause of being dispossessed of the suit premises but the court has been of the view that the present suit is not challenging execution of the decree passed in Commercial case No. 59 of 2013 per se but the plaintiffs are also claiming for ownership of the suit premises.

The court has also found that, although it is true that the plaintiffs filed Misc. Commercial Application No. 60 of 2017 in the High Court Commercial Division seeking to set aside sale of the suit premises without success but as rightly argued by the counsel for the plaintiffs that is not a bar for the plaintiffs to institute a suit in the court to claim for their rights or interest, they believe they have in the suit premises. The court has come to the stated finding after seeing section 38 (1) of the CPC is dealing with question arising between the parties to the suit in which the decree was passed and it does not cover even the parties who were not parties in the suit. For clarity purpose the above cited provision of the law reads as follows: -

"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 added].

The wording of the above quoted provision of the law and specifically the bolded part is very clear that the quoted provision of the law is governing determination of questions arising between the parties to the suit in which the decree was passed or their representative and not even persons who are not parties to the suit like the plaintiffs in the present

case. The court has also read section 38 (2) of the CPC which the counsel for the third and fourth defendants said would have been used by the plaintiffs to file their claims in the High Court Commercial Division where the decree was issued but failed to see how the cited provision is supporting the stated suggestion. For the purpose of precision the cited provision of the law read as follows: -

"38. (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.

From the wording of the afore quoted provision of the law it is crystal clear that there is no word which can be interpreted to establish the plaintiffs were supposed to file their suit in the court issued the decree which caused the plaintiffs to be dispossessed the land in dispute. In the premises the court has found section 38 (1) and (2) of the CPC cannot be applied in the case at hand where the plaintiffs were not parties in the case where the decree dispossessed them the land in dispute was passed.

The court has also found that, as rightly argued by the counsel for the plaintiffs even my learned brother Mruma, J stated in the ruling he delivered in the above cited Misc. Commercial Application No. 60 of 2017 dated 23rd October, 2017 that, although the applicants could have not

applied for setting aside of the sale of the suit property but they could have initiated a separate suit to claim for their right as prescribed under Rule 101 of Order XXI of the CPC.

Therefore, the act of the plaintiffs to initiate the present suit in this court whereby the plaintiffs are claiming to be declared lawful owner of the suit land is not an infringement or violation of section 38 (1) of the CPC as argued by the counsel for the defendants. In addition to that, the court has also found that, as rightly argued by the counsel for the plaintiffs the similar point of preliminary objection was raised in Misc. Land Application No. 100 of 2018 which involving the same parties and in the ruling delivered by my learned brother Mzuna, J on 8th June, 2018 it was stated that, the said provision of the law is not applicable in the matter at hand where the plaintiffs are not challenging execution of the decree but they are claiming for ownership of the suit premisses. Finally, the court has found the third point of preliminary objection is lacking merit.

Coming to the last point of preliminary objection it states that, institution of the present suit in this court is an abuse of court process as the plaintiffs were supposed to appeal against the ruling delivered in Misc. Commercial Application No. 60 of 2017 and not to institute the present suit in this court. The court has found that, as correctly argued by the counsel for the plaintiffs Rule 101 of Order XXI of the CPC states

categorically that a person claiming for a right over a property attached in execution of a decree where he is not a party to the suit, he can initiate a suit in the court to claim for his right as it has been done by the plaintiffs in the case at hand.

Under that circumstances the suit filed in this court by the plaintiffs cannot be an abuse of court process as argued by the counsel for the defendants. Similarly, my learned brother Mzuna, J refused to uphold this point of preliminary objection when it was raised in Misc. Land Application No. 100 of 2018 and stated that is not a point of preliminary objection. The above finding caused the court to come to the settled finding that, the fourth point of preliminary objections raised in this matter by the counsel for the third, fourth and sixth defendants are devoid of merit and they cannot be upheld.

Consequently, all points of preliminary objections raised in this matter by the counsel for the third, fourth and sixth defendants are hereby overruled in their entirety and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 30th day of August, 2022



I. Arufani

JUDGE

30/08/2022



Court:

Ruling delivered today 30th day of August, 2022 in the presence of Mr. Kephass Mayenje, advocate for the plaintiffs, in the presence of Mr. Norbert Tarimo, advocate for third and fourth defendant, in the presence of Mr. Adam Kassim Mamba, Director for the fifth defendant, in the presence of Mr. Kelly Mwitasi, advocate for the sixth defendant and in the absence of the first and second defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

JUDGE

30/08/2022