

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 80 OF 2022

MABROUK OMAR MOHAMED.....PLAINTIFF

VERSUS

EXIM BANK Tanzania LIMITED1ST DEFENDANT

JOSHUA MWITUKA t/s FOSTER AUCTION MART.....2ND DEFENDANT

FABIAN JOHN FIMBO.....3RD DEFENDANT

12/10/2022 & 31/10/2022

RULING

A. MSAFIRI, J.

On 13th April 2022, the above named plaintiff instituted the present suit against the defendants jointly and severally for reliefs *inter alia* that declaration that the sale by public auction dated 15th March 2022 of the plaintiff's property situated at Plot No. 27 Block 57 Kariakoo with Certificate of Title No. 36724 (hereinafter referred as the disputed property) was fraudulent, unlawful and illegal.

On lodging their joint written statement of defence, the 1st and 2nd defendants disputed the plaintiff's claim and they raised two preliminary objections to the effect that;

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- i. The suit is not tenable at law for non exhaustion of remedies under Order XXI to challenge the sale under decree.*
- ii. The Honourable Court has no jurisdiction to entertain a suit to challenge the execution of the decree.*

This is a ruling on the above raised preliminary objections. On 12th September 2022, I ordered the above preliminary objections be disposed of by way of written submissions. It is on record that the 1st and 2nd defendants having lodged their submissions in chief in support of the preliminary objection, the plaintiff's reply submissions were lodged beyond the prescribed time and without leave of the Court hence I accordingly expunged them from the record.

It follows therefore that determination of the preliminary objections raised will base on the 1st and 2nd defendants' submissions in chief which were drawn and filed by Mr. Gabriel Mnyele, learned advocate.

Mr. Mnyele prefaced his submission giving a brief background to the present suit contending that suit at hand arises from execution of decree passed by this court on 21st September 2021 and proclamation of sale was given on 15th February 2022. According to the learned advocate, the plaintiff's claim can be gathered under paragraph 9 of the plaint in which among other complaints the plaintiff claims that;

- 1. The auction and sale was conducted before expiration of thirty days calculated from the date on which the copy of the*

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proclamation had been affixed on the court - house ordering the sale.

- 2. The plaintiff was not notified of the public auction for sale of the suit property.*
- 3. The suit property was sold at TZS 500,000,000 far below its market price.*
- 4. During the said public auction the 2nd defendant refused and ignored to sell the suit property to other buyers who were willing to purchase at higher prices.*

It was submission by Mr. Mnyele that going by the above reliefs claimed by the plaintiff, the remedy available to the plaintiff was not to file the present suit rather to exhaust the remedy provided for under Order XXI Rule 88 (1) of the Civil Procedure Code [Cap 33 R.E 2019] (the CPC) to challenge the propriety of the auction.

To further fortify his stance Mr. Mnyele cited the decision of the Court of Appeal in **Badungu Ginning Company Limited v CRDB Bank Plc and 2 others** Civil Appeal No. 265 of 2019 (unreported) whereby on page 22 of the said decision the Court observed thus;

"In our considered opinion the question as to whether or not the sale of the disputed property followed the procedure could not be answered through the subsequent suit. The reason being that the said sale was conducted in execution of the decree. If the appellant was of the

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view that the same was improperly conducted she had a remedy under O. XXI Rule 88 (1) of the CPC”.

On further submission the learned advocate contended that as the plaintiff claimed the property was sold at the price far below the market price, the plaintiff should have exhausted the remedy provided for under Section 38 of the CPC which empowers the executing court to determine all questions arising from execution and not by filing a separate suit as was done in the present matter. The learned advocate maintained that by filing a fresh suit, this court lacks jurisdiction to entertain the same.

Hence the 1st and 2nd defendants prays the matter to be struck out with costs.

Having gone through the submissions by the 1st and 2nd defendants in support of the preliminary objections this court is called on to determine the competence of the present suit in which it has been claimed by the 1st and 2nd defendants that the same is un-maintainable as it arises from the execution of the court's decree. Hence the sole issue for my determination is whether the plaintiff was legally correct to file the present suit.

I have carefully gone through the plaint filed in the present suit, it is stated clearly on paragraph 6 that the plaintiff's wife one Sharifa Aloyce Mshana filed Land Case No. 162 of 2016 before this Court against the plaintiff and the 1st defendant. For easy of reference I shall refer Land Case No. 162 of 2016 as "the former suit". The plaintiff herein was the 3rd defendant in the former suit.

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It is further claimed on paragraph 7 of the plaint that parties to the former suit had on 11th September 2017 executed deed of settlement in which among other things agreed were that the plaintiff herein and his wife (the plaintiff in the former suit) had to pay the outstanding amount of Tsh 300,000,000/=, failure of which the disputed property which was mortgaged to the 1st defendant would be disposed to satisfy the decree.

Things did not go as agreed by the parties in the former suit, this state of affairs prompted the 1st defendant herein to lodge application for execution of the decree in the former suit, the application which was accordingly granted and the disputed property was sold so as to satisfy the decree in the former suit.

In the plaint particularly on paragraph 9, the plaintiff essentially challenges the execution order of this court arising from the former suit and several grounds have been advanced as indicated on page 3 above. The plaintiff therefore prays this court to declare the sale of the disputed property illegal, fraudulent and unlawful.

Now having seen the facts giving rise to the present suit, I must point out that the plaintiff essentially challenges the execution order of this court dated 15th March 2022. I am of the settled mind it was not proper for the plaintiff to prefer a fresh suit as there are available remedies. As rightly submitted by the learned advocate for the 1st and 2nd defendants the plaintiff ought to have preferred an application under Order XXI Rule 88 (1) of the CPC. The said provision provides;

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Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it: [Emphasis added].

In the suit at hand the plaintiff is challenging the propriety of the sale of the disputed property raising several grounds as there was material irregularity pertaining to the sale of the disputed property. As such sale was ordered by the Court in execution of the decree the plaintiff should have preferred an application to have the sale set aside basing on the grounds raised in the present suit. This stance was underscored by the Court of Appeal in the decision of **Badungu Ginning Company Limited v CRDB Bank Plc and 2 others** [supra].

Equally Section 38 (1) of the CPC provides that all questions relating to the execution of the decree be determined by the court executing the decree and the same cannot be determined as a separate suit as was done by the plaintiff in the present matter. The allegations that the disputed property was sold at the lower price should have been raised before the executing court.

In upshot and for the foregoing I proceed to sustain the preliminary objections raised by the 1st and 2nd defendants. The suit is hereby struck out with costs.

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A. MSAFIRI,
JUDGE
25/10/2022