

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 175 OF 2022**

**JOSEPH JOHN SHUMA t/a JJS**

**AUTO PARTS AND GENERAL DISTRIBUTORS .....PLAINTIFF**

**VERSUS**

**KCB BANK TANZANIA LIMITED .....1<sup>ST</sup> DEFENDANT**

**YONO AUCTION MART & CO. LTD.....2<sup>ND</sup> DEFENDANT**

*Date of last order: 19/10/2022*

*Date of ruling: 28/10/2022*

**RULING**

**A. MSAFIRI, J.**

On 19<sup>th</sup> July 2022, the above named plaintiff instituted the present suit against the defendants for orders that the latter be restrained from selling the plaintiff's house located at Plot No. 2050 Block C, CT No. 81441 L. O. No. 350035 Kimara Area and House located at Plots No. 217/1/ and 220/1 Block C C.T. No. 54213 L.O. No. 205222 Kunduchi Mtongani area Kinondoni Municipality Dare es Salaam region (hereinafter referred as the disputed premises).

The plaintiff further prayed for an order nullifying the planned auction for being encumbered with irregularities and for an order that time be extended within which the plaintiff shall be able to settle the loan with the 1<sup>st</sup> defendant.

*Aelle.*

On lodging their joint written statement of defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants disputed the plaintiff's claim and they raised two preliminary objections which can be conveniently paraphrased as follows;

- i. That the present suit is res judicate Land Application No. 717 of 2018 decided to conclusion by the District Land and Housing Tribunal for Kinondoni District.*
- ii. In alternative to 1(i) above this court lacks jurisdiction to adjudicate the present suit on account of the facts that pleaded cause of action is triable by an executing court in terms of Section 38(1) (2) and (3) of the Civil Procedure Code [Cap 33 R.E 2019].*

This is a ruling on the above raised preliminary objections. On 22<sup>nd</sup> September 2022, I ordered the above preliminary objections be disposed of by way of written submissions. The plaintiff and the defendants had the services of Messrs Justine Kaleb and Elisa Msuya learned advocates respectively. The order to file written submissions was duly complied with.

I propose to start with the 2<sup>nd</sup> preliminary objection as it touches the jurisdiction of this court, the determination of which can conveniently dispose of the matter at hand.

It was the submission by the learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 2<sup>nd</sup> preliminary objection that the main cause of action pleaded in the present suit is that the defendant is trying to illegally sale

*Alls.*

the decreed property (the disputed premises) at undervalued prices. It was submitted further that in Land Application No. 717 of 2018 filed by the plaintiff before the District Land and Housing Tribunal for Kinondoni at Kinondoni, (hereinafter referred as the DLHT) the disputed premises were to be disposed of in the event the plaintiff defaults in the payment of the loan.

It was the contention by the learned advocate for the defendants that it was wrong for the plaintiff to institute the present matter but rather to file the appropriate proceedings before the executing court as required under Section 38 (1) and (2) of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC).

To fortify his stance, Mr. Msuya has referred to me several decisions such as **Hassan Twaib Ngonyani v Tanzania Pipe Line Limited** Civil Appeal No. 201 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was unanimously held that under Section 38 (1) of the CPC, the executing Court enjoys exclusive jurisdiction to deal with any questions relating to execution, discharge and satisfaction of the decree.

Mr. Msuya was of the view that the DLHT has all mandates and jurisdiction to hear the plaintiff's complains on all the issues relating to the alleged illegal/unlawful sale of the disputed premises.

On reply in respect of the 2<sup>nd</sup> preliminary objection, learned counsel for the plaintiff contended that while admitting that the DLHT passed the decree on 16<sup>th</sup> July 2019 and extracted on 4<sup>th</sup> August 2022 there has never been an order for execution issued by the DLHT hence the same cannot be

*Adls.*

baptized as the executing court because there is no any order for execution issued hence this court has jurisdiction to entertain this suit. It was the plaintiff's further submission that Section 38 of the CPC is inapplicable to the circumstance at hand.

On rejoinder the 1<sup>st</sup> and 2<sup>nd</sup> defendants essentially reiterated the submission in chief.

Having gone through the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in support of the second preliminary objection this court is called on to determine whether it has jurisdiction to determine the present suit.

I have carefully gone through the pleadings filed in the present suit. On paragraph 6 of the plaint filed in the present suit, the plaintiff alleged that the 1<sup>st</sup> defendant had intended to dispose the plaintiff's disputed premises and this prompted him to file Land Application No. 717 of 2018 before the DLHT which was finalized through settlement deed.

The purported settlement deed has been attached to the defendants' joint written statement of defence and it indicates that Land Application No. 717 of 2018 was filed before the DLHT and as correctly claimed by the plaintiff on paragraph 6 of the plaint the matter ended by settlement deed which was adopted as decree of the DLHT. Going by the said settlement which I have thoroughly read, the plaintiff applied for and was granted a credit facility by the 1<sup>st</sup> defendant in which the disputed premises secure the said loan.

*Adle*

It appears that the plaintiff defaulted in the loan repayment hence the 1<sup>st</sup> defendant resorted to recovery measures. It is for that reason the plaintiff herein instituted before the DLHT, Land Application No. 717 of 2018 and at that time the outstanding amount was Tsh 656,206,504/30 and the said amount was to be settled through the agreed schedule stipulated under clause 2 of the said deed. I could not understand how the DLHT adjudicated on that matter as such amount decreed by it falls over and above its jurisdiction, suffice it to say for now the question of jurisdiction of DLHT is irrelevant here.

Now as per the settlement deed, the disputed premises which secured the loan were to be sold in the event of default by the plaintiff to pay the sum of money as agreed under clause 4 of the said deed. In no ambiguous terms clause 4 empowers the 1<sup>st</sup> defendant to dispose of the disputed premises without recourse to the DLHT.

It follows therefore that the disputed premises which the plaintiff seeks this court to give an order form the subject matter in the matter which the plaintiff himself instituted before the DLHT and indeed as per the settlement deed the 1<sup>st</sup> defendant is authorized to dispose the disputed premises.

Hence going by the defendants' submissions, the appropriate remedy available for the plaintiff was not to file the present suit rather was to exhaust the remedy availed under Section 38 of CPC. So if there is any complaint regarding the execution process the plaintiff should have approached the DLHT and it is the avenue with exclusive jurisdiction to

*Alle.*

determine question arising from execution. The plaintiff has submitted that no application for execution has been filed before the DLHT hence section 38 of the CPC is inapplicable.

I am unable to agree with the plaintiff on this argument because still he can file an application under section 38 of the CPC because the decree adopted from the settlement deed had already given the 1<sup>st</sup> defendant a go ahead in respect of the disputed premises hence if there is any issue arising from the said deed it can be resolved under Section 38 of the CPC.

Again under paragraph 7 of the plaint, the plaintiff claimed that disputed premises have been undervalued and the defendants are in the process of disposing them. I am of the settled opinion that although there is no proof that sale has been done the remedy available to the plaintiff in case there is a sale below the market price is provided for under Order XXI Rule 88 (1) of the CPC which provides;

*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].*

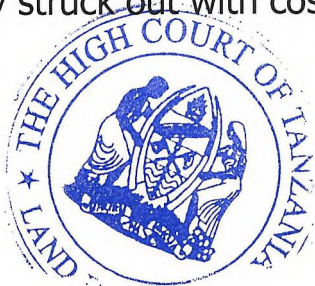
The above provision was underscored in the decision of the Court of Appeal in **Badungu Ginning Company Limited v CRDB Bank Plc and** *Atle.*

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

Hence as there is already a decree touching the dispute premises I think filing a separate suit is highly improper as it is likely to lead into conflicting decisions. The plaintiff should therefore resort to remedies stipulated under Section 38 and Order XXI Rule 88 (1) of the CPC because the 1<sup>st</sup> defendant's authority to dispose the disputed premises is derived from the settlement deed which remained unchallenged to date.

In upshot and for the foregoing, I proceed to sustain the 2<sup>nd</sup> preliminary objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The suit is hereby struck out with costs.



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**A. MSAFIRI**

**JUDGE**

**28/10/2022**