

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

LAND CASE NO. 171 OF 2022

RAJA MOHAMAD ASIF..... PLAINTIFF

VERSUS

KCB BANK TANZANIA LIMITED.....1ST DEFENDANT

ZAINAB JUMA KASWAKA.....2ND DEFENDANT

JORAM GENERAL ENTERPRISES LIMITED.....3RD DEFENDANT

YONO AUCTION MART & COMPANY LIMITED...4TH DEFENDANT

KURINGE REAL ESTATE COMPANY LIMITED.....5TH DEFENDANT

R U L I N G

Date of Last Order: 11. 10.2022

Date of Ruling: 26.10. 2022

T. N. MWENEGOHA, J.

Before me there are preliminary objections in need of determination as raised by the defendants here in above as follows;-

- 1. The suit is time barred (1st to 4th defendants);**
- 2. The suit offends Order IX Rules 2,3,5 and 6(1) of the Civil Procedure Code Cap 33 R. E. 2019 (1st to 4th defendant);**

3. The suit is an abuse of court process in the presence of dismissal order in the Land Case No. 55 of 2019(1st to 5th defendants).

The objections were argued by way of written submissions, Advocate Albert Lema, appeared for the 1st to 4th defendants. The 5th defendant was represented by Advocate Faisal Ally Seif and the appellant enjoyed the legal services.

In addressing the objections, I will start determining the 3rd objection as it was raised by all defendants (1st to 5th defendants). The learned counsels for the defendants maintained that, the dismissal order by Hon. Luvanda, J. dated 21st June, 2016 vide Land Case No. 91 of 2016 and Land case No. 55 of 2019 finalized the matter between the parties in respect of the disputed land. Hence the court is functus officio as far as the case at hand is concerned.

That in the previous two cases, the parties were the same hence the instant case is not maintainable. The counsel for 5th respondent referred the court to the case of **Chief Abdallah Said Fundikira vs. Hillal L. Hillal, Civil Application No. 72 of 2002, Court of Appeal of Tanzania at Dar es Salaam, (unreported).**

In reply to the 3rd objection, the plaintiffs' counsel was of the view that, the instant case is different from the previous cases. That the cause of action in Land Case No. 91 of 2016 is different from the one in the present case. The reliefs are not similar either. That, in the Land Case No. 91 of 2016, the plaintiff was challenging the mortgage for lack of spousal consent. In the instant case the plaintiff is seeking redemption of the mortgaged properties for having been created out of misrepresentation and undue influence. Therefore, the court is not functus officio under these circumstances, as stated in the case of **Hassan Suleiman versus S.M.Z (2005) TLR 236.**

After consideration of the arguments by both parties, this Court is of the finding that the 3rd objection has merit. It is obvious that the instant case is based on the legality of the mortgage same as the previous cases, especially Land case No. 91 of 2016. The plaintiff's claim in the instant case as given at paragraph 8 of the Plaint challenges the legality of mortgage on the grounds that the same was obtained by fraud, hence it is illegal. In land Case No. 91 of 2016, the plaintiff challenged the legality of the same mortgage on the ground that it lacked spouse consent.

It is my view that, the bone of contention in the two cases is the same, legality of the mortgage in question. Since the previous case was

determined to its finality by a dismissal order, the plaintiff is precluded from bringing a fresh suit on the same parties, same subject matter and reliefs which are substantially the same as in the previous case. This Court is functus officio to entertain the instant suit as stated in **Chief Abdallah Said Fundikira vs. Hillal L. Hillal**, (supra). In that case, I sustain the 3rd objection, owing to the reasons I have given here in above. On that basis, I see no need to discuss the remaining two objections (1 and 2 above), because the findings obtained in the 3rd objection are capable of finalizing the entire suit.

In the end, the suit is struck out with costs for want of competency.

It is so ordered.



T. N. MWENEGOHA

JUDGE

26/10/2022