

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 135 OF 2022

CLEMENT STEPHANO KAAYA.....PLAINTIFF

VERSUS

KINONDONI MUNICIPAL COUNCIL1ST DEFENDANT

COMMISSIONER FOR LANDS.....2ND DEFENDANT

ATTORNEY GENERAL3RD DEFENDANT

ELIZABETH MOWERO.....4TH DEFENDANT

BRENDA AI JAMES MAINA.....5TH DEFENDANT

25/10/2022 & 09/11/2022

RULING

A. MSAFIRI, J.

This is the ruling on preliminary objection raised by the 1st, 2nd and 3rd defendants in their joint written statement of defence lodged in Court on 1st August 2022 to the effect that;

1. The suit is bad in law, untenable and is an abuse of the court process.

On 3rd October 2022, I ordered the above preliminary objection to be disposed of by way of written submissions. Mr. Hosea Chamba learned

Alb

advocate appeared for the plaintiff while Ms. Happiness Nyabunya learned Principal State Attorney appeared for the 1st, 2nd and 3rd defendants. On the other hand the 4th and 5th defendants did not enter appearance hence hearing of the preliminary objection proceeded in their absence.

It is the submission by Ms Happiness that the present suit is an abuse of the court process because the plaintiff and the 4th defendant herein were defendant and plaintiff respectively in Civil Case No. 106 of 2000 before District Magistrate Court of Kinondoni (the District Court) in which the matter was determined and default judgment was entered against the plaintiff. Ms. Happiness contended further that the matter at issue as well as reliefs prayed in the said suit are substantially the same as in the present suit.

It is submitted that the plaintiff was aggrieved with the default judgment passed by the District Court hence he preferred Misc. Civil Application No. 235 of 2019 to set it aside and his application was granted. According to Ms. Happiness, pendency of Civil Case No. 106 of 2000 before the District Court makes the present suit res subjudice hence contravening the provision of Section 8 of the Civil Procedure Code [CAP 33 R.E 2019], (the CPC). According to the learned principal state attorney, essential

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elements for the principle of res subjudice to apply are that, the matter in issue in the present suit is also directly and substantially in issue in the matter pending before the District Court, that the plaintiff in the present suit is the same person under whom he claims and further claims against other defendants under the same title and the previously instituted suit at the District Court namely Civil Case No. 106 of 2006 is still pending.

On further submission, Ms. Happiness contended that instituting the present suit while the former suit is still pending amounts to both riding two horses as well as forum shopping which both amounts to abuse of court process. To fortify her stance the learned principal state attorney has referred to me several decisions including **East African Development Bank v Blueline Enterprises Limited** Civil Appeal No. 101 of 2009 as well as **The Registered Trustees of Kanisa la Pentekoste Mbeya v Lamson Sikazwe and 4 others**, Civil Appeal No. 210 of 2020 (both unreported)

On reply, the plaintiff refutes the contention that the present suit is an abuse of court process. While admitting the pendency of the matter before the District Court, the plaintiff submits that the said matter involves

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him and the 4th defendant. The rest of the parties are not involved in the said matter.

Similarly the plaintiff admitted the defaulted judgment was set aside by the District Court hence the matter will be determined inter-parties although the 4th defendant never bothered to pursue her claims against the plaintiff before the District Court. The plaintiff submitted further the land in dispute was illegally allocated to the 5th defendant while the matter is pending in courts hence he filed the present suit against the defendants because the Attorney General cannot be sued at the District Court.

The plaintiff maintained that the present suit is not res subjudice because the 1st, 2nd and 3rd defendants are not parties to the Civil Case No. 106 of 2000 and also the plaintiff has never raised a counter claim in the said suit. He added that, for the plea of res subjudice to succeed both courts must have jurisdiction to try the matter, in the matter at hand the District Court does not have jurisdiction to try the matter as it is a land matter.

The plaintiff has strongly denied the claims of forum shopping because he has never pursued the same right in any other forum apart

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from this suit. The matter before the District Court was preferred by the 4th defendant. The plaintiff therefore prayed the preliminary objection raised to be overruled and the matter to proceed on merits.

There was no rejoinder submission from Ms. Happiness learned principal state attorney.

Having gone through the parties' submissions rival and in support of the preliminary objection raised, the crucial issue for my determination is whether the preliminary objection raised has merits.

From the parties' submission it is not in dispute that there is a case pending before the District Court. The subject matter of dispute before the said court is Plot No. 712 Block E Mbezi Beach, Dar es Salaam. The plaintiff expressly admits that the dispute was determined to finality and default judgment entered against him by the District Court in favour of the 4th defendant. Paragraph 9 of the plaint reads;

9. That from 2000 the plaintiff never heard of the 4th defendant till sometimes in July, 2009 when the plaintiff went to the Ministry of Lands and Human Settlements to pay land rents, he was informed that there is a default

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judgment entered by the Kinondoni District Court in Civil Case No. 106 of 2000 against him in favour of the 4th defendant.

The plaint further reads on paragraphs 10, 11, 12, 13 and 14 on the efforts undertaken to challenge the default judgment both in this Court as well as before the District Court and finally he was successful to set aside the judgment entered against him and there is an order for the matter to proceed inter-parte.

The crucial issue which I need to resolve is whether it was proper for the plaintiff to prefer the present suit while there is a matter pending before the District Court. The plaintiff has forcefully submitted that the present suit is proper before this Court because the 1st, 2nd and 3rd defendants were not parties in the matter pending before the District Court and moreover the present suit is against the Government it cannot be filed in the District Court. The plaintiff contended further that the District Court does not have jurisdiction over the matter as it is a land dispute.

I take a different view. As the matter was determined and default judgment entered by the District Court over the land in dispute against the

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plaintiff then he could not have preferred a separate suit as he did in the matter before me. Although, truly as submitted by the plaintiff that the 1st, 2nd and 3rd defendants were/are not parties to the said case still the subsequent suit filed before this court is improper because there is already a decree touching the subject matter that forms the dispute in this matter.

Now as the plaintiff who was the defendant in the suit before the District Court has successfully filed an application to have the default judgment set aside and it has been ordered that it has to be determined inter-partes, then the plaintiff should have proceeded pursuing his rights before the District Court because the matter was instituted there prior to this suit. The claims by the plaintiff that the District Court lacks jurisdiction to entertain the said matter is irrelevant here as that claim should have been raised before the District Court.

I am aware that with coming into force of the Land Disputes Courts Act [Cap 216 RE 2019] (the Act) on 1/10/2003, courts established under the Magistrates Courts Act [CAP 11 R.E 2019] ceased to have civil jurisdiction over land disputes, however all the land disputes that were still pending before the said courts before the enactment of the Act ought to have been concluded within 2 years that is by 2005. If the said disputes

could not have been concluded within the said period the Registrar of the High Court is required to make an application to the Chief Justice for extension of time to conclude such disputes.

In the present matter it has been submitted that Civil Case No. 106 of 2000 is still pending before the District Court. I am of the settled view that the District Court is not automatically rendered without jurisdiction to try the matter because it was instituted before it prior to the enactment of CAP 216. Hence for advice, the Registrar of the High Court should be consulted before any further action is taken so that request for extension of time can be made to the Honourable Chief Justice in order for the District Court to continue with adjudication of the matter or as it can be directed otherwise. See Section 54(3) of the Act.

I subscribe to the authorities referred to me by Ms Happiness learned principal state attorney in **The Registered Trustees of Kanisa la Pentekoste Mbeya v Lamson Sikazwe and 4 others** [supra] that by abandoning the matter before the District Court and rushing to file the present suit, the plaintiff embarked on forum shopping and may lead into conflicting decisions as there is a matter which was instituted earlier

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touching on the subject matter which is substantially the same in the matter at hand.

In upshot and for the foregoing reasons, I proceed to sustain the preliminary objection raised by the 1st, 2nd and 3rd defendants. The suit is hereby struck out with costs.



A. MSAFIRI,

JUDGE

09/11/2022