

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

LAND CASE NO. 49 OF 2022

PROMATEX EST LIMITED.....PLAINTIFF

VERSUS

**MAENDELEO BANK PLC.....1ST DEFENDANT
KITUPA PROPERTY CONSULTS LIMITED.....2ND DEFENDANT
HILLARY SANDE LIGATE t/a
NOEL ESTATE COMPANY LIMITED.....3RD DEFENDANT
FRANK ROSE MAREALLE.....4TH DEFENDANT
NKRUMA MNJORI.....5TH DEFENDANT**

Date of Last Order: 31.10.2022
Date of Ruling: 07.11.2022

RULING

V.L. MAKANI, J

This is the ruling in respect of the preliminary objections raised by the
1st defendant that:

- 1. The Land Case No.49 of 2022 has been preferred by the Plaintiff contrary to provisions of Order XXI, Rules 88 (1) of The Civil Procedure Code, Cap 33 RE 2019.*
- 2. The suit is time barred as it contravenes the provisions of item 4 part 1 to the Schedule of the Law of Limitation Act Cap 89 RE 2019 which prescribe 2 years period of limitation to set aside sale in the execution of a decree of a court exercising Civil jurisdiction.*

The raised preliminary objections were orally argued by Mr. Kennedy Mgongolwa, Advocate who represented the 1st defendant.

Mr. Mgongolwa gave a brief history of the matter. He said the 1st defendant, Maendeleo Bank (the Bank) obtained judgment in her favour vide Land Case No. 56 of 2017 against the plaintiff herein. He said the Bank executed the decree by way of auction of the suit premises namely Plot No. 40, Block 1, Hananasifu Area, with CT No. 114273 (the **suit property**) which was sold successfully in execution of the decree.

As for the first point of objection, Mr. Mgongolwas said the plaintiff in the instant matter is challenging on how the public auction was conducted (paragraphs 14 and 15 of the plaint). He said the challenge is contrary to Order XXI Rule 88 of The Civil Procedure Code, CAP 33 RE 2019 (the **CPC**) which provides any challenge to such auction to be remedied by way of application. He said if the plaintiff was dissatisfied, he should have come to the court by way of application and not a suit. He relied on the case of **Badungu Ginning Co. Ltd vs CRDB Bank Plc & Others, Civil Appeal No.265 of 2019 (CAT-Mwanza)** (unreported)

On the second point of preliminary objection, he said that the matter is time barred. That paragraph 14 of the plaint reveals that the auction was on 22/11/2019 and that is when the sale was conducted. That according to Item 4 Part I to the Schedule of the Law of Limitation Act, Cap 89 RE 2019 (the **Limitation Act**), a suit to set aside execution of the decree is supposed to be filed within two years. That the auction was conducted in 2019 and this matter was filed on 09/03/2022, which is 3 years. That it is time barred and the suit should be struck out/dismissed with costs.

Mr. Kaijage represented the plaintiff. He replied that the 1st defendant has misconceived the suit before the court. He said the matter is on breach of duty of care by the Bank to look for the best buyer. That under contractual obligations the Bank was bound to comply as was entailed in the Facility Agreement. That the suit is based on a mortgage and the plaintiff is not seeking to set aside the sale. In that regard he said Order XXI Rule 88 (1) of the CPC does not apply.

As to the second point he said that the suit is within time as per Item 7 to the Schedule of the Limitation Act which provides six years for

suits on contract. He distinguished the cited case **Badugu Ginning Co. Ltd** (supra) and prayed for the raised points of objection to be dismissed.

In his rejoinder. Mr. Mgongolwa, reiterated his main submissions and added that the issue of contractual obligation under the duty of care is misplaced because the Bank did not sell the suit premises but the 3rd defendant who is the Court Broker. He said paragraph (c) of the reliefs prays for the sale to be declared void. He said that the suit does not emanate from contract and the plaint indicates that there is dissatisfaction in the sale. That the plaintiff has not disputed existence of Land Case No. 56 of 2017 and that the applicable are the laws of execution.

I have listened to Counsel for the parties and the main issue for consideration is whether the preliminary points of objection raised by the Bank have merit. I shall start with the second point of objection on time limitation as it touches on the whether this court has jurisdiction of this court to entertain the matter.

Having gone through the submission of Counsel for the parties. I have noted that the centre of the contention is the nature of this suit, that is, whether it is a contract or a suit challenging execution. In order to determine this I went through the plaint. In paragraph (c) of the reliefs sought, the plaintiff is praying for the sale to be declared void. In other words, he is praying for the sale to be nullified. This suffices to say that the plaintiff was dissatisfied on how the execution was conducted. The law requires a person who is dissatisfied with execution to challenge the same within 2 years. This is per Item 4 Part I of the Schedule to the Limitation Act which provides for time limit of two years for any dissatisfied party to file a suit in order to set aside the sale in execution of the decree in court exercising civil jurisdiction. Thus, even the suit at hand is improper as the plaintiff was required to file an application to set aside the sale. Since execution was conducted in 2019 the suit at hand is time barred as it was filed on 09/03/2022, which is three years.

Now, what is the remedy where a suit filed out of time? It is the law that when a matter is time barred it must be dismissed. This is per section 3(1) of the Limitation Act which states that:

"Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

It should be noted that there are two points here to be observed that the suit is improperly filed and also it is out of time. In that regard the said suit is hereby dismissed with costs.

Having said that, the second point of preliminary objection is enough to dispose of the whole suit. In that regard I shall not dwell on the other points of objections that have been raised.

For the reasons explained above, the second objection has merit, and it is sustained. The suit is hereby dismissed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
07/11/2022