

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 155 OF 2022

FREDRICK AUGUST MASSAWE

Appointed Attorney of MOGENS RIISE HANSEN)PLAINTIFF

VERSUS

CELINE EPHRAHIM NGAHUGHA1ST DEFENDANT

MESHAK GEORGE MANG'ULI alias

GEORGE EPHRAHIM NGAUGHA 2ND DEFENDANT

DIAMOND TRUST BANK LTD 3RD DEFENDANT

MAJEMBE AUCTION MART LTD 4TH DEFENDANT

E-FM COMPANY LTD 5TH DEFENDANT

FRANCIS CIZA @ MAJIZO 6TH DEFENDANT

JOYCE DONALD KIMARO t/a

FIFTY SUPER SEMBER SUPPLIES 7TH DEFENDANT

RULING

Date of last Order: 10.11.2022

Date of Ruling: 14.11.2022

A.Z.MGEYEKWA, J

On 8th July, 2022 the Plaintiff herein, instituted this suit against the

Defendants, seeking eight reliefs as follows:-

- i) For orders of declarations that the mortgage of the suit property was fraudulently procured; is therefore null and void.*
- ii) For orders that the spousal consent purportedly obtained is invalid, void ab initio for want of forgery.*
- iii) For nullification of the mortgage purportedly created by 1st Defendant in favour of the 3rd Defendant and for further orders that the suit property is restored to its true owner – the whole family of the 1st Defendant.*
- iv) In the alternative to (i), (ii), (iii); for orders that he Defendants should pay the compensation in the extent of Tshs. 375,000,000.00 as compensation for his contribution in acquiring and improving the suit property.*
- v) For payment of interests of 7% being the court rate from the date of pronouncement of judgment and decree until the date of payment in full.*
- vi) For payment of the costs of the case*
- vii) Any and further reliefs the court shall deem just and fit to grant.*

The 3rd, 4th 5th, and 6th Defendants filed a joint Written Statement of Defence denying the Plaintiff's claims and urged this court to dismiss the suit.

When the matter came up for orders on 17th October, 2022, the Plaintiff had the legal service of Ms. Regina Kiumbo, counsel, the 1st Defendant had the legal service of Mr. Mcharo, counsel also holding brief for Mr. Joakim, counsel for the 5th and 6th Defendants. The 3rd and 4th Defendant enlisted the legal service of Mr. Shaban, counsel and the 2nd Defendant did not show appearance. Before the hearing of the suit on merit, the suit encountered preliminary objections from the 3rd, 4th, 5th, and 6th Defendants' counsel. They raised seven objections as follows: -

- 1. That the Honourable Court has no jurisdiction to hear and determine this suit whose dispute does not concern land.*
- 2. The suit is incompetent and bad in law for being time-barred.*
- 3. That plaintiff has no locus standi to file the case for and on behalf of the family of the 1st Defendant.*
- 4. The suit is incompetent for being based on issues that are res judicata.*
- 5. The Honourable Court lacks jurisdiction for being functus officio.*
- 6. The suit is unmaintainable for being an abuse of the court process.*
- 7. The suit is incompetent and bad in law for containing a defective verification clause.*

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That

is the practice of the Court founded upon prudence which we could not overlook.

The learned counsels for the 3rd, 4th, 5th, and 6th Defendants opted to abandon the 6th and 7th points of objection. Submitting on the first limb of the objection, they contended that this Court has no jurisdiction to hear and determine this suit since the same does not concern land matters.

They further stated that section 167 of the Land Act, Cap. 113 [R.E 2019] establishes land courts and vests the Courts with exclusives powers to determine all disputes, actions, and proceedings concerning lands. Fortifying their submission they cited the cases of **Anderson Chale v Abubakar Sakapara**, Civil Appeal No. 121 of 2014 cited by Hon. Maige, J in **Charles Rick Mulaki v William Jackson Magero**, Civil Appeal No. 69 of 2019, the Court interpreted matters concerning land to mean land itself and anything attached to it or has interest to it. They also referred this Court to the case of **SME Impact F and CV & 2 others v Agraserve Company Ltd.** Civil Appeal No. 9 of 2018.

The learned counsels for the 3rd, 4th, 5th, and 6th Defendants continued to submit that the Plaintiff is not a registered owner of Plot No. 150, Block 'B' Tegeta, Kinondoni, Dar es Salaam. They added that the Plaintiff is praying for 7 reliefs including the relief for a declaration that the matter of the suit property was fraudulently procured which in their views is commercial

litigation based on the mortgaged contract created by the 1st Defendant. They went on to submit that the Plaintiff is alleging unlawfulness or illegality of spouse consent, it was their submission that the prayer cannot be granted in a civil court since it is not a land matter. Stressing on the point of jurisdiction, they argued that the matter is a criminal offence triable by a criminal court. To support their submission they cited the case of **William Sabuka v Safari Sipembo**, Land Appeal No. 31 of 2018, and **Britania Biscuit Limited v National Bank of Commerce Ltd & others**, Land Case No. 4 of 2011 (unreported). They insisted that this Court has no jurisdiction to hear matters which are not land matters, and they urged this Court to dismiss the suit.

With respect to the second limb of the objection, the learned counsels for the 3rd, 4th, 5th, and 6th Defendants contended that the suit is time-barred. The counsels were straight to the point and brief. The counsels for the 3rd, 4th, 5th, and 6th Defendants' contention, the mortgage was created on 16th July, 2015. He went on to submit that time started to run against the Plaintiff on 16th July, 2015. They went on to argue that the main prayer in the pleadings is compensation as the Plaintiff is not the owner of the suit land which is founded on tort. Supporting their submission they referred this Court to Part I Item No. 6 to the Schedule of the Law of Limitation Act, Cap. 89 [R.E 2019]. The applicant is a reputable company

that is established and owns vast assets capable of meeting financial obligations and settling the decretal sum in the event the intended appeal fails.

The learned counsels for the 3rd, 4th, 5th, and 6th Defendants continued to submit that the instant suit was filed on 8th July, 2022 after seven years. They added that the Plaintiff is also challenging the sale applying to set aside on the ground of fraud, in their view the Plaintiff ought to have filed an application instead of a suit and the time limit for setting aside a suit is thirty days as per Part III Item 6 to the Schedule of the Law of Limitation Act, Cap.89. They argued this Court to dismiss the suit for being time-barred. To support their argumentation they referred this Court to the case of **Stephene Masato Wasira v Joseph Sindi Warioba and the Attorney**, Civil Application No. 1/1998 [1999] TLR 334.

As to the third limb of the objection, the learned counsels for the 3rd, 4th, 5th, and 6th Defendants contended that the Plaintiff has *locus standi* to file the case for and on behalf of the family of the 1st Defendant. They argued that the third prayer to the Plaint appears that the Plaintiff is suing on behalf of the family of the 1st Defendant Title No. 46051 which is the basis of the suit which is in the name of the 1st Defendant not in the names of the family of the 1st Defendant. Hence it was their view that the Plaintiff has no power to sue on behalf of the 1st Defendant or her family in

absence of the power of attorney. The counsel fortified her position by citing the case of **Lajuna Shabi Balonzi Trustees of Chama Cha Mapinduzi** [1996] TLR, this Court quoted with the approval in the case of **Khanan Said Alabry v Nevumba Salum Mbondo**, Misc. Land Appeal Mo. 81 of 2021.

Submitting on the fourth limb of the objection, the counsels for the 3rd, 4th, 5th, and 6th Defendants submitted that the instant application is *res judicata*. They claimed that the matters which were directly and substantially in issue in Land Case No. 25 of 2017 have been adjudicated and put to its finality. They contended that the Plaintiff filed Land Case No. 25 of 2017 against the Defendants except the 2nd Defendant who is the husband of the 1st Defendant and the 6th Defendant the principal officer of the 6th Defendant.

The counsel did not end there, he argued that in Land Case No. 25 of 2017 the issue of illegality of the mortgage such as public auction, mortgage documents, default notices as well as purchase price were all discussed and the decision was made in favour of the Defendants. They went on to state that the Plaintiff being the partner parent of the 1st Defendant was impliedly a party to the said suit or rather privy he was not to be formally enjoined in a suit, but he was deemed to claim under the 1st

Defendant in the basis of a common interest in the subject matter of the suit.

They went on to submit that the Court which determined the case was competent to try the suit and the matter was heard and finally decided, hence all conditions requisite for the doctrine of res judicata are established. The counsels buttressed their contention by quoting the reasoning in **Zuberi Paul Msangi v Mary Machui**, Civil Appeal No. 316 of 2019. They also referred this Court to section 9 of the Civil Procedure Code, Cap.33 [R.E 2019] and the case of **George Shambwe v Tanzania Italian Petroleum Company Ltd** (1995) TLR 20 Chua, J. they stressed that the instant suit is res judicata to Land Case No. 25 of 2017.

On the fifth limb of the objection, they claimed that this Court lacks jurisdiction for being *functus officio*. The counsels for the 3rd 4th, 5th and 6th Defendants' contention is that this Court has disposed of a case making a decision and making the same known to the parties in Land Case No. 25 of 2017, this Court became *functus officio*. Supporting their stance they cited the case of **Kamanda v R** (1973) EA 540. They submitted that in Land Case No. 25 of 2017, this Court heard the parties and finally determined the matter, hence it ceases to have jurisdiction as emphasized in the case of **Tanzania Telecommunication Company Ltd & others v TriTelecommunication Tanzania Ltd** [2006] I E.A 393.

On the strength of the above, the learned counsels for the 3rd, 4th, 5th, and 6th Defendants beckoned upon this Court to dismiss the suit with costs.

Rebutting the 3rd, 4th, 5th, and 6th Defendants' objections, on the first limb of the objection, Mr. Elisa Msuya, the learned counsel for the Plaintiff contended that the submissions by the Defendants are anchored on the provision of section 167 of the Land Act, Cap.113 [R.E 2019] and the decision of Anderson Chale (*supra*).

It was his submission that in ascertaining whether the matter is a land matter or not we need to look at what is the cause of action pleaded. He stated that the expression cause of action is not defined under the Code, but it may be taken to mean essentially facts that are necessary for the Plaintiff to prove before he can succeed in the suit. To bolster his position he cited the case of **John M. Bvombalirwa v Agency Martime Internationale (Tanzania) Limited** [1983] TLR 4. Mr. Elisa went on to submit that looking at the pleadings and annexures, it is obvious that the Plaintiff sues the Defendants jointly and severally for repossession of his land and or the value thereof on account of fraudulent acts which resulted in mortgaging the suit land to the 3rd Defendant and who eventually sold the same to the 6th Defendant.

In his view, this is the core issue on the matter at hand and the rest are consequential reliefs arising in connection to the main issues. It was his

submission that this matter is substantively a land matter and this Court has jurisdiction. Fortifying his submission he cited the case of **The National Bank of Commerce Ltd v National Chicks Corporation Ltd & 4 others**, CAT, Civil Appeal No. 129 of 2015.

On the second limb of objection, Mr. Msuya contended that this is not a tortious liability matter instead it is a suit founded on repossession of landed property, and the same is filed within time. The learned counsel for the Plaintiff asserted that Plaintiff under paragraph 17 (i) - (iii) discovered the fraud on 9th July, 2021 when his son informed him that 1st Defendant and the son have been evicted because the house was sold to the 6th Defendant. They claimed that the objection has no merit.

Arguing for the 3rd objection, the counsel for the Plaintiff contended that the Defendants submission is an irrelevance to the issue that the Plaintiff lack *locus standi*. He referred this Court to the case of **Lujuna Shubu Ballonzi Senior v Registered Trustees of CCM** (supra) and argued that the cited cases are distinguishable from the case at hand. He submitted that the Plaintiff has been illegally deprived of his entitlements over a landed property fraudulently disposed of him by all Defendants jointly and severally. He added that the Plaintiff prays for repossession of this property and or value thereof, hence it defends all logic that he has no *locus standi* on the case.

Submitting on the 4th limb of objection that the case is *res judicata*, the learned counsel for the Plaintiff contended that the principle test in the case of **Ester Ignas Luambano v Adrirano Gedam Kipalile**, Civil Appeal No. 91 of 2014 CAT held that:-

“The test is whether the claim in the subsequent suit or proceeding is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.”

Mr. Msuya submitted that the above principle is put to test the present case and the decision of this Court in Land Case No. 25 of 2017, it is clear that the subject matter in the former suit is not substantially the same as issues in the present suit and parties are not claiming on the same title.

He submitted that in Land Case No. 25 of 2017 the 1st Defendant sued for a declaration that the suit property was illegally sold in a public auction conducted by the 4th Defendant on 22nd April, 2017 while in the present suit the cause of action is founded on alleged fraudulent actions of the Defendants jointly and severally which led to the dispossession of the Plaintiff rights over the suit property and the fraud is proved the Plaintiff shall require re-instatement of the suit property and or in the alternative the value thereof at Tshs. 375,000,000/=.

The learned counsel for the Plaintiff went on to argue that the holding in

Land Case No. 25 of 2017 is only over the 5th and 6th Defendants, the rest Defendants are not covered by the decision in Land Case No. 25 of 2017. He added that the 1st, 2nd, 3rd, and 7th Defendants are charged for perpetrating forgeries at the time of the creation of the mortgage not during selling auctioning. He added that the creation of a mortgage is a separate cause of action that was never decided by any judgment of any competent Court and the 4th Defendant is sued for vandalizing the Plaintiff's properties as pleaded in the plaint at paragraph 2.00, the dispositions have never been decided by any court.

As to the 5th objection, the learned counsel for the Plaintiff submitted that the question is whether any Court has issued a decision covering the 1st, 2nd, 3rd, 4th and 7th Defendants on the issue of the subject matter in the matter at hand. He submitted that this court is not *functus officio* since the acts in the plaint are those involved in the creation of the fraudulent mortgage and mishandling of the Plaintiff properties during the sale.

On the strength of the above submission, Mr. Msuya urged this court to overrule the objections.

In their rejoinder, the learned counsels for the 3rd, 4th, 5th, and 6th Defendants reiterated their submissions in chief. They stressed that the Plaintiff is not the owner of the suit land and so he cannot be heard suing

for repossession of something which does not belong to him. They submitted that the counsel for the Plaintiff has admitted that the Plaintiff is suing the Defendants for value on account of fraudulent acts which resulted in mortgaging the suit land, they stressed that it is an issue of tort and criminal matters, not land matter and the High Court Land Division is established to deal with land matters. They contended that the cited case of **The National Bank of Commerce Limited** (supra) is distinguishable from the facts of this case. In the cited case the issue for discussion was the jurisdiction of the court where the matter has elements of both land and commercial essentials which is not the issue of this case. Ending, they urged this Court to dismiss the suit with costs.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserved. I should state at the outset that the main issue for determination is *whether the objections raised are meritorious*.

I have opted to start to address the 4th and 5th objections, whether or not the matter is *res judicata* and *whether this Court is functus officio to entertain the present suit*. The Court of Appeal set out five conditions of *res judicata* in the case of **Paniel Lotta v Gabriel Tanaki & Others** [2003] TLR 312 the same arises from the scheme of section 9 of the Civil Procedure Code Cap.33 [R.E 2002] which when coexistent, bars a

subsequent suit as follows:-

- i) *The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;*
- ii) *The former suit must have been between the same parties or privies claiming under them.*
- iii) *The party in the subsequent suit must have litigated under the same title in the former suit.*
- iv) *The matter must have been heard and finally decided.*
- v) *That the former suit must have been decided by a court of competent jurisdiction.*

Applying the first principles of *res judicata*, whether the matter is directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. The learned counsel for the Plaintiff tried to convince this court that the matter in Land Case No. 25 of 2017 was different from the instant case. While in the matter at hand the Plaintiff's claims are related to Plot No. 150 Block 'B' Tegeta Kinondoni Municipality and comprised in CT No. 46051. In Land Case No. 25 of 2017, the 1st Defendant's claims were also related to Plot No. 150 Block 'B' Tegeta Kinondoni Municipality and comprised in CT No. 46051.

Therefore, the record reveals that the subject matter in all proceedings is the same.

The Plaintiff in the present application the Plaintiff alleges fraud connected to the landed property Plot No. 150 Block 'B' Tegeta and in the Land Case No. 25 of 2017, the Plaintiff who is the first Defendant claimed that the public auction carried on 22nd April, 2017 in respect to Plot No. 150 Block 'B' Tegeta are Kinondoni Municipality was null and void. The end result of Land Case No. 25 of 2017, the suit was dismissed.

It is worth noting that the dismissal of the suit has the effect of barring subsequent proceedings on the same cause of action, and the same subject matter even where the parties are different. The matter becomes constructively res judicata, regardless that it was not finally determined or heard on merit since the orders to dismiss the suit for want of prosecution has the same effect as orders emanating from a matter determined on merits. Therefore, the Plaintiff is barred from instituting a case involving the same subject matter.

Next for consideration is the second condition; the former suit must have been between the same parties or privies claiming under them. As to the second principle whether the parties in the former suit are similar to those in the instant case. The records reveal that in Land Case No.150 of 2017

the parties were Celine Ephram Ngahugha against Diamond Trust Bank, Joyce Donald Kimaro t/a Fifty Fifty Super Sembe Supplies, Majembe Auction Mart Ltd, and E-FM Company LTD, and in the present suit parties are N Fredrick August Massawe (Appointed Attorney of Mogens Riise Hansen) against Celine Ephram Ngahugha, Meshak George Mang'uli alias Geroge Ephrahim Ngaugha, Diamond Trust Bank, Majembe Auction Mart Ltd, E-FM Company LTD, Francis Ciza @ Majizo and Joyce Donald Kimaro t/a Fifty Fifty Super Sembe Supplies.

The Plaintiff in the present application has added two Defendants, however, reading the records it is revealed that all Defendants are involved in the alleged fraud connected to the landed property Plot No. 150 Block 'B' Tegeta which was a subject matter in the Land Case No. 25 of 2017 and the same was determined by this Court to its finality. In my considered view, the instant suit is a subset of the doctrine of *res judicata*. In other words, the suit is constructive *res judicata*, a suit *that* sets to bar any claims being raised in a later proceeding if the claim on the same subject matter ought to have been raised and decided earlier.

As to the third condition, the party in the subsequent suit must have litigated under the same title in the former suit. Reading the Plaintiff and the decision in Land Case No. 25 of 2017, it is clear that the subject matters are the same whereas Plot No. 150 Block 'B' Tegeta is the subject matter in Land

Case No. 25 of 2017 and the Plaintiff in the instant case on paragraph 9 is claiming that the 1st Defendant fraudulently represented to the 3rd Defendant that she is the sole lawful owner of the Plot No. 150 Block 'B' Tegeta Kinondoni Municipality and comprised in CT No. 46051. Consequently, Mr. Msuya's submission that the cause of action is not the same is tenuous because in the matter at hand the Plaintiff is trying to execute the property which is involved in both cases. Constructive *res judicata* implies this matter at hand and renders the first condition to be fulfilled.

As to the fifth principle, the Court which decided the previous suit must have been competent to try the subsequent suit; the High Court, Land Division in Land Case No. 25 of 2017 was competent. The record reveals that the matter Land Case No. 25 of 2017 was finally determined on merit whereas the 1st Defendant lost her case. Therefore this condition is met.

Having said so, I hold that this application is *constructive res judicata* and this court is *functus officio* to determine the instant suit. Guided by the above principles I find merit in the 4th and 5th preliminary objections raised by the 3rd, 4th, 5th, and 6th Defendants' counsels.

The above finding sufficiently disposes of the suit. Consideration of other preliminary objections raised will not affect the above finding. I, therefore, refrain from delving into other alleged points of law.

In the upshot, I hereby dismiss the suit with costs.

Order accordingly.

DATED at Dar es Salaam this 14th November, 2022.




A.Z.MGEYEKWA

JUDGE

14.11.2022

Ruling delivered on 14th November, 2022 via video teleconference whereas mT. Robert, counsel for the 1st Defendant and Mr. Shaban Kabelwa for the 3rd and 4th Defendants were remotely present.




A.Z.MGEYEKWA

JUDGE

14.11.2022

Right to appeal fully explained.