

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

LAND CASE NO. 219 OF 2021

BENEDICTO RWEIKIZA IJUMBA PLAINTIFF

VERSUS

ALEX MSAMA MWITA 1ST DEFENDANT

BANK OF AFRICA TANZANIA LIMITED 2ND DEFENDANT

YUSUF SHABANI OMARY 3RD DEFENDANT

RULING

14/6/2022 & 30/6/2022

A. MSAFIRI, J

This ruling pertains to preliminary objections on point of law raised by the 2nd and 3rd defendants in this suit.

In the suit, the plaintiff claims against the 1st and 2nd defendants for an order of nullification of consent order which was obtained fraudulently between the 1st & 2nd defendants in Commercial Case No. 50 of 2020, a declaration that the plaintiff is the rightful owner of land situated at Plot No. 62 Block 17 Makurumla Street Magomeni Area, Kinondoni Municipality, *Alle*

Dar es salaam and an order of perpetual injunction against the 1st, 2nd and 3rd defendants in respect of the said property.

When filing their Written Statement of Defence, the 2nd defendant raised two preliminary points of objection that;

- i) To the extent that the plaintiff seeks this Court to overturn or set aside its own decision in Commercial Case No. 50 of 2020 between the defendants herein as per paragraph 4 and relief section of the Complaint, and to the extent as a general rule this Court, like any other Courts, has no jurisdiction to overturn or set aside its own decision, in terms of the Court of Appeal in **Scolastica Benedict vs. Martin Benedict** (1993) TLR 2, this court is functus officio.
- ii) To the extent that the plaintiff seeks an order nullifying a consent judgment and decree in Commercial Case No. 50 of 2020 between the defendants herein as per paragraph 4 and relief section of the Complaint, and to the extent that it is trite law the remedy for a party aggrieved by the decree in which he was not a party is not to pursue a fresh suit in terms of the Court of Appeal decision in the case of **Bank of Africa Tanzania Limited vs. Said A. Marinda & 30 others**, Civil Application No. 74 of 1998(Unreported), this suit is untenable in law.

Also the 3rd defendant raised preliminary objections to the effect that; *Acle*

1. This Court has no jurisdiction to nullify the consent settlement order entered by the High Court of Tanzania Commercial Division in Commercial Case No. 50 of 2020.
2. In view of the ruling of this Court dated in Misc. Land Application No. 658 of 2021, this suit is not maintainable.

The 2nd and 3rd defendants prayed for the dismissal of the suit with costs.

The hearing of preliminary objections was by way of written submissions. The written submissions by the 2nd defendant in support of preliminary objection was drawn and filed by Hendry Polycarp Kimario, advocate, the submissions by the 3rd defendant in support of preliminary objection was drawn and filed by Sylivatus Sylvivanus Mayenga, advocate while the reply submission by the plaintiff opposing the preliminary objections was drawn and filed by Augustine Mathern Kusalika, advocate.

I have observed that the preliminary objections raised by the 2nd and 3rd defendants although they were filed separately, they are similar, and so I will consolidate and determine them jointly.

Submitting on the first point of objection, the 2nd defendant through her advocate Mr. Kimario stated that this Court is functus officio. That, the plaintiff at paragraph 4 and the relief section (i) of the Plaint, seek to nullify the consent Judgment and Decree in Commercial Case No. 50 of 2020 by Commercial Division of the High Court by Hon. Nangela, J. He stated that *Alles*.

this Court has no jurisdiction to do so as it is functus officio, having already issued the said consent judgment and Decree.

To cement his point, Mr. Kimario cited the case of **Scolastica Benedict vs. Martin Benedict (supra)** and the case of **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012.

On the second point of objection, Mr. Kimario submitted that this suit is untenable in law. He stated that, the plaintiff seeks nullification of the consent Judgment and decree in Commercial Case No. 5 of 2020. In the said consent Judgment and Decree, the plaintiff is not a party.

He argued that in law, a remedy for the person aggrieved by the Court judgment in which he/she was not a party, is not to file a fresh suit rather to file a revision at the higher Court so that the impugned decision is set aside/nullified and necessary orders are issued. To buttress his point, he cited the case of **Bank of Tanzania vs. Said A. Marinda & others, (supra)**. He prayed for the suit to be struck out with costs.

In support of the raised preliminary objection raised by the 3rd defendant, Mr. Mayenga submitted that, it is clear that section 38 of the Civil Procedure Code Cap 33 R.E 2019, requires all questions relating to execution be dealt by the executing Court. That, the High Court Commercial Division being the executing Court is the proper Court in which the current suit ought to have been lodged. *Alle*

Mr. Mayenga submitted further that, the cause of action sought in this suit concerns the same property which is the subject of the execution in Commercial Case No. 50 of 2020. That, since the Commercial Division of the High Court as the executing Court has already entered the consent order(which the plaintiff is seeking to impugn), the appropriate remedy would have been for the plaintiff to seek for the leave of Commercial Court to set aside the consent order or challenge execution proceedings. That, the executing Court being seized with the original proceedings in execution, stands with a better chance to rule on any issue arising with execution. He concluded that, this suit lacks legs to stand.

In reply submission, Mr. Kusalika for the plaintiff, made a response on all preliminary objections raised by the 2nd and 3rd defendants and stated that all are misconceived and devoid of merit as none of the objection addressed the consent Judgment or Order which is prayed to be nullified in the main suit.

Mr. Kusalika responded on the point of objection raised that the suit is bad in law for lack of jurisdiction as the matter is functus officio and that the suit is untenable in law. He stated that, the consent judgment can be challenged by the plaintiff on allegation of fraud by filing the new suit and that Court is not functus officio. He cited the case of **Mohamed Enterprises (T) Ltd vs. Masoud Mohamed Masser (supra)**, where at page 6, the Court of Appeal held that; *Adile*.

".....the only remedy of person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree"

He argued that, the consent decree entered by fraud or misrepresentation can only be challenged by filing a fresh or new suit in the same Court hence this suit is tenable and not functus officio. He contended that the cases/authorities cited by the defendants in this suit are distinguishable. He prayed that the preliminary objections be overruled for lack of merit.

In rejoinder, the 2nd and 3rd defendants reiterated their submissions in chief.

Having gone through the respective submissions by the learned counsels for the 2nd & 3rd defendants and the plaintiff, supporting and opposing the raised preliminary objections, the main issue is whether the same has merit or not.

In the submissions by the 3rd defendant, the counsel made observation to the Court that, the plaintiff in this suit lodged the present suit together with an application for temporary injunction registered in this Court as Misc. Land Application No. 658 of 2021. In the said Application, the 2nd & 3rd defendants raised the preliminary objections on point of law contending the competence of the main suit plus the application. *Alls.*

That, after hearing the preliminary objection related to the said application, this Court ruled that the application is not tenable and proceeded to strike it out. According to the 3rd defendant, the ruling in Application No. 658 of 2021 sealed the matter and rendered the present suit to have no leg to stand. The plaintiff in his response to the objections raised, did not respond on the said Application No. 658 of 2021.

I have taken judicial notice of the Ruling of my learned Sister Hon. Madam Mkapa, J in Misc. Land Application No. 658 of 2021. The application was filed along the present suit i.e. Land Case No. 219 of 2021. In the application, the applicant who is the plaintiff moved this court to issue an interim injunction order against the respondents who are also the defendants. In the said application the 2nd & 3rd respondents also raised preliminary points of objection on the following grounds;

- i) That the application is untenable in law to the extent that the application is against execution of a decree of this Court in Commercial Case No. 50 of 2020 whose execution proceedings are pending at the High Court Commercial Division.
- ii) That this Courts lacks the requisite jurisdiction to entertain this matter as it is moved to issue injunction order against the execution of the decree of the High Court Commercial Division in Commercial Case no. 50 of 2020.

After hearing the submissions from both parties, the Hon. Madam Judge set to determine the raised objections. She was of the view that as the suit *Acle*.

property is part of the execution order given by the High Court Commercial Division with the same jurisdictional powers with this Court (High Court Land Division), the question to be asked was whether the application was tenable. Her answer was in negative where she reasoned that, the suit property was the subject matter in consent judgment in Commercial Case No. 50 of 2020 which the Court has ordered execution of the decree. She ruled that, since the suit property is subject to the execution decree then the appropriate remedy would have been for the applicant to knock the doors of the High Court Commercial Division and file objection proceedings rather than filing a fresh suit in this Court (High Court Land Division).

This ruling was pertaining to the application but since the said application was based on the main suit, the ruling also touched directly the main suit. I have read through the ruling and I am convinced that the arguments by the parties and the ruling of this Court was also on the main suit. This can be observed in the ruling of the said application where Hon. Judge held thus;

*"Since the suit property is subject to the execution decree, **the appropriate remedy would have been for the applicant to knock the doors of the High Court Commercial Division and file objection proceedings rather than filing a fresh suit in this Court** (High Court Land Division)". (Emphasis is mine).*

The above findings sealed the fate of this suit before this Court. This Court in the application which was filed with this suit has already made a ruling *Alles-*

that, this matter is untenable before this Court since the suit property is subject to the execution decree by the High Court Commercial Division. That the appropriate remedy was to file objection proceedings instead of filing a fresh suit in this Court. By the said ruling, I find that my hands are tied as I see no reason to depart from the findings and ruling of my learned sister Hon. Madam Judge Mkapa.

Mr. Kusalika has argued that, the consent judgment can be challenged by the plaintiff on allegation of fraud by filing this suit, as the same was obtained fraudulently between the defendants. However, as it was observed in the case of **Quality Center Ltd & another vs. Price Water House Coopers (PWC) & 3 others**, Misc. Land Application No. 44 of 2019, this Court cannot order a nullification of a consent judgment while there is a decision and execution order made by the High Court Commercial Division on the same suit property.

The Court in the cited case observed that;

"If the applicants are aggrieved with the decision of Commercial Court in respect of the suit premises, they have to seek for other remedies like knocking the door of the Court of Appeal, applying for review before the same Court (Commercial Court) or the 1st applicant (Quality Centre Limited) who was not a party at Commercial Court filing an objection proceedings thereat". Alls.

Guided with those observations and subscribing to the findings of this Court in Misc. Application No. 658 of 2021, I find the preliminary objections raised by the 2nd and 3rd defendants to have merits and are hereby sustained. This suit is struck out with costs.

It is so ordered.

Dated and Signed at Dar es Salam this 30th Day of June 2022.



A handwritten signature in black ink, appearing to read "A. Msafiri", written over a horizontal line.

A. MSAFIRI

JUDGE