

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 68 OF 2022

INNOCENT FODE MAMOUDOU SHANGO..... 1ST PLAINTIFF

ANNA LEORNARD SHANGO.....2ND PLAINTIFF

VERSUS

EFC TANZANIA LTD.....1ST DEFENDANT

MEM AUCTION & GENERAL BROKERS.....2ND DEFENDANT

TANZANIA QUALITY AUCTION MART LIMITED3RD DEFENDANT

NGABANI PATRICK MTENGA.....4TH DEFENDANT

Date of last order: 22/6/2022

Date of ruling: 13/7/2022 & 26/7/2022

RULING

A. MSAFIRI, J.

On 30th March 2022, the plaintiffs lodged in this Court a plaint, claiming against the defendants jointly and severally for reliefs *inter alia*; a declaration that the sale through auction of the landed property situated on Plot No. 243-245 Block C situated at Kimara Mavurunza within Kinondoni Municipality in Dar es Salaam City (the disputed premises) was illegal. *Alls.*

On filing their respective written statements of defence, the 1st defendant on 20th April 2022 raised two preliminary objections on points of law to the effect that;

- i. *This matter has been overtaken by events in terms of section 51 (1) of Land Registration Act, CAP 334 R.E 2019 and section 135 of the Land Act CAP 113 R.E 2019.*
- ii. *That this suit is bad in law for being res-sub judice*

The 4th defendant on lodging his written statement of defence also raised an objection on the point of law that;

1. *That the suit is bad in law for being overtaken by event in terms of section 51 (1) of Land Registration Act, CAP 334 R.E 2019 and section 135 of the Land Act CAP 113 R.E 2019*

On 12th May 2022, this Court ordered the preliminary objections raised be disposed of by way of written submissions. The order which was complied with by the parties hence this ruling. Ms. Catherine Lyasenga and Mr. Cleofas James learned advocates appeared for the plaintiffs and 1st and 4th defendants respectively.



Submitting on the above preliminary objection by the 1st and 4th defendants, it was contended that the present suit has been overtaken by events in terms of section 51 (1) of Land Registration Act [CAP 334 R.E 2019] and Section 135 of the Land Act [CAP 113 R.E. 2019] because the transfer has been effected and being registered in the name of 4th defendant herein. It was contended further that in terms of section 51 (1) cited above aimed at protecting the bona fide purchaser, the remedy available to the plaintiff was to challenge the sale in the High Court within 30 days after being served with notice by the Registrar.

It was further submitted that because the plaintiffs failed to challenge the matter before the Registrar the transfer was effected after expiry of 30 days. Several decisions have been cited by the 1st and 4th defendants to fortify their stance.

Submitting on the second objection, it was contended that there is a pending notice of appeal to the Court of Appeal lodged by one Esther Innocent Shango suing the plaintiffs and the defendants herein over the same subject matter. The said notice was filed on 1st day of April 2022 and was served to the parties on 11th April 2018 arising from Land Case No. 39 of 2020. *Alls.*

It was submitted that once notice of appeal is lodged the High Court ceases to have jurisdiction over the matter. To buttress this point the learned advocate for the 1st and 4th defendants cited the decision **Central Paris Complex Company Limited v Diamond Trust Bank Limited & another** Civil Case No. 09 of 2021 High Court (unreported). The learned advocate contended that this suit is therefore incompetent before this Court.

On reply, the plaintiffs strongly opposed the 1st and 4th defendants' submission by stating that the plaintiffs were not served with any notice of transfer and therefore they had no knowledge of transfer of the disputed premises to the 4th defendant. Hence the plaintiffs maintained that such transfer of the disputed premises to the 4th defendant was done fraudulently. The plaintiffs have referred to me Section 33 of CAP 334 which states that the owner of any estate shall, except in case of fraud, hold the same free from all estates and interests whatsoever.

Reference was also made to the case of **Amina Maulid Ambali & two others v Ramadhani Juma**, Civil Appeal No. 35 of 2019 Court of Appeal of Tanzania at Mwanza (unreported). The plaintiffs contended that

Atto.

though the suit premises have already been registered in the name of 4th defendant, the procedure for transferring the same was not followed.

On the second preliminary objection the plaintiffs contended that the present suit is not *res sub judice* because the elements have not been proved. According to the plaintiffs for a suit to be *res sub judice* the following elements must be proved citing Section 8 of the Civil Procedure Code [CAP 33 R.E 2002]. These are;

- i. That the matter in issue in the second suit is also directly and substantially in issue in the first suit.*
- ii. That parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;*
- iii. That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit;*
- iv. And that previously instituted suit is pending.*

According to the plaintiffs, the matter which is pending at the Court of Appeal is the intended civil appeal by one Esther Innocent Shango against EFC/MFC Tanzania, Innocent Shango, Anna Shango, MEM Auctioneers and General Brokers and Ngabani Patrick Mtenga after being

Alls.

dissatisfied with the decision of this Court in Misc. Land Application No. 692 of 2022 which was an application for restoration of Land Case No. 39 of 2020 which was dismissed for want of prosecution.

Therefore the matter in issue in the present suit and the pending appeal before the Court of Appeal are different, whereas in the former the matter in issue is illegal sale by auction and transfer of the title of the suit property by 1st defendant to the 4th defendant and the matter in issue in the latter is all about dismissal of application to have the suit dismissed for want of prosecution restored.

Similarly it was contended that parties in the said notice of appeal and in the present suit are different. Hence the plaintiffs are of the view that the conditions of the *res subjudice* have not be proved in the matter at hand.

On rejoinder the 1st and 4th defendants essentially reiterates the submission in chief, and in addition it was contended that the plaintiffs were duly served with notice from the Registrar hence the plaintiffs cannot claim to have not been served with the said notice in the present matter. *Atts.*

Having gone through the submissions of the parties, rival and in support of the preliminary objections raised, the issue that calls for my determination is whether the said objections have merits.

On the first objection the 1st and 4th defendants have raised an issue regarding the competence of this suit because the plaintiffs ought to have challenged the purported transfer to the 4th defendant within thirty days before the Registrar of titles. Now parties herein are at variance as to whether the notice was issued.

Unfortunately the 1st and 4th defendants have not cited any authority to show that this Court is ousted from entertaining a suit under the circumstance where a party did not challenge the transfer like the one at hand. All the authorities cited are to the effect of protection of bona fide purchaser but in my view the jurisdiction of this Court has not been ousted by failure to challenge the transfer after notice was issued by Registrar. After all the plaintiffs contended that they were not issued with any notice and the property was fraudulently transferred to the 4th defendant.

Whether or not the notice was issued to the plaintiffs is a matter of evidence which in my humble view cannot be determined as preliminary *Alles*.

objection because an objection should be on pure points of law. It is for that reason that the 1st preliminary objection is without merit and it is hereby overruled.

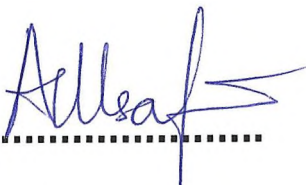
On the second objection, as submitted by the plaintiffs for a suit to be *res sub judice* all the conditions stipulated under section 8 of the CPC are to be established. I wish to add further that the said conditions must be cumulatively established. This requirement was underscored by this Court in the case of **M & Five B Hotels & Tours Limited v Exim Bank Tanzania Limited**, Commercial Case No. 104 of 2017 High Court at Dar es Salaam (unreported). As submitted by the parties no doubt that the present suit and the appeal which is pending before the Court of Appeal involve different parties.

The said notice was lodged by Esther Innocent Shango who is not a party to the present matter that alone defeats the principle of *res sub judice* because it should be established that parties are the same or are suing under the same title. Now the 1st and 4th defendants only claimed that parties to the present suit are in the matter before the Court of Appeal are claiming under the same subject matter that is disputed property. But it was not clearly stated what exactly reliefs are being claimed. *Alle.*

The plaintiffs submitted that the present matter is all about the illegal auction of the disputed premises while the matter appealed against to the Court of Appeal is all about dismissal of the application to have a suit restored. The 1st and 4th defendants ought to have said something on this aspect on their rejoinder but they just merely maintained that parties are suing under the same subject matter without saying on which reliefs. It follows therefore that the reliefs in the two matters are different. Hence the second preliminary objection is hereby overruled for lack of merits. I hold that the elements of what constitutes *res sub judice* have not been established.

Consequently all the preliminary objections are hereby overruled for lack of merits with costs.




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A. MSAFIRI,
JUDGE
26/7/2022