

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 137 OF 2015**

BIABANA LIMITED.....PLAINTIFF

VERUS

CRDB BANK PLC.....1ST DEFENDANT

ABANA LIMITED.....2ND DEFENDANT

(In the original action)

AND

CRDB BANK PLC PLAINTIFF

VERSUS

ABANA LIMITED1ST DEFENDANT

RICHARD KIMWAGA STIKA.....2ND DEFENDANT

VINCENT M. S. MTANI.....3RD DEFENDANT

(By the way of counter claim)

Date of last order: 09/8/2022

Date of ruling: 30/8/2022

RULING

A. MSAFIRI, J.

This is a ruling on preliminary objections raised by the defendants in the counter claim. The plaintiff in the counter claim, claims against the *Alles.*

defendants thereof jointly and severally for reliefs *inter alia*, payment of USD 321,376.29 (*United States Dollars three hundred twenty one thousand three hundred seventy six and twenty nine cents*) as well as Tshs. 2,172,372,794.86 (*two billion one hundred seventy two million three hundred seventy two thousand seven hundred ninety four and eighty six cents*), being outstanding amounts owed to the defendants in the counter claim on loan advanced to the 1st defendant and guaranteed by the 2nd and 3rd defendants.

On lodging their respective written statements defence to the counter claim, the 1st defendant on 1/7/2022 raised a preliminary objection to the effect that;

1. *This matter is improperly before this Honourable Court for want of jurisdiction.*

On 1st July 2022, the 2nd and 3rd defendants in the counter claim lodged their joint written statement of defence in which they raised three preliminary objections on point of law to the effect that;

- i. *That the case is improperly before the Court as it is not based on any land dispute.* *Atle*

- ii. *That there is no any claim or claims against the 2nd and 3rd defendants by the plaintiff following the fact that the said plaintiff failed to notify the 2nd and 3rd defendants as guarantors on the variations made to the credit facilities which they originally guaranteed.*
- iii. *That the amended counter claim by any dimensions is hopelessly time barred*

On 12th July 2022, this Court ordered the said preliminary objections be disposed of by written submissions, the order was duly complied with by learned advocates for both parties. Ms. Irene Mchau assisted by N. Ndesamburo learned advocates appeared for the plaintiff in the counter claim, while the defendants had the services of Mr. Mathew Kakamba learned advocate.

In the course of arguing the preliminary objections, Mr. Kakamba combined the objections raised separately by the defendants as shown above hence in essence there are three preliminary objections.

Submitting on the first preliminary objection, it was argued that the matter is improperly before the Court for want of jurisdiction. The reason

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stated by the defendants is that on 23rd day of October 2017, the plaintiff in the original case and the plaintiff in the counter claim entered into a deed of settlement to settle the ongoing suit on recovery of the mortgaged property namely Plot No. 1 Block "C" Mapinga area Bagamoyo District, with CT no. 89125 (hereinafter referred to as the mortgaged property). The said deed was recorded and entered as an order and decree of the Court on 30th October 2017.

The defendants maintained that the settlement deed referred in the foregoing paragraph discharged the mortgage hence there is no any mortgage in existence between the parties. To fortify their point, the defendants have referred to me Section 37 (1) of the Land Disputes Courts Act [CAP 216 R.E 2019] which gives power to this Court to entertain disputes concerning land. Hence the current dispute being not a land matter, this Court does not have jurisdiction.

The defendants cited the decision of this Court in **Ali Shaibu Khamis v Sher-Mohamed Bahdour (as legal representative of Hajrwa Bibi Mohamed Hussein (deceased))**, Land Case No. 117 of 2021 (unreported) in which the matter in dispute was on breach of joint

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venture agreement hence it was held not to be a land matter rather a commercial related matter.

The defendants submitted that as the mortgage was discharged, the matter ceased to be a land matter rather a purely commercial matter.

On reply the plaintiff on the counter claim contended that the matter at hand is a land matter and therefore properly before the Court. The plaintiff contended further that although there was a deed of settlement in terms of Order XXIII Rule 3 of the Civil Procedure Code [CAP 33 R.E 2019], the same did not oust the jurisdiction of the Court because the said deed never relieved the 2nd defendant from liability arising from the said mortgage. The plaintiff has referred to me clause 1.5 of the said settlement deed.

The plaintiff contended further that the amount of money claimed against the defendants in this matter was secured by several securities including the mortgaged property.

On rejoinder the 1st, 2nd and 3rd defendants reiterated their submission in chief. They further contended that the reliefs claimed in paragraphs 1-4 of the counter claim are on payment of outstanding debts

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and the related interests evolving around the debts and they are in no way associated with any land issue or mortgage.

The first preliminary objection is on the competency of this Court to try the present suit. Parties are at variance whether the matter at hand should have been instituted in this Court or not. The central issue for my determination in the first preliminary objection is whether the Court has jurisdiction to try the matter.

I will first start with the purported settlement deed in which the defendants have claimed that it discharged the mortgage whereas on other hand the plaintiff contended that it did not discharge the mortgage.

It is on record that, in the original suit which was between the parties as shown above, the plaintiff instituted the matter claiming against the 1st defendant for declaration that the loan agreement entered between the defendants was illegal as the mortgaged property belonged to the plaintiff and she never consented her property to be mortgaged. It is further discerned that the 1st defendant, now the plaintiff in the counter claim lodged a counter claim against the defendants. While the matter was still pending the plaintiff in the original suit decided to withdraw the suit


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against the 2nd defendant but concluded a settlement deed with the 1st defendant.

Now whether the said settlement deed discharged the mortgage as claimed by the defendants in their preliminary objection, is a matter of evidence as one has to look at the said deed of settlement first and see whether it discharged the mortgage. Hence I am of the settled mind that the same cannot be raised as a pure point of law within the test laid down in the case of **Mukisa Biscuits**.

I have gone through the said settlement deed and it is stated clearly on clause 1.5 that the second defendant in the main suit (now the first defendant in the counter claim) shall not be relieved from paying the remaining balance arising from the mortgage. It follows therefore that the settlement deed did not discharge completely the mortgage as claimed by the defendants.

I have also gone through the counter claim, paragraph 9.0 reads;

The 1st defendant's credit facilities referred to herein above were secured inter alia by first charge over landed 

property situated at and or known as Plot No. 1 Block "C"

Mpinga Area Bagamoyo District, with CT no. 89125.

From the quoted paragraph of the counter claim it is not true that the claims in the counter claim are only related with payment of outstanding amount and they are not related with land issues as claimed by the defendants because the amount claimed by the plaintiff was secured by the mortgaged property. The counter claim has to be read as whole.

Looking at the counter claim as I have referred under paragraph 9.0 as well as the settlement deed, I am of the settled mind that the matter at hand is not purely a commercial matter rather land cum commercial matter because there is land which has been used as a collateral for the credit facility advanced to the 1st defendant as claimed in the counter claim. Hence the plaintiff had a liberty to either institute the present matter at the High Court (Commercial Division) or in this Court as the two divisions of the High Court have concurrent jurisdiction on the matter.

Consequently the first preliminary objection that this Court has no jurisdiction lacks merits and it is hereby overruled.

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On the second preliminary objection, it is contended that there is no any claim or claims against the 2nd and 3rd defendants by the plaintiff since the plaintiff failed to notify them (the 2nd and 3rd defendants) as guarantors on the variations made to the credit facilities. It was contended that as the plaintiff in the original suit signed a settlement deed with the plaintiff in the counter claim, the 2nd and 3rd defendants who were guarantors to the said loan were not consulted and consented to the same. To fortify their stance, the defendants have referred to me the decision of this Court in **CRDB Bank PLC v Africhick Hatchers Ltd and two others**, Commercial Case No. 97 of 2014, High Court of Tanzania at Dar es Salaam (unreported), in which creditors varied the terms of loan facility without consent of the guarantor and the Court held that was illegal.

On reply, the plaintiff contended that the 2nd preliminary objection does not qualify to be an objection on point of law. To fortify its stance, the plaintiff has referred to the Court the decision of the Court of Appeal in **Jackline Hamson Ghikas v Mlatie Richie Assey** Civil Application No. 656/01 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was held; *Acce.*

"A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion."

On rejoinder the defendants reiterated their submission in chief.

The 2nd preliminary objection should not detain me longer than is necessary. As rightly pointed out by the plaintiff, the 2nd preliminary objection cannot be determined without reference to the facts. I wish to add that whether the 2nd and 3rd defendants were consulted or not on the variation of the mortgage, is a matter that has to be ascertained by evidence. Right away the 2nd preliminary objection is devoid of merits and it is hereby overruled.

On the 3rd preliminary objection, it has been contended that the counter claim is hopelessly time barred as time frame prescribed for it to be filed is six years as required under item 7 part 1 of the Law of Limitation Act [CAP 89 R.E 2019].

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The defendants contended further that since the matter at hand is purely contractual dispute and not a land dispute as evidenced in the prayers, time limit is six years as the credit facility became due on 31/12/2014 and 30/9/2014 hence the matter ought to have been filed in 2020. As the 2nd and 3rd defendants in the counter claim were joined in the matter at hand on 23rd March 2022 then the matter against them is time barred for more than a year.

The defendants prayed for the matter to be dismissed under Section 3(1) of the Law of Limitation Act.

On reply the plaintiff contended that the 2nd and 3rd defendants are sued for breach of their duties as sureties who undertook to indemnify the plaintiff against the loan advanced to the 1st defendant. The plaintiff contended further that it is true that the matter at hand is founded on contract but as there was continuation of breach, the provisions of section 7 of the law of Limitation Act apply.

The plaintiff contended further that the 2nd and 3rd defendants were required to furnish the guarantee on 14th July 2021 immediately before the

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counter claim was filed. Hence the matter has been filed within six years as required by the law.

On rejoinder the defendants reiterated their submission in chief. They contended that the counter claim against the 2nd and 3rd defendants is hopelessly time barred.

On the third preliminary objection, the Court is called upon to determine whether the counter claim is time barred against the 2nd and 3rd defendants. I have gone through the counter claim in which the total amount being claimed against the defendants jointly for Tsh account is Tsh 2,172,372,794.86 as of 15/12/2017. While for USD account the plaintiff is claiming a total of \$ 321,376.29 as of 19/4/2019. It follows therefore that the claims by the plaintiff as indicated are based on outstanding amounts of 2017 and 2019 respectively. The 2nd and 3rd defendants were joined in the counter claim on 22nd March 2022. Therefore counting from the date on which the claims for both Tsh and USD matured as stated in the counter claim, it cannot be said the counter claims is time barred.

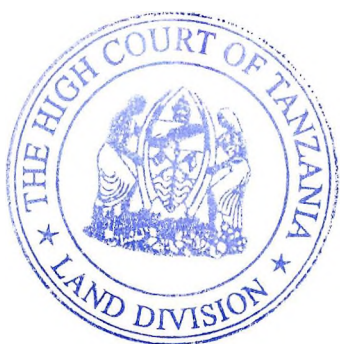
The defendants have contended that the cause of action arose in 2014 and 2015 for TSH and USD accounts respectively. Hence whether the

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plaintiff should have claimed the outstanding amount as of 2014 and 2015 or 2017 and 2019 is a matter which cannot be resolved through preliminary objection because it requires evidence to prove the same.

Consequently the preliminary objection that the counter claim against the 2nd and 3rd defendants in the counter claim is time barred is hereby overruled.

In upshot and for the foregoing all the preliminary objections raised by the defendants are hereby overruled with costs.



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

**A. MSAFIRI,
JUDGE
30/8/2022**