

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.312 OF 2022

SAUDA MAALIM LAURENT..... APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED 1ST RESPONDENT

MABROUK OMAR MOHAMED 2ND RESPONDENT

MABROUK OMARY MOHAMED ENTERPRISES LTD 3RD RESPONDENT

JOSHUA MWITUKA t/a FOSTER AUCTION 4TH RESPONDENT

FABIAN JOHN FIMBO 5TH RESPONDENT

RULING

Date of last Order: 29.03.2023

Date of Ruling: 29.03.2023

A.Z. MGEYEKWA, J

On 24th November 2022, the Plaintiff herein, instituted this suit against the Defendants seeking six reliefs as follows:-

- i) Declaration order that the mortgage agreement against the suit property is null and void abinitio,*

- ii) *Order for nullification of the purported sale of the suit property to the 5th Defendant be declared void.*
- iii) *Order for perpetual injunction restraining Defendants, their agents, servants, assignees and or workmen, and any other persons acting on their behalf.*
- iv) *That, Defendants, be ordered to pay Tshs. 50,000,000/= as general damages.*
- v) *That, Defendant ordered to pay Costs of the case*
- vi) *Any other relief (s) this Honourable Court may deem just to grant.*

The 1st, and 5th Defendants' filed a separate Written Statement of Defence disputing the claims. The suit did not have a smooth sail, for, ahead of the hearing, it is hurdled by points of preliminary objections lodged by Mr. Mnyele, Advocate for the 1st Defendant. The preliminary objection notice was lodged on 13th March 2023. It reads:-

1. *The suit is time barred.*
2. *The Plaintiff has no cause of action against the 1st Defendant*
3. *Challenging the sale under the decree is unmaintainable in law.*

Mr. Stanslaus Halawe, Advocate for the 5th Defendant also filed the preliminary objection notice on 19th December 2022. It reads:-

The suit is bad for being preferred prematurely contrary to Order XXI Rule 101 of the Civil Procedure Code Cap.33 [R.E 2019].

When the matter was placed before this court for hearing on 7th March 2023, the Plaintiff had a legal service of Mr. Mshumbuzi holding brief for Mr. Godwin Godlove, Advocates, the first Defendant had the legal service of Mr. Mnyele, Advocate, and the fifth Defendant had the legal services of Mr. Sani Malimi, Advocate. The Plaintiff's counsel urged this Court to argue the objection by way of written submission. By the Court's consent, all parties complied with the Court order.

Supporting the objections was Mr. Mnyele, in his written submission started to submit on the first objection. He stated that the suit is time barred. Mr. Mnyele stated that in dealing with preliminary objections such as limitation of time, the Court cannot avoid going through the pleadings. To support his submission he cited the cases of **Mukisa Biscuit** (supra) and **Ali Shaban & 48 Others v Tanzania National Roads Agency (TANROADS) and the Attorney General**, Civil Appeal No. 261 of 2020. He went on to submit that the period of limitation prescribed by this Act in relation to any proceedings shall subject to the provision of this Act herein after contained commence from the date on which the right of action for such proceedings accrues. He

added that a cause of action in a bundle of facts that are proved shall entitle the Plaintiff to the relief claimed, there must be a correlation between the facts constituting the cause of action and the reliefs prayed. The learned counsel for the first Defendant continued to argue that in paragraph 7 of the plaint, the Plaintiff's claim that the Defendant unlawfully mortgaged the matrimonial house, and in paragraph 9 upon inquiry to the 2nd Defendant, the Plaintiff was informed that sometimes in 2006 they entered into a loan agreement by way of mortgage with the 2nd Defendant guaranteeing the 3rd Defendant using their plot of land and secured the loan to a tune of Tshs. 50,000,000/=. Based on those fact, Mr. Mnyele was in his view that the cause of action arose in 2006. To support his submission he referred this Court to item 24 of the first Schedule of the Law of Limitation Act, Cap.89 whereas the time limit is 6 years.

The learned counsel for the first Defendant further submitted that the Plaintiff in paragraph 8 of her plaint attempted to impress the court that she became aware about the matter on 24th July 2022 when she saw the eviction notice. He added that in case she was required to apply for an extension of time to the Minister responsible for legal affairs to file asuit as stated under section 44 of the Law of Limitation Act Cap.89.

Mr. Mnyeleinsist ed that once the Court is satisfied that the suit challenging the validity of the mortgage is time barred, then the prayer challenging the sale shall automatically crumble.

Mr. Mnyele abandoned the second objection.

On the third objection, Mr. Mnyele argued that the suit is untenable before exhausting the remedies provided under Order XXI of the Civil Procedure Code Cap.33 [R.E 2019] . He contended that the Plaintiff being a wife of the judgment debtor was entitled to object to the sale of the property under the decree by virtue of Order XXI Rule 88 (1) of the Civil Procedure Code Cap.33 [R.E 2019] as a person who has an interest is affected by the sale he argued that the Plaintiff was required to challenge the sale under Order XXI of the Civil Procedure Code Cap.33 [R.E 2019] . To support his submission he cited the case of **Budungu Ginning Company Ltd v CRDB Bank PLC and 2 Others**, Civil Appeal No. 265 of 2019 (unreported), the Court cited in the case of **Mabrouk Omar Mphamed v Exim Bank Tanzania Ltd & 2 others**, Land Case No. 80 of 2022.

In conclusion, Mr. Mnyele urged this Court to dismiss the suit with costs.

In support of the objections, Mr. Stanslaus for the 5th Defendant began by stating that it is settled law that a preliminary objection must be on the pure

point of law as envisaged in the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v West Edn Distributors Ltd** [1960] EA 696. He submitted that the raised objection is a pure point of law. The learned counsel for the 5th Defendant submitted that Order XXI of the Civil Procedure Code Cap. 33 [R.E 2019] provides that where an immovable property has been sold in execution of a decree and a decision is made in respect of Rules 98, 99, and 100 of Order XXI of the Civil Procedure Code against any party not being a judgment debtor, he may institute a fresh suit to establish a right which he claims to the present possession of the property.

He went on to submit that for an aggrieved party to institute a fresh suit at this juncture she ought to have exhausted the remedies available under Rules 98 and 99 of the Civil Procedure Code Cap.33 by making an application to the court complaining about such dispossession before instituting a fresh suit like the present one.

He contended that a look at paragraph 7 (b) of the plaint, the Plaintiff among other things prays for this Court to declare that the sale and eviction in respect of the suit property in Execution No.1 of 2018 was unlawful. He argued that the same shows clearly that the Plaintiff is challenging the execution order which sanctioned the sale of the suit property and eviction

forthwith. He went on to argue that the instant case was lodged prior to Misc. Land Application No. 780 of 2022 was dismissed for lack of merit.

He contended that failures to exhaust remedies by a litigant are fatal and render the suit thereof incompetent as such this Court lacks jurisdiction to entertain it. Supporting his submission he referred this Court to the case of **Philip Samson Chigulu Agent v Judge of the High Court of Tanzania & 7 Others**, Misc. Civil Cause No. 23 of 2021, HC (Dar es Salaam Main Registry) at Dar es Salaam (unreported). He added that the import of Rule 101 and Order XXI of the Civil Procedure Code Cap.33 [R.E 2019] provides among other things that the complaint under such rule should be a person other than a judgment debtor while the Plaintiff under paragraph 11 of her plaint has stated that she is the wife of the judgment debtor which implies that being a wife is part and parcel of the judgment debtor.

In conclusion, the learned counsel for the 5th Defendant urged this Court to find the instant suit is incompetent before this Court for being filed prematurely as such unmaintainable the be dismissed with costs.

On the adversary side, the Plaintiff was very adamant, and the learned counsel for the Plaintiff focerfully submitted that the 1st Defendant wants to mislead this Court in respect of the cause of action. He went on to state that

the facts of the case are to the extent that the Plaintiff unsuccessfully filed the suit to establish her rights and interest and the suit derives its origin from the provision of Order XXI Rule 62 of the Civil Procedure Code Cap.33. He contended that the Plaintiff was not a party to the case that gave the right to the respondents to erode her right over the disputed land. He added that after noting that her property was attached in execution, the Plaintiff filed objection proceedings to challenge the sale of suit property Plot No. 27 Block 57, CT No. 36724 and LO No. 126728 located at Kariakoo, Dar es Salaam.

The learned counsel went on to submit that the suit is not time barred. The same emanated from the point of being dispossessed from her matrimonial home which she claims to have an interest. He stated that the limitation time starts to run from the date of the dispossession or discontinuance. Supporting his argumentation he cited section 9 (2) of the Law of Limitation Act, Cap. 89. To buttress his contention he cited the case of *Fitina Mshingwa v Budo Yamlinga* 9administrator of the estate of the late Yamlinga Magina) HC of Tanzania at Mwanza (unreported) and *Jestina Martin Barabara & 3 others v Joseph Keenan Mhaiki*, Land Appeal No. 194 of 2021 (unreported). He went on to argue that the Plaintiff was not required to refer the matter to the Minister because the cited section 44 of Limitation Act, Cap. 89 does not apply in the circumstances at hand.

Regarding the issue of cause of action, Mr. Godlove argued that Plaintiff has a cause of action against the first Defendant because the Plaintiff is challenging not only the sale but the unlawful mortgaging of the matrimonial home as stipulated under paragraph 7 (a) of the Plaint.

Submitting on the point of law raised by the fifth Defendant, Mr. Godlove argued that it is not true that the Plaintiff is seeking the nullifying of sale as alleged by the Defendant. He went on to submit that the only way to sue is because she failed to pursue the objection proceedings hence she decided to initiate a fresh suit. He claimed that the Plaintiff has exhausted all remedies. To support his submission he cited the case of **Philip Samson Chigulu t/a Philip Samson Chigula Agent v The Judge of the High Court of Tanzania and 7 others**, Misc. Civil Cause Np. 23 of 2021 HC Main Registry at DSM.

The learned counsel for the Plaintiff went on to submit that the Plaintiff in Misc. Land Application No. 780 of 2022 was looking for an interlocutory order of being possessed from her own land waiting for a hearing the main case. To support his submission, he referred this Court to paragraph 2.6 of the defendants' submission. He went on to argue that the presence of the Plaintiff as a legal wife of the judgment debtor suffices. He claims that the

suit cannot be prematurely filed because the Plaintiff cannot claim for unexhausted remedies since the first application was unsuccessful. It was his submission that the defendant could have prayed for striking out of the suit instead of dismissing it.

In conclusion, the learned counsel for the Plaintiff beckoned upon this Court to overrule and dismiss all objections with costs.

In his rejoinders, the learned counsels for the 1st and 5th Defendants reiterated their submissions in chief. Mr. Mnyeale added that the suit is not based on Order XXI Rule 62 of the Civil Procedure Code. He distinguished the cited cases of *Fitina* (supra) from the suit landed property since in the cited case it was by implication an issue of disability, where due to sickness thus the appellant was unable to commence the case, and in *Barabara* (supra) there was no service of summons for the date set for delivering the Judgment, unlike the case at hand, where it follows therefore that the decision never established a rule of law of general applicability in every situation as the plaintiff want the court to believe. He stressed that Order XXI Rule 8 of the Civil Procedure Code, Cap.33 is applicable in the matter at hand since the suit is filed prematurely before this Court.

Mr. Stanslause claimed that the objection raised by the 5th Defendant is on a pure point of law. He insisted that the previous Applications. Misc. Land Application No. 627 of 2022 and Misc. Land Application No. 780 of 2022 was filed after the sale of the suit property had already taken place by this Court. He referred this Court to the margin note of Order XXI Rule 62 of the Civil Procedure Code, Cap.33, the same show, the saving of suits to establish the right to attached property. He stated that the same implies that Rue 62 of Order XXI of the Civil Procedure Code applies in the circumstances at hand whereas a claimant pursuing her rights when the property is in dispute is still attached by instituting a fresh suit, however, if the suit property is sold the provision of Order XXI Rule 62 of Civil Procedure Code Cap.33 does not apply. Instead, the proper provisions are Rules 98, 99, and 101 of the Civil Procedure Code Cap.33 [R.E 2019].

Ending, both counselors urged this Court to uphold the preliminary objections and dismiss the suit with costs.

Having read the oral submissions of the learned counsels for the 1st and 5th Defendants and the Plaintiff, the issue for determination is whether the objections are meritorious.

I have opted to start addressing the sole objection raised by the 5th Defendant and the third objection raised by the 1st Defendant's counsel, that the suit is bad in law for being preferred prematurely contrary to Order XXI Rule 101 of the Civil Procedure Code Cap.33 [R.E 2019].

For ease of reference, I find it apposite to reproduce Order XXI Rule 101 of the Civil Procedure Code Cap.33 [R.E 2019] hereunder:-

“ 100. Nothing in Rules 97 and 98 shall apply to resistance or obstruction in the execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.”

There is no dispute that suit before this Court was filed after the sale of the suit property, had taken place and concluded. This fact is supported by the Plaintiff himself in paragraph 7 (b) when is praying for a declaration of this Court that the sale and eviction were unlawfully done by the 4th and 5th Defendants. The record also proves that a certificate of sale was issued by this Court on 25th April 2022 and it is evident that the suit property was sold on 15th March 2022 to the 5th Defendant.

In my considered view, since the sale was done, Order XXI Rule 62 of the Civil Procedure Code Cap [R.E 2019] cannot apply in the matter at hand since the matter of attaching the suit landed property applies in a situation where the suit landed property is attached by instituting a fresh case, and as rightly pointed out by Mr. Mnyele the Plaintiff has cited Order XXI Rule 62 of the Civil Procedure Code Cap.33 [R.E 2019] from the bar.

Mr. Godlove in his submission stated that in Misc. Land Application No. 780 of 2022, this court stated that it is *functus officio* is not a justification to move this Court to determine the suit at hand because as stated above the procedure of filing this suit is improper and as stated above a fresh suit is supposed to be lodged after exhausting the requirement stated under Order 1xxi Rules 98, 99 and 100.

In the situation at hand the suit landed property is not at the stage of attachment hence Order XXI Rule 62 of the Civil Procedure Code Cap.33 [R.E 2019] is inapplicable. Guided by Order XXI Rule 98 of the Civil Procedure Code, Cap. 33 [R.E 2019]. The Plaintiff's Misc. Land Application No. 780 of 2022 was dismissed which means the Plaintiff cannot file a fresh suit until the order of the court in respect to her claims or dispossession is

granted. For ease of reference, I reproduce section 98 of the Civil Procedure Code Cap.33 [R.E 2019] hereunder:-

*“ 98.-(1) Where any person other than **the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.**”*

[Emphasis added].

Applying the above provision of the law, it is clear that the Plaintiffs prayers was not granted thus, she cannot move this Court to proceed to determine the main suit.

In addition, I am in accord with Mr. Stanslaus that the instant Land Case No. 312 of 2020 is prematurely filed before this Court since the same was filed on 24th November 2022 and Misc. Land Application No. 780 of 2022, an application for dispossession was lodged in this Court on 5th December, 2022, thus, it is vivid clear that the Plaintiff did not follow a proper path to file the instant suit.

Since the Plaintiff did not prove that she was in possession at the time when the suit landed property was sold then she can not file a fresh suit. Doing so is wasting the precious time of the Court and the Defendants' counsels.

Having reached the above finding, I deem it superfluous to determine the remaining preliminary objections doing so will be an academic exercise.

In the upshot, I find that the above objection has merit hence I proceed to strike out the instant suit before this Court with costs.

Order accordingly.

Dated at Dar es Salaam this date 29th March 2023.


A.Z. MGEYEKWA
JUDGE
29.03.2023


Ruling delivered on 29th March 2023 via video conferencing whereas Mr. Godlove Godwin, counsel for the Plaintiff, and Mr. Stanslaus Halawe, counsel for the 5th Defendant were remotely present.


A.Z. MGEYEKWA
JUDGE
29.03.2023
