

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 242 OF 2022**

**ANNA INVESTMENT LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL MICROFINANCE BANK PLC.....1<sup>ST</sup> DEFENDANT**

**ADILI AUCTION MART LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

15/02/2023 & 07/03/2023

**L. HEMED, J.**

On 22<sup>nd</sup> day of September, 2022 the plaintiff herein ANNA INVESTMENT LIMITED instituted the present suit against the defendants NATIONAL MICROFINANCE BANK PLC and ADILI AUCTION MART LIMITED. The plaintiff claims against the defendants jointly and severally for declaration that the public auction scheduled to take place on 22<sup>nd</sup> day of September, 2022 and 24<sup>th</sup> day of September, 2022 over the suit landed properties described as Plot No. 376 under C.T No. 84645, Block "43", Kijitonyama, Dar es salaam, Plot No. 233 under C.T No. 7949, Block "A", Ngarasero Usa River Area, Arusha as well as Farm No. 1845, C.T No.

19610, Ilkiurei Village, Arumeru District, Arusha, is illegal for want of statutory notice and breach of term loan agreement executed between the parties.

The 1<sup>st</sup> defendant disputed the claims of the plaintiffs by lodging the written statement of defence. In the written statement of defence which was filed on 12<sup>th</sup> October, 2022 a preliminary objection was raised on the following points of law to name are:-

- 1. The plaintiff has no any locus standi to bring the suit against the defendants and seek and (sic) or be entitled to the orders sought in the plaint.*
- 2. The suit is bad in law for contravening section 9 of the Civil Procedure Code [Cap 33 R.E 2019] after being filed after the decision of this Hon. Court in Land Case No. 185 of 2020 which was decided between Anna Investment Company Limited and Others versus National Microfinance Bank PLC and Others on 26<sup>th</sup> day of July, 2022.*

It is the requisite of law and procedure that preliminary objections on points of law have to be disposed of before proceeding with the determination of the substantial issues. It was thus pertinent in the matter

at hand to start disposing of the preliminary objection before embarking into the merits of the suit at hand.

By the Court consent of parties followed by the Court orders dated 08/12/2022 and 07/02/2023, the preliminary objections were argued by way of written submissions. The parties herein with the aid and legal representation of learned counsel, Mr. Brian Mambosho for the 1<sup>st</sup> defendant and Ms. Bumi Mwaisaka for the plaintiff filed their written submissions in compliance with the directed schedule.

In support of the first limb of objection, counsel for the 1<sup>st</sup> defendant submitted that the plaintiff is a stranger to the case and lacks privity to the loan arrangements with the 1<sup>st</sup> defendant. He stated that, the 1<sup>st</sup> defendant denies having any contractual arrangements or agreements with the plaintiff as claimed in the plaint rather the 1<sup>st</sup> defendant entered into contractual arrangements with Anna Investment Company Limited as evidenced in annexure NMBPLC-1 to the 1<sup>st</sup> defendant written statement of defence filed October, 12<sup>th</sup>, 2022.

To reinforce his submission, he referred the decision of **Tanzania Epilepsy Organisation vs. Attorney General**, Misc. Civil Cause No. 5 of 2022 at page 5 and the case of **Chama cha Wafanyakazi Mahotel na Mikahawa Zanzibar (Horau) vs Kaimu Msajiri wa Vyama vya**

**Wafanyakazi na Waajiri Zanzibar**, Civil Appeal No. 300 of 2019 at page 11 which they all defined the term *locus standi*. More so, the case of **Omari Mbwana vs Daniel Loisujaki**, Misc. Land Application No. 57 of 2022 at page 6 on the effect of a person suing without *locus standi*. More so, the case of Omari Mbwana vs. Daniel Loisujaki, Misc. Land Application No. 57 of 2022 at page 6 on the effect of suing without *locus standi*.

On the second limb of objection, he asserted that, in Land Case No. 185 of 2020 the parties were Anna Investment Company Limited, Anna Jeremiah Kaaya, Emmanuel Lugano Ngallah and Jeremiah Saluni Kaaya as 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, where the 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are alleged to be the rightful owners of the mortgaged properties involved in Land Case No. 242 of 2022 and National Microfinance Bank PLC, Starcom Hotel Limited and Adili Auction Mart Limited as the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He cited section 9 of the Civil Procedure Code [Cap 33 R.E 2019] to that effect.

He referred the case of **Onesmo Olengurumwa vs. Hon. Attorney General**, Misc. Civil Cause No. 36 of 2019 at page 9 and that of **Salvatory Henerico & Another vs. Thomas Bagoa & Another**,

Land Case Appeal No. 69 of 2021 at page 7 to substantiate on the point of *res judicata*. To end, he prayed for the suit to be dismissed with costs.

In reply, thereto, Ms. Bumi Fred Mwaisaka, appearing for the plaintiff contended that, there is no sufficient facts demonstrated by the 1<sup>st</sup> defendant to show that the facts pleaded by the plaintiff in her plaint reveals lack of *locus standi*. He submitted that, the plaintiff's name is correctly written and such annexures are part and parcel of the pleadings (plaint). She cited the case of **Investment House Limited vs. Webb Technologies (T) Ltd and 2 Others**, Commercial Case No. 97/ 2015 HCT-DSM (Unreported) in fortifying his points.

Regarding the issue of *res judicata*, she uttered that, the 1<sup>st</sup> defendant has materially failed to comprehend the applicability of the doctrine of *res judicata* in relation to the present suit and Land Case No. 185 of 2020.

She stated that, the plaintiff has pleaded under paragraph 17 of the Plaint that in the Land Case No. 185 of 2020 the issue before the trial Court was whether the total outstanding loan was the sum of Tshs. 3,560,000,000/= as of 9<sup>th</sup> day of November, 2020. In the present suit the issue called for determination is not for the outstanding loan. She

concluded that, the preliminary objections be overruled with costs for being non meritorious in law.

In a brief rejoinder, the advocate for the 1<sup>st</sup> defendant herein reiterated to what he had asseverated in his submissions in chief.

I have carefully considered the arguments advanced by the 1<sup>st</sup> defendant and rebuttal from the plaintiff in order to determine the merit or demerit of the preliminary objections raised. It has been profoundly explained in the landmark case of **Lujuna Shubi Ballonzi, Senior vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 where it was observed and held that:

*"In this country, locus standi is governed by the common law. According to the law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the Court has power to determine the issue but also that he is entitled to bring the matter before the Court".*

Going by the pleadings and their annexures thereat, the plaintiff currently is Anna Investment Limited. In relation to the offer for a term loan dated 10/10/2016 and marked AIC-1, first amendment to the banking offer letter dated 20/11/2016 and marked AIC-2, offer for a term loan dated 03/07/2018 and marked AIC-3, notice dated 09/11/2020 and

marked AIC-4, amended plaint filed on 03/09/2021 and marked AIC-5, judgment of this Court dated 26/07/2022 and marked AIC-6, letter requesting for certified judgment, decree, proceedings, certificate of delay and exhibits dated 05/08/2022 and marked AIC-7 and notice for public auction dated 29/08/2022 and marked AIC-8 which reads together with para 6, 7, 10, 13, 16, 17, 18 and 19 of the plaint thereof names no one thereof than Anna Investment Company Limited and/ or Anna Investment Co. Ltd.

Again, the 1<sup>st</sup> defendant under para 6, 9, 10, 12 of her written statement of defence filed on 12/10/2022, she endorsed the existence of credit facilities provided under annexure NMBPLC-1 collectively, proof of several default notices issued to the plaintiff prior to 14 days' notice marked NMBPLC-2, plaint filed on 18/11/2020, 1<sup>st</sup> and 3<sup>rd</sup> defendants written statement of defence filed on 10/12/2020, judgment dated 26/07/2022 collectively annexed and marked NMBPLC-3, current bank statements indicating status of payment and outstanding amount annexed and marked NMBPLC-4 to the written statement of defence all they flow with Anna Investment Company Limited and/ or Anna Investment Co. Ltd and not the plaintiff herein.

Basing on the above analysis, Anna Investment Limited (now the plaintiff) and Anna Investment Co. Ltd (the then plaintiff in Land Case No. 185 of 2020) are two different persons in legal terms. In the case of **Bodi ya Wadhamini Uru Secondary School vs. Laban Masaule Msumanje**, Land Revision No. 1 of 2022 (Unreported), my learned sister Hon. Mwenempazi, J at page 4 of the Ruling *opined* that:

*"I am of the considered opinion that, like human beings with names, legal personality has their distinct names".* Emphasis supplied.

Therefore, the omission or change of the name Co. in the now plaintiff's suit instead of Anna Investment Co. Ltd as used prior, is fatal in the circumstances and unmaintainable in the eyes of law. Refer the case of **Cocacola Kwanza Ltd vs. Peter John Mkenda**, Civil Appeal No. 111 of 2017 (Unreported) at page 9 of the Ruling where my learned sister Sameji, J (as she then was now Justice of Appeal) observed that:

*"It was wrong for the appellant to change the parties at the appellate level without even seeking the leave of this Court. This is illegal and unacceptable procedure".*

Although the advocate for the plaintiff has invited this Court to consider the principle of overriding objectives as incorporated under



section 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019], so to speak, the same should not be used to circumvent the spirit of the laws of our land. In the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017, (Unreported), the Court of Appeal of Tanzania was of the view that:

*"...overriding objective principle cannot be applied blindly against mandatory provisions of the procedural law which goes to the foundation of the case".*

Consequently, I find merit in the 1<sup>st</sup> limb of the preliminary objection raised by the 1<sup>st</sup> defendant's counsel.

As to the limb of *res judicata*, the law governing the same is section 9 of the Civil Procedure Code [Cap 33 R.E 2019] which provides to the effect that:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has*

*been subsequently raised and has been heard and finally decided by such court.*

From the analysis of facts and the said provision of law, it is with no doubt that, the decision was delivered by this Court [Hon. M.R Gwae, J] on 26<sup>th</sup> day of July, 2022 in respect to Land Case No. 185 of 2020 see para 16 and 17 of the plaint altogether with para 10 of the 1<sup>st</sup> defendant's written statement of defence.

The subject matter in Land Case No. 185/ 2020 as per para 8 of the amended plaint filed on 03/09/2021 are Plot No. 376 under C.T No. 84645, Block "43" Kijitonyama, Dar es salaam, Plot No. 1036 under C.T No. 125005, Block "E" Sinza, Dar es salaam, Plot No. 233 under C.T No. 7949, Block "A" Ngarasero Usa River Area, Arusha as well as Farm No. 1845 C.T No. 19610, Ilkiurei Village, Arumeru District, Arusha which are the same with the present suit under para 6 of the plaint filed on 22/09/2022.

Notwithstanding the allegation by the attorney for the plaintiffs' that, the issue for determination in this suit is the validity of the intended auction without issuance of statutory default notice as pleaded under para 4 of the plaint compare to the issue in Land Case No. 185/ 2020, I disagree to concur with his submissions as the issue remains intact which is sale by auction or public auction all being used interchangeably.

Further, the decision in Land Case No. 185/ 2020 before Hon. G.M Gwae, J delivered on 26<sup>th</sup> day of July, 2022 was final and in the premise the appellant lodged a notice of appeal to the Court of Appeal of the United Republic of Tanzania on 12<sup>th</sup> day of August, 2022. See para 18 and annexure AIC-7 to the plaint. If that is the position, why does the plaintiff still want to ride two horses at the same time without waiting for the former to be determined on merits?

Lastly, the parties herein are litigating under the same title, leave apart in Land Case No. 185/ 2020 the parties were Anna Investment Co. Ltd, Anna Jeremiah Kaaya, Emmanuel Lugano Ngallah and Jeremiah Saruni Kaaya vs. NMB Bank PLC, Starcom Hotel Limited and Adili Auction Mart Limited and currently they are Anna Investment Limited vs. NMB Bank PLC and Adili Auction Mart Limited, **constructively**, they are litigating under the same title which have been aforementioned above.

In the case of **Witness Rhobi Elia vs. Khamis Abdallah Mduma & 2 Others**, Land Case No. 300 of 2022, (Unreported), at page 7 of the Ruling my learned sister Hon. A.Z. Mgeyekwa, J stated that and I reproduce:



*"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 (sic) on the same subject matter ought to have been raised and decided earlier". Emphasis underlined.


Having said so, I hold that this suit is constructive *res judicata* and this Court is *functus officio* to determine the instantaneous matter.

That said and done, I sustain the preliminary objections on both points of law. As a result, the suit is dismissed accordingly with costs. It is so ordered.

**Dated at Dar es salaam** this 7<sup>th</sup> day of March, 2023.

  
**L. HEMED**  
**JUDGE**  


**COURT:** Ruling is delivered this 7<sup>th</sup> March, 2023 in the presence of Ms. Rose Mwambusi holding brief of Ms. Bumi Mwaisaka for the plaintiff and of Brian Mombosho for the 1<sup>st</sup> defendant. Right of appeal explained.

  
**L. HEMED**  
**JUDGE**  
**07/03/2023**  
