

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 55 OF 2022

JACKSON W. ELIPHASI 1ST PLAINTIFF
FRANK MUSARI 2ND PLAINTIFF
MUNSA TRADING ENTERPRISES 3RD PLAINTIFF

VERSUS

RAHIM SHABAN 1ST DEFENDANT
JOYCE MALAI 2ND DEFENDANT
VICTOR MATONDANE 3RD DEFENDANT
NAOMI AMBWENE 4TH DEFENDANT
ECO BANK TANZANIA LIMITED 5TH DEFENDANT
LONG XING INTERNATIONAL LIMITED 6TH DEFENDANT
STEAM GENERATION RECOVERY LIMITED 7TH DEFENDANT

Date of last Order: 25/04/2023

Date of Judgment: 18/05/2023

RULING

I. ARUFANI, J

This ruling is for the preliminary objections on points of law raised by the counsel for the 2nd, 3rd, 4th, 5th and 7th defendants which read as follows:-

- 1. This honourable court has no jurisdiction to entertain this suit because it is hopelessly time barred for all intents and purposes.*

2. *This honourable court is functus officio to entertain this suit in view of the decision of this honourable court delivered on 11th June, 2021 by Hon. Madam Justice Maghimbi in Land Case No. 426 of 2017 filed by the 3rd plaintiff against the 5th and 6th defendants in the suit.*
3. *The suit before this honourable court is an abuse of the court process because it does not have jurisdiction to entertain this matter in view of the notice of appeal filed in this honourable court on 28th June, 2021.*
4. *The suit is bad in law since it offends the mandatory provisions of section 8 of the Civil Procedure Code, Cap 33 R.E 2019 in view of Civil Appeal No. 57 of 2022 filed by the 3rd plaintiff against the decision of the honourable court in Land Case 426 of 2017 which was delivered by the honourable Maghimbi, J on 11th June, 2021.*

While the plaintiffs were represented in the matter by the firm of Chuwa and Company advocates, the 2nd, 3rd, 4th, 5th and 7th defendants were represented in the matter by the firm of Locus Attorneys. Hearing of the matter was ordered to proceed ex parte against the 1st and 6th defendants as they were dully served but failed to appear in the court. By consent of the counsel for the parties the matter was argued by way of written submissions.

The counsel for the 2nd, 3rd, 4th, 5th, and 7th defendants (henceforth the defendants) stated in relation to the first point of preliminary objection that, the suit filed in the court by the plaintiffs is hopelessly time barred.

He argued that, as the suit filed in the court by the plaintiffs is based on contract, then as provided under section 3 (1) read together with item 7 of Part I of the Schedule to the Law of Limitation Act, Cap 89, R.E 2019 (hereinafter referred in short as the LLA) ought to be filed in the court within six years from the date on which the contract was executed.

He argued that, as the plaintiffs' suit is based on Memorandum of agreement dated 7th December, 2015 in which the 3rd plaintiff company pledged its property known as Plot No. 63 Block E, located at Kariakoo Area in the City of Dar es Salaam held under Certificate of Title No. 38634 (henceforth the suit property) to secure the loan advanced to the 6th defendant, the suit ought to be filed in the court by 7th December, 2021. He submitted that, as the suit was filed in the court on 17th March, 2022 it is hopelessly time barred and should be dismissed with costs.

In expounding the above submission, he stated that, as averred at paragraph 8 of the plaint the cause of action upon which the suit is based is fraud, whereby the plaintiffs claim the defendants conspired and forged the signature of one Regnald Frank Musari in procuring the corporate guarantee agreement of the 3rd plaintiff company who is now a deceased. He argued that, the stated corporate guarantee agreement was produced as exhibit P2 in Land Case No. 426 of 2017. He stated that, when the mentioned Land case No. 426 of 2017 was filed in the court on 29th

November, 2017 the plaintiffs were aware of the alleged fraud. He submitted the stated allegation of fraud on signature of Reginald Musari ought to be made in the mentioned case.

He went on submitting that, raising the stated claim of fraud in the present case which was filed in the court on 17th March, 2022 is an afterthought. He referred the court to the cases of **NBC Limited & Another V. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, CAT at Mbeya and **M. M. Worldwide Training Company Limited & Two Others V. National Bank of Commerce Limited**, Civil Appeal No. 258 of 2017, CAT at DSM (Both unreported) where it was stated that, a time limit set for suit found on contract as provided under item 7 of Part I of the Schedule to the LLA is six years from the date on which the cause of action accrued.

He argued in relation to the second point of preliminary objection that, after the court delivered the judgment in Land Case No. 426 of 2017 on 11th June, 2021 it became *functus officio* to entertain the third plaintiff's claims emanating from the collateral agreement dated 7th December, 2015 in which the suit land was pledged to the 5th defendant as a collateral for the loan advanced to the 6th defendant which to date remain unpaid. He cited in his submission section 9 of the Civil Procedure Code which bars courts to try any suit or issue in which the matter directly and

substantially in issue has been directly and substantially in issue in the former suit between the same parties or their privies.

He argued that, the legal implication of the decision made by the court in the above cited case is to render the court *functus officio* in determine the same cause of action filed in the court by the plaintiffs against the defendants on the same transaction. He referred the court to the case of **Kogel Fahrzeugwerke V. Liberty Transcargo Limited**, Misc. Commercial Application No. 288 of 2015, HC Com. Div. at DSM (unreported) where it was stated that, the maxim *functus officio* means no court when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error.

He stated the final order with regards to the plaintiffs lacking cause of action against the defendants was signed when the court dismissed Land Case No. 426 of 2017 making the court *functus officio* to entertain the current matter which is based on the same subject matter. He stated the decision in Land Case No. 426 of 2017 is still binding upon the parties. He submitted that, as all courts are bound by the stated principle the court is not justified to reopen and determine the matter basing on the same cause of action which was previously dismissed by the court.

He went on explaining how the Court of Appeal determined the issue of a person who was not a party in a former suit for the purpose of application of doctrine of res judicata in a case as stated in the case of **Lotta V. Tanaki & Others** [2003] 2 EA 556 and related the same with the matter determined by the court in the Land Case No. 426 of 2017 and the matter in the case at hand. He argued that, the plaintiffs have pretended to alleged fraud in the present case to distinguish the present case from the previous case and added the first and second plaintiffs in the case to show parties are different. He argued it was stated in the case of **Salomon V. Sslomon & Co. Limited**, [1896] UKHL 1, [1897] AC 22 that, once a company is registered, it becomes a legal person and it can sue and be sued on its name.

He submitted that, inclusion of the 1st and 2nd plaintiffs in the case is a mere academic exercise and it has no any legal consequences in so far as the liabilities of the 3rd plaintiff towards the 5th defendant with regard to the collateral used to secure the loan advanced to the 6th defendant by the 5th defendant is concern. He went on arguing that, the 3rd plaintiff filed the instant case in the court against the first defendant in the pretext of distinguishing the present case from Land Case No. 426 of 2017. He stated that has nothing to assist in so far as the decision in the mentioned case is concern because the record of the matter shows

Rahimu Shaban appeared in the court on behalf of the 6th defendant and adduced evidence to defend the 6th defendant.

He stated that, the 2nd, 3rd and 4th defendants in the instant matter were officers of the 5th defendant hence they cannot be sued on their own. He stated that, the 6th defendant was 2nd defendant in the previous suit while the 7th defendant is an agent of the 5th defendant engaged to dispose of the collateral so as to recover the loan advanced to the 6th defendant plus interest. He submitted that, the position of the law in determination of whether a party was privy to another party in the former suit is whether the person who was not a party in the former suit had a common interest in the subject matter of the former suit. He argued the stated test is applied in the doctrine of res judicata. He argued the 1st and 2nd plaintiffs had common interest in the matter as were directors of the 3rd plaintiff.

He joined and argued the 3rd and 4th points of preliminary objection together which literally states the court has no jurisdiction to entertain the matter in view of the notice of appeal filed in the court on 28th June, 2021 and Civil Appeal No. 57 of 2022 filed in the Court of Appeal by 3rd plaintiff against the decision made by this court in Land Case No. 426 of 2017 and it is also offending section 8 of the Civil Procedure Code. He stated the defendants filed in the court their written statement of defence along with

the preliminary objections which are being determined in this ruling on 12th April, 2022.

He stated that, after the plaintiffs being served with the written statement of defence of the defendants they filed in the court their reply to the defendants' written statement of defence accompanied with two copies of the order of the Court of Appeal dated 28th April, 2022 showing the Civil Appeal No. 57 of 2022 originating from Land Case No. 426 of 2017 decided by this court and Civil Application No. 449/17 of 2021 arising from Civil Appeal No. 57 of 2022 between the 3rd plaintiff versus the 5th and 6th defendants had been withdrawn from the Court of Appeal. He stated the Civil Application No. 449/17 of 2021 was filed in the Court of Appeal by the 3rd plaintiff seeking for an order of injunction against the 5th, 6th and 7th defendants and an order of restraining the 7th defendant from disposing of the suit property following dismissal of Land Case No. 426 of 2017 by this court on 11th June, 2021.

He submitted the stated orders attached to the reply to the written statement of defence of the defendants should be ignored by the court in determination of the preliminary objections raised in the present matter by the counsel for the defendants. He supported his submission with the case of **John M. Byomalirwa V. Agency Maritime Internationale (Tanzania)**, [1983] TLR 1 and **Mukisa Biscuit Manufacturing Co.**

Limited V. West End Distributors Limited, [1969] EA 696 where it was stated that, in determine whether the plaint discloses a cause of action, it is only the plaint not a reply to the defence or any other pleading that should be considered.

Without prejudice to what he submitted hereinabove he argued that, withdraw of the notice of appeal and Civil Appeal No. 57 of 2022 from the Court of Appeal which were challenging the decision made by this court in Land Case No. 426 of 2017 was made by Advocate Stephen Ally Mwakibolwa on 8th April, 2022 while the suit at hand (Land Case no. 55 of 2022) was filed in the court on 17th March, 2022. He submitted that, withdraw of the appeal and the civil application from the Court of Appeal was done to circumvent the 3rd and 4th preliminary objections filed in the court by the counsel for the defendants.

He submitted that the plaintiffs' counsel became aware of the preliminary objection raised in the matter after being filed in an application for temporary injunction sought in Land Application No. 115 of 2022 served to them on 1st April, 2022 when the application was coming for hearing. He stated that, filing in the Court of Appeal the notice to withdraw the notice of appeal and appeal which was challenging the decision of this court made in Land Case No. 426 of 2017 was intended to rectify the defects of Land Case No. 55 of 2022.

He referred the court to the case of **Standard Chartered Bank & Others**, Civil Application No. 222 of 2016, CAT at DSM and **Emmanuel Lyabonga & Another V. R**, Econ Case No. 3 of 2017, HC at Iringa cited in the case of **Bahadurali E. Shamzi & Another V. The Treasury Registrar, Ministry of Finance Tanzania**, Civil Appeal No. 4 of 2003 (All unreported) which principally it was stated once objection has been lodged in the court, it is no longer open or appropriate to the appellant to remedy the deficiency complained therein. He based on the afore stated submissions to pray the court to upheld their points of preliminary objections and dismiss the plaintiffs' suit with costs.

In response to the submission by the counsel for the defendants, Advocate Edward Peter Chuwa filed in the court the submission of the plaintiffs which states that, the submission by the counsel for the defendants is devoid of merit and he has labored himself in distorting the facts of the case and misleading the court on the settled legal principles. He stated the first objection is premised on the time limitation of the cause of action and the counsel for the defendants argued that, as the suit is based on contract it ought to be filed in the court within six years.

He stated the counsel for the defendants referred the court to the memorandum of agreement dated 7th December, 2015 in which the 3rd plaintiff pledged the suit property to secure the loan advanced to the 6th

defendant by the 5th defendant. He submitted that is misdirection as well as misconception of the pleadings. He referred the court to the claims of the plaintiffs as averred at paragraph 8 of the plaint and the reliefs sought in the plaint and stated that, the plaintiffs' cause of action is based on corporate guarantee agreement issued by the 3rd plaintiff as the security for the loan advanced to the 6th defendant dated 12th February, 2016 which is alleged it was forged. He stated the cause of action is also based on board resolution dated 12th December, 2016 and the mortgage deed dated 24th January, 2016 alleged were fraudulently obtained.

He premised his submission on the documents upon which the cause of action of fraud and forgery is alleged to have arisen. He stated that, the position of the law as provided under section 6 (f) of the Law of Limitation Act is that, the right of action in a suit for damages for inducing a party to break a contract is deemed to have accrued on the date of the breach. He also referred the court to section 7 of the same law which provides that, where there is continuing breach of contract or continuing wrong independent of a contract, a fresh period of limitation shall begin to run at every moment of the time which the breach or the wrong as the case may be occurred.

He argued that, even if it will be said the alleged memorandum of agreement dated 7th December, 2015 is a contract forming the cause of

action in the plaintiffs' suit, time would start to run not from the date of execution but on the date of breach. To hold otherwise, would lead into absurdity as parties enter into contract with expectations that their wishes would be met and not to bring case to the court. He submitted one cannot hold immediately after signing the contract, the cause of action arose.

He went on submitting that, it cannot be said the date of the contract embodied in the corporate guarantee agreement which is an integral part of the facility dated 12th December, 2016 established when the cause of action arose as the cause of action arose from the date of the breach of the facility letter. He went on arguing that, the liability of the guarantor only arises after the default of the principal debtor. He stated further that, the facility would not mature before October, 2016 and the liability of the guarantor would only arise upon demand. He submitted that, as the principal debtor has not repaid the loan there is a continuing breach and time accrued on every year.

He stated another aspect of cause of action is the forgery and fraudulently procured mortgage deed dated 24th January, 2016. He argued that, mortgage of right of occupancy is a land matter and it is one of the land disposition others being sale and lease. He stated that, when one is alleging that a mortgage is void, he is essentially claiming for the removal of an encumbrance on his right of occupancy and for recovery or

repossession of his land free from any encumbrance. He submitted as the plaintiffs alleged the 5th and 7th defendants have advertised to sale their land in a newspaper dated 16th August, 2021, it means the cause of action in this respect is founded on land whose time limit as per item 22 of Part I of the schedule to the Law of Limitation Act is 12 years.

He went on arguing that, another aspect of the plaintiffs' claim is that the above stated transactions were procured by forgery and fraud. He submitted the alleged fraud is admitted by the defendants in their defence only that they have wrongly argued the knowledge of the fraud in respect of the forgery was before filing of Land case No. 426 of 2017 in the court. He stated from the proceedings of the mentioned case and letter dated 21st February, 2022 from Locus Attorney annexed in the written statement of defence shows the plaintiffs got knowledge of the fraud in the course of hearing of the matter and on 8th September, 2021 they reported the matter to the police force alleging fraud. In fine he stated the fraud was discovered by the plaintiff in 2021.

He referred the court to section 26 of the Law of Limitation Act which states the period of limitation for proceedings based on fraud does not begin to run until when the plaintiff has discovered the fraud. To support his submission, he cited in his submission the case of **Mr. Eric John Mmari V. M/S Herkin Builders Ltd, Com.** Case No. 138 of 2019

HC Com. Div. at DSM (unreported) where various cases including the case of **Murphy V. Joe O'Toole & Sons Ltd & Another** [2014] IEHC 486 were cited to show the cause of action in a contract must be the date on which a breach occurs and not the date when the contract is made.

He submitted in relation to the argument that the allegation of fraud and forgery on the corporate guarantee agreement and the legal mortgage basing on the forgery of signature of Reginald Musari is an afterthought as it ought to have been raised in Land Case No. 426 of 2017. He argued the stated argument is misconceived as the issue of fraud was not raised in the mentioned case. He stated the 3rd plaintiff was not in possession of the original documents referred above and that is why she gave notice to produce in the afore mentioned case. He argued that, to alleged and submit the alleged fraud and forgery were within the knowledge of the plaintiff a long time before filing of the suit in the court is wrong.

He submitted that, in case of fraud the time starts to run from February, 2021 and if it is alleged is from when the Land Case No. 426 of 2017 was instituted in the court, then it is from 29th November, 2017 and therefore the suit is still within the time. He stated that, the argument that the allegation of fraud ought to be raised when Land Case No. 426 of 2017 was filed in the court is baseless.

As for the second objection the counsel for the plaintiff argued that, the counsel for the defendants have failed to convince the court it is *functus officio* and how this case is similar to the Land Case No. 426 of 2017. He stated the case of **Kogel Fahrzeugwerke** (supra) which discussed the maxim *functus officio* is not applicable in the present suit hence it is distinguishable. He stated the counsel for the defendants equated the principle of *functus officio* and *res judicata* and submitted that, the case is not *res judicata* as argued by the counsel for the defendants. He referred the court to section 9 of the CPC and the case of **Peniel Lotta V. Gabriel Tanaki & Others**, [2003] TLR 312 which interpret the principle of *res judicata* and submitted the present suit is not *res judicata*.

He stated the present suit is not *res judicata* because the parties in the former suit are not the same as parties in the current suit. He stated the 1st and 2nd plaintiffs were not parties in the former suit. He stated the argument that the 1st and 2nd plaintiffs are directors and shareholders of the 3rd plaintiff and their inclusion in the current suit does not distinguish them from the former suit is very wrong. He stated the case of **Salomon V. Salomon** (supra) and section 15 of the Companies Act supports their case as they state directors and shareholders of a company are distinct

persons in law from the company. He argued that, the company can sue or be sued in its own name.

He stated the argument that inclusion of the 1st and 2nd plaintiffs in the instant suit is an academic exercise does not have any consequences as regards the liabilities of the 3rd plaintiff is misconceived as that is a matter need to be proved by evidence. He added that, only the 5th and 6th defendants were parties in the former suit and the rest of the defendants in the present suit were not parties in the former suit. He stated that shows the element of the same parties to be in both suits for the purpose of applicability of the doctrine of res judicata has not been established in the present case.

He argued in relation to the element of the subject matter in the former suit and the current suit to be the same that, the counsel for the defendant has failed to assist the court to know how the two cases resemble on the subject matter. He argued that, while the summary of the former case made in the judgment of the court states the claims of the 3rd plaintiff was seeking for declaratory order that the 5th defendant bank was unlawfully withholding certificate of the suit property, the issue of fraud, forgery, or illegality of the mortgage deed was never raised in the former suit and was not an issue. He stated that, while the claim of the plaintiff in the former suit was TZS 900,000,000/=, the claims of the

plaintiffs in the current suit as stated at paragraphs 8, 20 and 21 of the plaint is not containing the stated claim. He submitted that, as the elements of res judicata are required to apply conjunctively and not disjunctively the second objection has failed.

Although the counsel for the defendants argued the 3rd and 4th objections together but the counsel for the plaintiffs argued them separately. He stated in relation to the 3rd objection that, although the counsel for the defendant argued there is a pending notice of appeal filed in the court on 28th June, 2021 but the particulars of the stated notice of appeal were not disclosed in the preliminary objection to enable them to understand the same and get prepared for hearing of the same. He went on arguing that, as the counsel for the defendant argued that notice of appeal in Civil Appeal No. 57 of 2022 and Civil Application No. 449/17 of 2021 in the Court of Appeal upon which the third objection is based have been withdrawn the objection has been overtaken by event.

He argued that, the stated appeal and application filed and withdrawn from the Court of Appeal by Advocate Stephen Mwakibolwa have no relationship whatsoever with this matter. He stated the difference between the stated two matters can be seen on the parties and subject matters involved therein which are different. He stated the argument by the counsel for the defendants that the matters filed in the Court of Appeal

were withdrawn to pre-empt their objections should not be accepted as the court cannot close its eyes and hold there is an appeal pending in the court of appeal while there is no appeal. He stated the case of **Standard Chartered Bank** (supra) is distinguishable to the present case because in the referred case there was a prayer to amend the record while there was preliminary objection touching on the same application. He stated the appeal and application stated were in the Court of Appeal have already been withdrawn in accordance with the Court of Appeal Rules.

He argued in relation to the fourth point of preliminary objection that, from the wording of section 8 of the Civil Procedure Code it is misconceived as there is no matter between the same parties on the same subject matter which is pending in the court. He submitted though Land Case No. 426 of 2017 is not the same as the current suit but its judgment has already been delivered hence the doctrine of res sub judice cannot apply. He based on the above submission to pray the court to dismiss the objections with costs.

In their rejoinder the counsel for the defendants reiterated their submission in chief. It was stated by the counsel for the defendants that, the memorandum of acceptance by guarantor alleged was forged was executed on 12th February, 2016 and signed by the Directors of the 3rd plaintiff namely Jackson W. Lema (1st Plaintiff) and Reginald Musari

together with 6th defendant as a borrower and 5th defendant as the lender/bank. He argued that, as the first plaintiff signed the memorandum of acceptance by the guarantor and there is nowhere stated his signature was forged the plaintiffs cannot justify their allegations that there was forgery which could have not been discovered on the date of execution of the corporate guarantee agreement. He submitted that, counting from 12th February, 2016 the limitation period of six years expired on 11th February, 2022, hence the current suit filed in the court on 17th March, 2022 is beyond time frame fixed by the law.

He argued that, although annexure "H" in the plaint does not disclose the date of the ordinary meeting but it is dated 17th March, 2016. He stated it means that with reasonable diligence the plaintiffs should have discovered the alleged forgery latest by 17th March, 2016. He submitted counting from 17th March, 2016 the six years limitation of time for the plaintiffs to file the current suit on the allegations of fraud was on 16th March, 2022 which was beyond the time permitted by the law. He submitted that shows the court has no jurisdiction to entertain the case which is time barred.

He adopted his rejoinder in respect of the first point of preliminary objection as his rejoinder in respect of the second point of preliminary objection. He argued that, since the case on corporate guarantee

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agreement is time barred even the allegations on forgery of the Board resolution is time barred; hence the court has no jurisdiction to link it with a case which is time barred.

He went on rejoining the submission of the counsel for the plaintiffs in respect of the third point of objection that, the argument by the counsel for the plaintiffs that as the plaintiffs alleged the 6th and 7th defendants had advertised sale of their land then the cause of action is founded on land whose time limit is twelve years is misconception of the point of law with regards to the limitation of time. He submitted the suit before the court is not about recovery of land which is stated under item 22 of Part I of the Schedule to the Law of Limitation Act its limitation of time is twelve years.

He stated that, the issue before the court is when the right of action for the plaintiffs begun with regards to the allegations that the mortgage deed dated 24th January, 2016 is null and void on account of forgery and fraud. He submitted that, as the action remains to be on the mortgage deed, meaning the contract and not recovery of land, the six years limitation period is applicable. He stated that marks the time started to run against the plaintiffs from 12th February, 2016 and makes the plaintiffs cause of action which forms the third point of objection time barred.

He submitted further that, there is nowhere in the defendants' submission in chief the defendants plainly admitted the allegation of fraud. He stated to the contrary the counsel for the defendants maintained in the submission in chief that the allegations of fraud are unfounded and afterthought which made the plaintiffs to file a flimsy case in the court. In fine, he submitted that, all causes of action of fraud in the plaintiffs' case are time barred and the court has no jurisdiction to entertain the plaintiffs suit and prayed the court to dismiss it with costs.

The court has painstakingly considered the detailed and well-crafted submissions from the counsel for the parties which I have indevoured to summarize hereinabove. After going through the pleadings filed in the court by both sides; and applied the same in the rival submissions filed in the court by the counsel for the parties in respect of the points of preliminary objections raised in the matter by the counsel for the defendants, the court has found the issue to determine here is whether the objections raised by the counsel for the defendants deserve to be upheld or not.

I will start with the first point of preliminary objection which states the court has no jurisdiction to entertain the suit at hand as it is hopelessly time barred. The court has found the counsel for the defendants started his submission by arguing the plaintiffs' suit is time barred basing on the

reason that, the claims of the plaintiffs is based on memorandum of agreement (collateral agreement) dated 7th December, 2015 in which the 3rd plaintiff pledged the suit property to secure the loan advanced to the 6th defendant by the 5th defendant. The counsel for the defendants argued that, as provided under item 7 of Part I of the Schedule to the LLA the plaintiffs' suit which is based on the stated contract ought to be instituted in the court within six years from the date on which the contract was executed.

The court has found that, although it is not in dispute that the 3rd plaintiff entered into the stated memorandum of agreement dated 7th December, 2015 and pledged the suit property as a security for the loan advanced to the 6th defendant by the 5th defendant, but after going through the plaint the court has failed to see anywhere stated the claims of the plaintiff is based on the stated memorandum of agreement. The court has found as rightly argued by the counsel for the plaintiffs the claims of the plaintiffs as stated at paragraph 8 of the plaint and in the relief clause are based on fraud and forgery alleged were committed by the 1st to 6th defendants on the corporate guarantee agreement dated 12th February, 2016, Board Resolution bearing the same date and mortgage deed dated 24th January, 2016.

The court has arrived to the stated finding after seeing that, even the counsel for the plaintiffs stated in his submission that the claims of the plaintiffs are not arising from the memorandum of agreement dated 7th December, 2015. He stated it is arising from the fraud and forgery alleged were committed by the 1st to 6th defendants on the mentioned documents. Without prejudice to what I have stated hereinabove, the court has gone through item 7 of Part I of the Schedule to the LLA which the counsel for the defendants argued it states a suit found on contract is required to be instituted in court within six years from when the contract was executed and find it states the suit founded on contract not otherwise provided for is required to be instituted in court within six years.

As the cited provision of the law is not stating from when the stated period of six years is required to start counting, the court has found the issue to determine here is when the stated six years is required to start counting. The court has found the answer to the stated issue is provided under section 5 of the LLA which states the limitation of time for instituting any proceeding in courts shall start to accrue on the date on which the cause of action arises. The wording of the cited provision of the law shows clearly that, if it will be taken the plaintiffs' cause of action in the present suit is based on contract the limitation of time for instituting the suit in the court is required to start counting from when the cause of

action arose and not from when the parties executed the contract as submitted by the counsel for the defendants.

Having found the claims of the plaintiffs is not basing on the memorandum of agreement dated 7th December, 2015 but on the allegations of fraud and forgery stated by the plaintiffs were committed by the 1st to 6th defendants on the corporate guarantee agreement dated 12th February, 2016, Board Resolution dated 12th February, 2016 and the mortgage deed dated 24th January, 2016, the question to determine here is when the cause of action arising from the alleged fraud and forgery started to accrue.

The court has found that, as limitation of time for the claim arising from fraud and forgery is not provided for in any item of Part I of the Schedule to the LLA the limitation of time for such claims are supposed to be governed by item 24 of Part I of the same Schedule to the LLA which states that, any suit not otherwise provided for is supposed to be instituted in court within six years from when the cause of action accrued. The court has found as the claims of the plaintiffs are arising from the allegations of fraud and forgery then, as rightly argued by the counsel for the plaintiffs and as provided under section 26 of the LLA the period of limitation for the plaintiffs' cause of action of fraud started to accrue from when they discovered the alleged fraud. The question is when the

plaintiffs discovered the fraud and forgery alleged are on the documents stated were forged.

The court has found there is nowhere in the plaint filed in the court by the plaintiffs pleaded expressly or implied as to when the plaintiffs discovered the alleged fraud and forgery. The arguments by the counsel for the defendants is that, the plaintiffs became were aware of the alleged fraud and forgery when Land Case No. 426 of 2017 was filed in the court as the 1st plaintiff who testified in the mentioned case as PW2 stated at page 27 of the proceedings of the cited case that he signed the corporate guarantee agreement which it is alleged in the present case it was forged by the 1st to 6th defendants in the present case.

The court has found that, even if it will be accepted the first plaintiff stated in the testimony, he gave in the mentioned case that he signed the stated corporate guarantee agreement but that is not enough to establish he was aware of the fraud and forgery alleged is in the said corporate guarantee agreement, Board Resolution and in the mortgage deed. To the contrary the court has found, even if it will be said the first and third plaintiffs were aware of the alleged fraud and forgery when the stated case was filed in the court but it has not been stated when exactly they became aware of the alleged fraud and forgery so that it can be said from when they became aware of the alleged forgery and fraud until when the

present matter was filed in the court the limitation period for instituting their claim in the court had expired.

The counsel for the defendants tried to argue in their rejoinder that, by using reasonable diligence the plaintiffs would have discovered the alleged fraud and forgery on 17th March, 2016 when the letter annexed in the plaint as annexure "H" was written to the Managing Director of the 6th defendant to show their intention of withdrawing their guarantee because the process to get loan from the 5th defendant had taken too long time and a lot of agreements had been breached. The court has failed to see any merit in this argument because there is nothing in the said annexure showing how it would have caused the plaintiffs to discover the alleged fraud and forgery.

The foregoing finding caused the court to come to the view that, as the counsel for the plaintiffs argued the plaintiffs became aware of the alleged fraud and forgery at the time of hearing Land Case No. 426 of 2017 and written the letter dated 21st February, 2021 concerning the alleged fraud and forgery it cannot be said the suit filed in the court on 17th March, 2022 is time barred as from when the plaintiffs became aware of the fraud and forgery until when the suit was filed in the court six years provided under the law for filing in the court a suit arising from fraud had not expired.

The court has found the counsel for the defendants argued further that, the plaintiff cannot justify their allegations that there was a forgery in the corporate guarantee agreement which was not discovered by the Directors of the 3rd plaintiffs as the corporate guarantee agreement was signed by the 1st plaintiff and it has not been stated anywhere in the plaint that the signature of the 1st plaintiff appearing in the corporate guarantee agreement was forged. The court has found that, it is true that there is nowhere in the plaint stated the signature of the 1st plaintiff in the corporate guarantee agreement was forged.

However, after going through the plaint the court has found paragraphs 8 and 18 of the plaint shows it is averred the signature of the 1st plaintiff appearing in the Board Resolution and Mortgage deed was forged. That being what is averred in the cited paragraphs of the plaint, the court has found a mere failure to state in the plaint that the signature of the 1st plaintiff in the corporate guarantee agreement is forged cannot be taken as a conclusive establishment that the suit is time barred as that is a fact which need to be proved or disproved by getting evidence from the parties and it cannot be determined at this stage of the matter.

While bearing in mind what has been stated hereinabove, the court has found that, the position of the law stated in the case of **Mukisa Biscuit Manufacturing Co Ltd V. West End Distributors Ltd**, [1969]

1 EA 696 is that preliminary objection is required to be raised on a point of law pleaded by one party in a suit and taken by the other side as a correct fact and it cannot be raised on point which is not pleaded. That being the position of the law the court has found that, the first point of preliminary objection raised by the defendants that the plaintiffs' suit is time barred cannot be upheld because it has not been substantiated by the counsel for the defendants that the plaintiffs' suit was filed in the court after expiration of the period of time provided by the law for institution of fraud case in court.

Coming to the second objection the court has found the counsel for the defendants states the court is *functus officio* to entertain the suit at hand because of the decision delivered by this court in Land Case No. 426 of 2017 dated 11th June, 2021. The court has found in arguing the stated objection the counsel for the defendants based his submission on the doctrine of res judicata provided under section 9 of the CPC.

The court is agreement with the counsel for the defendants that the meaning of the term *functus officio* as stated in the case of **Kogel Fahrzeugwerk** (supra) and in the cases of **Bibi Kisoko Medard V. Minister for Lands Housing and Urban Developments and Another**, [1983] TLR 250 and **Mohamed Enterprises (T) Limited V. Mohamed Nasser** [2013] EA Vol. 1, 249 is very that, once a matter is

finally disposed of by a court, the said court is not entitled to entertain the same matter again unless the former decision is set aside by a court of complete jurisdiction.

The court has found proper to state here that, the position of the law provided under section 9 of the CPC which the counsel for the defendants used to support his second point of preliminary objection has been considered in number of cases which one of them is **Peniel Lotta** (supra) where it was stated that: -

"The object of the doctrine of res judicata is to bar the multiplicity of suit and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit".

The factors or conditions which need to be taken into consideration when determine a matter is in violation of section 9 of the CPC were well summarized in the case of **Peniel Lotta** (supra) and were also referred in the case of **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited 8l Two Others**, Civil Appeal No. 2008, CAT at Tanga (unreported) where it was stated that: -

"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These are; (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

(ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit and (v) the matter in issue must have been heard and finally decided in the former suit"

While being guided by the position of the law stated hereinabove the court has found the issue to determine here is whether the present suit is res judicata and the court is *functus officio* to entertain it. After going through the pleadings and decision of the court in respect of Land Case No. 426 of 2017 which the counsel for the defendants argued is causing the court to be *functus officio* to entertain the current suit as it is res judicata to the former suit, the court has failed to side with the arguments fronted by the counsel for the defendants.

The court has come to the stated finding after seeing that, although the parties in the former suit are also parties in the current suit but in the current suit there are parties who were not parties in the former matter. The court has found while the 3rd plaintiff was a sole plaintiff in the former suit and the defendants were only the 5th and 6th defendants, the rest of the parties in the current suit were not parties in the former suit. The court has found that, although the counsel for the defendants argued the 1st and 2nd plaintiffs are directors of the 3rd plaintiff something which would have made them privies to the 3rd plaintiffs but the issues and reliefs

sought in the former suit are quite different from the issues and reliefs the plaintiffs are seeking from this court.

The court has arrived to the stated finding after seeing that, while the prayer of the 3rd plaintiff in the former suit was a declaratory order that the 5th defendant was withholding the certificate of title of the suit property without any probable cause or justification, the claims and prayer of the plaintiffs in the current suit is for declaratory orders that the 1st to 6th defendants, forged the corporate guarantee agreement, board resolution and mortgage deed used to secure the loan advanced to the 6th defendant. Therefore, while the cause of action in the former suit was based on breach of contract the current suit is based on fraud and forgery which as rightly argued by the counsel for the plaintiffs were never raised in the former suit and were not in issue in the former suit.

Under that circumstances the court has found that, as it was held in the cases of **Hamza Byarushengo V. Mwanga Hakika Microfinance Bank Limited**, Land Case No. 45 of 2019, HC Land Division at DSM, (unreported) and **Peniel Lotta** (supra) that, the five conditions required for the principle of res judicata to stand must co-exist and they are not in co-existence in the mentioned two suits, the court has found the principle of res judicata cannot be applied in the matter at hand. In the premises

the court has found it is not *functus officio* to entertain the current suit and the suit is not res judicate to the Land Case No. 426 of 2017.

With regards to the third and fourth points of preliminary objections which states the court has no jurisdiction to entertain the current suit because of the notice of appeal filed in the court on 28th June, 2021 and is offending section 8 of the CPC in view of Civil Appeal No. 57 of 2022 and Civil Application No. 449/2017 of 2021 filed in the Court of Appeal by 3rd plaintiff the counsel for defendants argued them together and the counsel for the plaintiffs argued them separately. The court has found the counsel for the defendants argued that, although the appeal and the application mentioned hereinabove upon which the third and fourth preliminary objections were being hinged have already been withdrawn from the Court of Appeal but he prayed the court to disregard withdrawal of the stated appeal and application and proceed with determination of the 3rd and 4th points of preliminary objections.

The court has found the basis of the prayer by the counsel for the defendants for the court to continue to determine the mentioned two objections is that the notice to withdraw the appeal and the application which were pending in the Court of Appeal was filed in the Court of Appeal on 8th April, 2022 which is after the plaintiffs being served with the copy of the notice of preliminary objections on 1st April, 2022. The court has

found that, even if it will be accepted the notice to withdraw the stated appeal and application from the Court of Appeal was filed in the Court of Appeal after the plaintiffs being served with the notice of preliminary objection filed in the court by the counsel for the defendants but as rightly argued by the counsel for the plaintiffs the stated appeal and application which originated from Land Case No. 426 of 2017 had no relationship whatsoever with the current suit.


The court has arrived to the stated finding after seeing it has already been found in the second point of preliminary objection that the matter before the court is quite different from the issue determined in the Land Case No. 426 of 2017. If the suit at hand is different from the mentioned former suit, there is no way it can be said the court has no jurisdiction to entertain the present suit basing on the ground that the present suit is contravening section 8 of the CPC. In the premises the court has found the cases of **John M. Byombalirwa** and **Standard Chartered Bank** (supra) cited in the submission of the counsel for the defendants are not relevant in the matter at hand.

It is because of the foregoing stated reasons the court has found all the points of preliminary objections raised by the counsel for defendants cannot be upheld as they have not been established to the extent of being upheld. Consequently, all the points of preliminary objections raised by

the counsel for the defendants are hereby overruled in their entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 18th day of May, 2023




I. Arufani

JUDGE

18/05/2023

Court:

Ruling delivered today 18th day of May, 2023 in the presence of Mr. John Laswai, learned advocate holding grief for Ms. Anna Lugendo, learned advocate for the plaintiffs and Mr. John Lasawi is also appearing for the 2nd, 3rd, 4th, 5th and 7th defendants. The ruling has been delivered ex parte against the 1st and 6th defendants as they were dully served but failed to appear in the court. Right of appeal to the Court of Appeal is fully explained.




I. Arufani

JUDGE

18/05/2023