

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO.291 OF 2022

ELIZABETH WILLIAM MANYANDA PLAINTIFF

VERSUS

STANBIC BANK TANZANIA LIMITED 1ST DEFENDANT

LUMANDE KASULE LUMANDE 2ND DEFENDANT

DOTTO CHARLES BUDAKILAGA 3RD DEFENDANT

RULING

25th August & 8th September, 2023

L. HEMED, J

ELIZABETH WILLIAM MANYANDA, the plaintiff in the instantaneous suit and **DOTTO CHARLES BUDAKILAGA**, the 3rd defendant, are the wives of the 2nd defendant, **LUMANDE KASULE LUMANDE**. The plaintiff who is the senior wife of the 2nd defendant is before this court trying to challenge the intention of **STANBIC BANK TANZANIA LIMITED** the 1st defendant, to dispose of by way of sale, properties which are house situate on Plot No.251 Block 10, Kibada

Area, Temeke Municipality and Plots No. 389 and 391, Block F, Ifakara Urban Area, Kilombero District.

The plaintiff claims to have interests over the suit properties which were mortgaged by the 2nd and 3rd defendants to the 1st defendant. She has levelled blames against the 2nd and 3rd defendants for deliberately keeping the plaintiff in the dark despite being fully aware of her legal interest in the said mortgaged properties (the suit properties). The plaintiff further pleaded in her Complaint (paragraph 11) to have discovered that the 2nd defendant had instituted Land Case No. 17 of 2021 in this court seeking to restrain the 1st Defendant from auctioning the mortgaged properties (the suit properties).

The plaintiff is thus seeking for judgment and decree against the defendants jointly and severally for the following orders: -

- "a) Nullification of the whole mortgage processes.*
- b) A declaration that the purported mortgage deeds in respect of the mortgaged properties...are null and void and the same be declared a nullity.*
- c) Costs of this suit*
- d) That, any other relief(s) that this Honourable Court may deem just and equitable to grant."*

The 1st Defendant disputed all the claims raised by the plaintiff. On

their part, the 2nd and 3rd defendants appear to support the plaintiff's claim. In his written statement of defence, the 2nd defendant averred the plaintiff to be his elder wife and that she was not involved in the loan and mortgage processes complained of. The 3rd defendant pleaded in her defence that she was not aware if the plaintiff was not informed of the mortgage process. She also stated to have never consented to mortgages regarding assets at Ifakara, Morogoro.

The plaintiff's case was heard and concluded on 24th July 2023. Upon conclusion of the plaintiff's case, the Court discovered existence of the decision of this court in Civil Case No. 17 of 2021 between the 2nd and 1st defendant (**Lumande Kasule Lumande vs STANBIC Bank Tanzania Limited**). In the said suit, the same properties were the subject matter and the 2nd defendant herein was challenging the sale of the suit landed property by the 1st defendant herein. This court, Hon. Mongela, J, *inter alia* made the following orders:

- "1. The plaintiff's suit is dismissed;*
- 2. The counter claim by the defendant partly succeeds subject to recalculation of the unpaid principal loan, which shall be charged interest and other penalties;*
- 3. The defendant is at liberty to exercise power under*

mortgage including attachment and sale of the mortgaged properties...;

4. Costs of the suit to be borne by the plaintiff."

Since the aforesaid decision in Civil Case No. 17 of 2021 appears to bless the mortgage in question and the fact that the present suit challenges the said mortgage, the question is whether this court is *functus officio* to determine the instant case. It was ordered by the court that this point be addressed by way of written submissions. The plaintiff was represented by Mr. **Miyambebele Abedinego Levi Ng'weli**, learned advocate. The 1st defendant was represented by **Mr. Antipas Akam**, learned advocate while the 2nd and 3rd defendants enjoyed the service of **Mr. Alphonse Katemi**, learned advocate.

Arguing in support of the point, Mr. Akam submitted that, this court is faced with one major issue which is the right of the parties in respect to the mortgage agreement. He asserted that the issue was determined by this court in Civil Case No. 17 of 2021, whereby the court allowed the first Defendant to be at liberty to exercise powers under mortgage including attachment and sale of the mortgaged properties. It was the submission of the learned counsel for the first defendant that this court cannot redetermine the issue regarding the rights of the parties in the mortgage agreement.

Mr. Akam submitted further that, the current plaintiff was not a party to Civil Case No.17 of 2021, nevertheless, he was of the view that this court having pronounced its judgment to the 1st and 2nd Defendants, it cannot be moved by way of fresh suit to determine the same issue on ground that the current plaintiff was not a party to the previous one. To cement his point he cited the decision of the court the case of **Jacqueline Ntuyabaliwe Mengi & Others vs Abdiel Reginald Mengi & Others, Civil Application No. 332 of 2021, TZCA 748.**

He concluded by stating that the current suit is incompetent as this court is *functus Officio*. He cited the case of **Scolastica Benedict vs Martin Benedict, [1993] TLR 1 (CA)** and **Bibi Kisoko Medard vs Minister For Land, Housing and Urban Development and Another, [1983] TLR 250 (HC)** to bolster his argument.

Mr. Katemi, counsel for the 2nd and 3rd defendants contended that this court is not *functus officio* on the reason that, the parties and the nature of the two cases are not the same. He stated that, in the 1st case, the issue was on whether the 2nd defendant borrowed and breached the loan agreement while in the case at hand the issue is on whether the plaintiff consented to the mortgage entered between the 1st and 2nd defendant.

He averred that, the plaintiff in the instant case has interest in the

mortgaged properties that need to be protected by the court of law. It was insisted by Mr. Katemi that the court cannot be *functus officio* because the plaintiff and the 3rd defendant were not parties to the previous case. In cementing his point, he cited the case of **The International Airlines of the United Arab Emirates vs Nassor Nassor**, Civil Appeal No. 379 of 2029, at Dar es Salaam. He added that, the decision made in Land Case No. 17 of 2021 cannot be a bar to other third parties with interest in the subject matter because that judgment is only directed to the 1st and 2nd defendants. It cannot operate against all other person who were not parties to it. He referred to the case **Jackline Jonathan Mkonyi and another vs Gausal Properties Limited**, Civil Appeal No. 311 of 2020, at Dar es Salaam, at page 15 and 17. He therefore prayed the court to find that it has jurisdiction to finally determine the matter before it.

Mr. Mlyambe, the learned counsel for the plaintiff had similar view with Mr. Katemi that the court is not *functus officio*. He cited cases of **Karori Chogoro vs Waitihache Merengo**, Civil Appeal No. 164 of 2018, at page 9, **Omahe Garani vs Wambura Francis**, Misc. Land Appeal No.31 of 2020, High Court of Tanzania, at page 4 and the case of **Bibi Kisoko Medard vs Minister for Lands Housing and Urban Developments and Another** (1983) TLR 250. From the above cited

decisions, Mr. Mlyambebele was of the opinion that the decision in Civil Case No. 17 of 2021 binds parties thereto in exclusivity to the new parties in this suit. Mr. Mlyambebele further argued that, the decision in Civil Case No.17 of 2021, is not a *judgment in rem* thus it cannot bind parties who were not party to it

Having gone through the rival submissions of the counsel for the parties, the major issue for determination is whether this court is *functus officio* to determine the matter at hand. The definition of the term *functus officio* is found in the **Black's Law Dictionary** to mean a task performed. It was also defined in the case of **School Trustees of Washington City Administrative Unit vs Benner**, 22, N.C. 566, 24 S.E 2d 259, 263, thus: -

"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.

It is trite law that in a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal/court thereby becomes *functus officio*. This was also echoed in **Bibi Kisoko Medard vs Minister for Lands Housing and Urban Developments and Another** (supra).

I have perused pleadings of this matter and found that the plaintiff

and the defendants are aware of the judgment and decree of this court (Dar es Salaam District Registry), in Civil Case No. 17 of 2021 between **Lumande Kasule Lumande vs Stanbic Bank Tanzania Limited**, dated 16th June, 2023, (Hon.Dr.Mongella, J) in respect of the same properties. In the said decision, the court blessed the first Defendant to be at liberty to exercise powers under mortgage to attach and sale the mortgaged properties

The order of this Court in Civil Case No.17 of 2021 allowing the 1st Defendant to exercise its right over the Mortgage, including attaching and auctioning the suit properties pledged as security, implies the blessing of the mortgage in question between the 1st and 2nd defendants. In the instant suit, the Plaintiff is challenging the legality of the same mortgage on the ground that she did not consent to it as spouse of the 2nd defendant.

The question that needs to be answered is whether this court, having blessed the said mortgage *vide* Civil Case No.17 of 2021, can declare it illegal in the instant suit? The answer to this question is straightforward that, this court cannot curse what it has already blessed. It is *functus officio* to make another order as long as the previous one exists and remains valid.

From the foregoing, I find this court *functus officio* to determine

the matter at hand. I hereby dismiss it entirely with costs.

DATED at DAR ES SALAAM this 8th day of September, 2023.


L. HEMED

JUDGE

