

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

AT DAR ES SALAAM

LAND CASE NO. 81 OF 2023

EDGAR EDWARD KAIJAGE PLAINTIFF

VERSUS

ERICK EDWARD KAIJAGE.....1ST DEFENDANT

INTERNATIONAL COMMERCIAL BANK

TANZANIA LIMITED.....2ND DEFENDANT

CHAMPION AUCTION MART.....3RD DEFENDANT

OMARY ALLY UBAYA.....4TH DEFENDANT

MKONGOWO TRADING COMPANY LIMITED.....5TH DEFENDANT

RULING

7th August 2023 & 18th September 2023

L. HEMED. J.

EDGAR EDWARD KAIJAGE the Plaintiff herein claims to be the owner of Plot No. 750 Block 'G' Tegeta Area, Kinondoni Municipality under the certificate of Title No. 18902 (the suit property). He is in the corridors of this court *vide* the instant suit trying to challenge the mortgage created in respect of the suit property and the intended sale of the same.

The Plaintiff's claims against the defendants jointly and severally are for declaration that the purported mortgage of the suit property dated 18th July 2011 was fraudulently created without the sanction of him.

The background of the instant case as alleged by the Plaintiff is such that, sometimes in 2010 while he was residing in Holland, the 1st defendant caused for the preparation of and signed an illegal power of attorney purporting to have been issued by the Plaintiff. By virtue of the power of attorney, the 1st defendant collected a certificate of Title from the office of the Registrar of Titles which later on was used in a mortgage of the same to the 2nd defendant in favour of the 5th defendant.

It was alleged further that the 1st defendant prepared another power of attorney and forged the signature of the plaintiff to have been appointed by the Plaintiff as his attorney with power among others to mortgage the land on Plot No. 750 Block G. Tegeta area, Kinondoni Municipality (the suit property)

Following the said power of attorney, the 1st defendant together with the 5th defendant approached the 2nd defendant for a loan of Tshs. 167,000,000/= pledging the suit property as security thereof. On 29th

October 2012 Land Case No. 229 of 2012 was instituted in this court bearing the names of the Plaintiff, 1st, 4th and 5th defendants as plaintiffs thereof. In the said case, the plaintiffs were challenging the intended sale of the suit property. However, the said Land Case was dismissed on 9th June 2016 for want of prosecution due to non-appearance of the Plaintiffs. The plaintiff is thus praying for judgment and decree on the following reliefs:

- a) A declaration that the created mortgage of the property or Plot No. 750 Block G. Tegeta Area, Kinondoni Municipality under certificate of Title number 118902 was procured by fraud.*
- b) An order that the intended auction and sale of the plaintiff's house on Plot No. 750 Block G. Tegeta area, Kinondoni Municipality by the 3^d defendant under the instruction of the 2nd defendant is unlawful.*
- c) A declaration that the power of attorneys in favour of the 1st dated 18th July, 2011 was not issued by the Plaintiff. (sic)*

d) A declaration that the Plaintiff had never instituted a suit in Land Case No. 229 of 2012 jointly with the 1st, 4th and 5th defendants.

e) General damages and

f) Costs of the suit." [Emphasis added]

The 1st, 3rd, 4th and 5th defendants, **ERICK EDWARD KAIJAGE, CHAMPION AUCTION MART LIMITED, OMARY ALLY UBAYA** and **MKONGOWO TRADING COMPANY LIMITED**, respectively, could not file their written statement of defence or appear in court despite being duly served. The matter was thus proceeded *ex parte* against them. Only the 2nd defendant, **INTERNATIONAL COMMERCIAL BANK (T) LTD** who was appearing and filed written statement of defence to challenge the claims.

On 7th August 2023 the matter was called for final pretrial conference.

Issues were framed. Among the issues framed were: -

"3 Whether the Plaintiff has previously instituted a suit against the 2nd defendant over the same mortgage transactions."

The above issue was based on what the plaintiff had pleaded in his Plaint that he never instituted Land Case No. 229 of 2012 jointly with the 1st, 4th and 5th defendants which ended up being dismissed for want of prosecution.

Having noticed that the Plaintiff herein was recorded as one of the Plaintiffs in Land Case No. 229 of 2012, the court invited parties to address it on the propriety of the instant case. Parties addressed the court on the point by way of written submissions. **Mr. Thomas Brash**, learned advocate acted for the Plaintiff while the 2nd defendant enjoyed the service of **Mr. Richard Madibi**, learned advocate.

In his submissions the learned counsel for the Plaintiff asserted that the suit at hand is competent. He argued that in this case, the plaintiff is alleging that the mortgaging process of the disputed house was unlawfully procured and that the intended sale also was unlawful on the reason that he never pledged his house for mortgage in favour of the 5th defendant. He was of the view that there is nowhere these facts can be dealt with except in the suit like this. In Land Case No. 229 of 2012 the facts mentioned in the instant case have no space as the Plaintiff is alleging that he was not a party to it. He added that the said case did not determine the rights of the Plaintiff. In his opinion, the outcome of this case cannot affect any decision

in any way as what the court is asked to rule out on whether the mortgage was obtained as a result of forgery.

Submitting in support of the point, the learned counsel for the 2nd defendant stated that the suit at hand is not proper before this court as there is a Notice of Appeal in this Court against the decision in Misc. Land Application No. 518 of 2016 which was an application to restore Land Case No 229 of 2012 in which the court refused to restore it. It was the view of the learned advocate for the 2nd defendant that the suit at hand is an abuse of court process. To substantiate his argument he cited the decision of the Court of Appeal of Tanzania in **Hector Sequara vs Serengeti Breweries Ltd**, Civil Application No. 395 of 2019 where it was stated that the law does not allow riding two horses at the same time. He further submitted that this court has no jurisdiction to declare that the plaintiff had never instituted a suit in Land Case No. 229 of 2012 jointly with the 1st, 2nd and 5th defendants herein.

In the rejoinder submissions the learned counsel for the plaintiff reiterated his submissions in chief.

Having gone through the rival submissions, the questions for determination is whether the instant suit is proper before this court. From the pleadings and submissions available it is clear that the Plaintiff herein was the 2nd Plaintiff in Land Case No. 229 of 2012. It is also a fact that the said case intended to challenge the intended sale of the suit landed property pledged as security for the loan of Tshs. 160,000,000/=. The said Land Case was dismissed by this court on 9th June 2016. Among the prayers in the instant case is for the court to find that he did not institute Land Case No. 229 of 2012 together with the 1st, 3rd, 4th and 5th defendants. In a way, the Plaintiff seems to challenge the proceedings and orders of Land Case No. 229 of 2012 through the instant Case. The issue is whether this court can excrete the plaintiff from the Proceedings in Land Case No. 229 of 2012. I am at one with the learned counsel for the 2nd defendant on the sanctity of the court record. Record of the Court is always accurate of what transpired in court unless otherwise proved. This was also insisted in **Halfani Sudi vs Abieza Chichili** [1998] T.L.R. 527 that: "*court record is a serious document; it should not be lightly impeached.*"

The records of the Court can be impeached by the same court through review or by the higher court through revision or appeal. Records of the Court cannot be impeached by instituting fresh suit like the one at hand. The records of Land Case No. 229 of 2012 have remained intact that the Plaintiff herein was among the plaintiffs who were challenging the sale of the suit property. The plaintiffs in the said case including the plaintiff herein, failed to prosecute it and ended being dismissed for want of prosecution. I am aware that the plaintiffs in the said case attempted to restore it in vain.

The fact that Land Case No. 229 of 2012 is still dismissed and the Plaintiff has never caused it to be impeached in proper way, all plaintiffs in the previous dismissed suit including the plaintiff herein are precluded from instituting similar suit to challenge mortgage or sale of the mortgaged property.

The plaintiff has alleged fraud and forgery even in instituting Land Case No. 229 of 2012. He has attached police reports in the Plaint. However, there is no decision of the court confirming such allegation of forgery by convicting the persons alleged to have committed the said crime of forgery. Besides, even if there would have been such decision of the court, the same

would have supported the plaintiff in the process to impeach the proceedings of Land Case No. 229 of 2012 and not to institute fresh suit.

The principle of *functus officio* requires that once a court makes decision on a particular issue its hands become tied up to redetermine it. The court becomes functus officio when it disposes of a case by a verdict or orders finally disposing of the case. In **Bibi Kisoko Medard** vs Minister for Lands Housing and Urban Developments and Another [1983] TLR 250 this Court, Mwakibete, J. had this to say: -

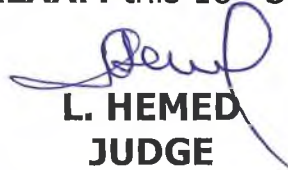
"In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

In the instant case, this court made its order to dismiss Land Case No. 229 of 2012 in which the Plaintiff herein was a party there to as co- Plaintiff. The fact that the said dismissal order has remained intact un impeached, this court remains *functus officio* to redetermine this case which is on the same suit property where, the Plaintiff is attempting to challenge the intended sale of the same suit property.

From the foregoing, I have no option other than to dismiss the entire suit. the fact that the point was raised by the court *suo moto*, each party has to bear its own costs.

DATED at **DAR ES SALAAM** this 18th September 2023.




L. HEMED
JUDGE