

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO. 132 OF 2023**

**ILA YOGESH ..... 1<sup>ST</sup> PLAINTIFF**

**JYOTIKA ARUNKUMAR NARANDAS ..... 2<sup>ND</sup> PLAINTIFF**

**BHAVINI MOHANLAL DHARSHI ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK**

**TANZANIA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

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

**SUNRISE BEACH RESORT LTD ..... 3<sup>RD</sup> DEFENDANT**

**DILESH KUMAR VITHALDAS BHOVAN SOLANKI**

**(Also otherwise known as Dilesh Solanki) ..... 4<sup>TH</sup> DEFENDANT**

**RAVI VITHALDAS SOLANKI**

**(Also otherwise known as Ravi Solanki) ..... 5<sup>TH</sup> DEFENDANT**

**YOGESH AMRATAL KANJI**

**(Also otherwise known as Yogesh Kanji) ..... 6<sup>TH</sup> DEFENDANT**

**RAJESH VITHALDAS BHOVAN SOLANKI**

**( Also otherwise known as Rajesh Salonki ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

26/7/2023 & 06/10/2023



**A. MSAFIRI, J.**

The plaintiffs hereinabove have instituted this suit claiming for declaratory orders against the defendants jointly and severally to the effect that the mortgage transactions that culminated the surrendering of a matrimonial property registered as Plot No:2 with Certificate of Title No: 54276, located at Mjimwema Area in Kigamboni, Dar es Salaam is null and void for lack of spousal consents, and a declaration that the mortgage transactions concluded among the 1<sup>st</sup>, 3<sup>rd</sup> -7<sup>th</sup> defendants in respect of suit property is null and void.

Upon being served with the plaint, the 1<sup>st</sup> defendant filed her written statement of defence and along with it, she raised a preliminary objection to the effect that;

- 1. That, this Honourable Court has no jurisdiction to hear and determine this suit, consequently, it should be struck out with costs.*

The hearing of the preliminary objection was disposed of by way of written submissions and the schedule was complied with. The submission in support of the preliminary objection was drawn and filed by Mr Zacharia Daudi, learned advocate for the 1<sup>st</sup> defendant while the reply submission by the plaintiffs was drawn and filed by Mr Goodchance Lyimo, learned

*Alle.*

advocate for the plaintiffs. The rest of the defendants neither appeared nor filed their written submission on the preliminary objection.

Arguing in support of the preliminary objection, Mr Daudi for the 1<sup>st</sup> defendant stated that, this Court has no jurisdiction to hear and determine this suit on the grounds that; the plaintiffs being aggrieved with the attachment and order for proclamation of sale, filed their objection application at the High Court of Tanzania, Commercial Division vide Misc. Commercial Application No.30 of 2022 which was dismissed for want of merit. That as per paragraphs 16 of the plaint, the plaintiffs were advised to come to this Court following the dismissal of their objection proceedings.

Mr Daudi submitted further that it is correct that once an application for objection proceedings has been determined by the executing Court, the remedy against the aggrieved party is to file a fresh suit under the provisions of Order XXI Rule 62 of the Civil Procedure Code, Cap 33 R.E. 2019. (herein the CPC). He was of the view that however, such suit has to be filed at the executing Court and not any other Court. He pointed that in the circumstances at the present case, the plaintiffs were entitled to knock the doors of the High Court Commercial Division and not this Court.



To bolster his arguments, Mr Daudi referred the cases of **Rosebay Elton Kwakabuli vs. Aziza Selemani and others**, Land Case No. 57 of 2019(Unreported) and **Jacquiline Donath Kweka Abrahamson vs. Exim Bank Tanzania Ltd and others**, Land Case No. 17 of 2020 (Unreported) where it was held that the court which has competently determined the objection proceedings is the one competent to determine the fresh suit filed by the party who has lost in the said objection proceedings.

In his reply, Mr Lyimo submitted that the battle line of war is whether the suit at hand is maintainable pursuant to Order XXI Rule 62 of the CPC. He argued that the above cited provision makes it clear that once objection proceedings is dismissed, the only available remedy is to file a fresh suit, the act which the plaintiff have done by filing this present case.

He argued that, the 1<sup>st</sup> defendant's submission that this suit ought to be filed at commercial court is misconceived and the cited cases are distinguishable from this case. That in their plaint, the plaintiffs have clearly established their rights on the suit property.

The counsel submitted further that the reliefs sought by the plaintiffs are only grantable by this Court being a land matter case with the applicability of land law and law of marriage which are very different with

*Alb.*

commercial court. He said that the cause of action in this suit is claim of spousal rights. He concluded that the suit is maintainable and prayed for the Court to dismiss the preliminary objections with costs and allow the suit to proceed on merit.

Having gone through the submissions by the rival parties, and read the pleadings, it is my view that the major issue here is whether this Court is competent to hear and determine the case at hand.

Order XXI Rule 62 of the CPC provides for the circumstances where a party may institute objection proceedings to establish his interest over the suit property which is subject for execution or attachment. Once that party lose in the said objection proceedings, the available remedy is to institute a fresh suit in the competent court which the plaintiffs have done by filing this present case.

In determining the issue of jurisdiction, two matters have to be looked upon, the first being the cause of action and second being the reliefs claimed and whether the court has the power to grant them. In the matter at hand, the cause of action as per the plaint is that the plaintiffs claims that the suit property is matrimonial property and that they were saddened to note that the said matrimonial property have been pledged as collateral security for loan security extended to the 3<sup>rd</sup> defendant in

*Adle.*

favour of the 1<sup>st</sup> defendant without them plaintiffs being afforded with reserved right to consent and condone the said transaction as the legal spouses of the 4<sup>th</sup> -7<sup>th</sup> defendants.

In their reliefs prayers, among the reliefs which is sought to be granted by this Court is as follows;

- 1. Declaration that the referenced matrimonial property above with ploy No.2 with certificate of Title No. 54276 located at Mji Mwema area in Kigamboni, Dar es Salaam that was pledged as security for loan consideration by the 4<sup>th</sup> -7<sup>th</sup> defendants to 3<sup>d</sup> defendant in favour of 1<sup>st</sup> defendant is illegal for want of plaintiffs' consents as spouses.*
- 2. Declaration that the collateral property registered as Plot No.2 with certificate of Title No. 54276 located at Mji Mwema area in Kigamboni, Dar es Salaam is amongst matrimonial property.*

The above reproduced reliefs are among reliefs which are being sought by the plaintiffs against the defendants. The pertinent question is whether this Court can grant the sought reliefs.

It is my finding that this Court cannot grant the sought reliefs for the reason that it is *functus officio* as the issue of the plaintiffs' interest on the land has already been determined by this Court at Commercial Division.

*Aulis*

According to the pleadings, it is undisputed fact that the plaintiffs filed Commercial Application No.30 of 2022 before this Court at Commercial Division. The Application was an objection proceedings where the applicants sought to establish their interest on the attached property. Their claim were the same as in the case at hand, i.e. the suit property is the matrimonial property having the same coming into their husband's possession and ownership and that the suit property became matrimonial one as they have extensively invested into the same in form of time, energy, mental vitality and finances.

The major issue which was framed by the Court in the said Application was whether the applicants (now the plaintiffs) have proved having interest in the attached property (now the suit property). In determination of the said issue, my learned brother Hon. Mkeha, J held as follows at page 4 of the ruling in the said Application;

***"There was no proof whatsoever regarding interest of the applicants in the attached property and particularly, on how they acquired and developed the property with their respective husbands. It would appear that it is undeniable fact that the 4<sup>th</sup> to 7<sup>th</sup> respondents inherited the attached property in its developed state after the demise of the late Nirmala Bhowan. That being the case, it is only fair to hold that, the 4<sup>th</sup> to 7<sup>th</sup> respondents inherited the***

*Alle.*

*attached property subject to the conditions attached to it including existence of legal mortgage...." (emphasis added).*

Hon. Mkeha, J held further that;

***"I hold the applicants to have failed proving interest in the attached property which can prevent the mortgagee from exercising his remedies over the legal mortgage and consent decree." (emphasis added)***

Gleaning from the above ruling of this Court at Commercial Division, it is crystal clear that the issue on whether the suit property is matrimonial property as per the claims of the plaintiffs have already been determined and concluded, i.e. the suit property was acquired by the 4<sup>th</sup> – 7<sup>th</sup> defendants( who are claimed to be the plaintiffs husbands) through inheritance and the plaintiffs (then the applicants) have failed to prove how they have acquired and developed the suit property with their husbands.

In such circumstances, I cannot again determine the issue of the plaintiffs' interest on the suit property and come out with a different finding or grant the reliefs which are contrary to the findings and ruling of this Court albeit by a different Judge. In the circumstances, my hands are tied.




For the foregoing reasons, I hereby find that this Court is incompetent to hear and determine this suit. I therefore sustain the preliminary objection and I proceed to dismiss the suit with costs.

It is so ordered.

Dated at Dar es Salaam this 06<sup>th</sup> day of October, 2023



  
A. MSAFIRI  
JUDGE  
06/10/2023