

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO.622 OF 2023**  
(Originating from Land Case No.325 of 2023)

**LAMECK MBAWALA NKATHA.....APPLICANT**

**VERSUS**

**KCB BANK (T) LTD.....1<sup>ST</sup> RESPONDENT**

**ROSE ALOYCE MALYA.....2<sup>ND</sup> RESPONDENT**

**BID CITY AUCTION&ESTATE SALES LIMITED...3<sup>RD</sup> RESPONDENT**

**R U L I N G**

*Date of Last Order: 05.10.2023*

*Date of Ruling: 26.10.2023*

**T. N. MWENEGOHA, J.**

In this Application, the applicant sought for an Injunction Order, under **Order XXXVII Rule 1 and 2**, read together with **Sections 68 (c) and (e) and section 95 of the Civil Procedure Code, Cap 33 R. E. 2019**.

He prayed among others, for an order, restraining the respondents and any other person working under their instructions, from interfering, tempering, evicting the applicant from a landed property, the first one being located at Kijitonyama Area, Kinondoni Municipality, with Certificate of Title No.41791 Plot No. 26, Block B, and the other property, located at Plot No. 3, Block 25A, with a Certificate of Title No. 97632, within Kinondoni Municipality within the Dar es Salaam Region, pending the

determination of Land Case No. 325 of 2023. The Application was supported by the affidavit of the applicant, Lameck Mbawala Nkatha.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents on the other hand, objected the Application for reasons that, this Court is functus officio, owing to the Judgment given by Hon. Hemed, J. vide Land Case No. 76 of 2022.

Mr. Antipas Lakam, counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, submitting in support of the Objection, was of the view that, the 1<sup>st</sup> respondent raised a counter claim in Land Case No. 76 of 2022, for her to be allowed to exercise a right of sale of the properties listed above, as they were mortgaged to her. The counter claim was allowed, the 1<sup>st</sup> respondent was given an order to exercise her right to sell the said properties.

That, in this Application, the applicant is seeking to restrain permanently, the respondents, including 1<sup>st</sup> respondent from among other things, selling the suit properties. That, it is obvious that, this suit cannot be entertained and that the Application is functus officio. Mr. Lakam referred the Court to the case of **Scholastica Benedict versus Martin Benedict 1993 TLR 1**. He insisted that, the instant suit is incompetent as this Court is functus officio. He also cited among others, the case of **Elizabeth William Manyanda versus Stanbic Bank Tanzania Limited & Others, Land Case No. 291 of 2022, High Court of Tanzania at Dar es Salaam (unreported)**.

In reply, Advocate Allan Emily Kabitina for the applicant, insisted that, the Court does not become functus officio in a matter which has not been heard and determined. That, the case referred by the 1<sup>st</sup> respondent's counsel, vide Land Case No. 76 of 2022 has different parties, cause of action and reliefs claimed to the present Application. Therefore, it cannot

be functus officio. That, the Court becomes functus officio when it disposes a case and then re-open it.

In a brief rejoinder, the counsel for the 1<sup>st</sup> respondent reiterated his submissions in chief.

Having heard the arguments of parties, for and against the Objection, the issue in need of determination is whether the Objection has merits or not.

I will start by going straight to the merit of the Objection. I find the Objection to have merits due to reasons explained below. On records, I have the Judgment given by Hon. Hemed, J. vide land Case No. 76 of 2022, appended as annexure A-2 in the counter affidavit, of which I have taken a judicial notice of the same. The parties were **Rose Aloyce Mallaya (2<sup>nd</sup> respondent) versus KCB Bank Tanzania Limited**, the 1<sup>st</sup> respondent above. The suit involved the two properties listed above, which were placed as security for the loan advanced to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent issued a sixty days' notice, of intention to sell the said properties, owing to the default in repaying the loan as agreed in their facility agreement. The suit ended in favour of the 1<sup>st</sup> respondent herein above. She was given a greenlight to recover the loan advanced to the 2<sup>nd</sup> respondent.

Now, in this Application, the applicant, being the husband of the 2<sup>nd</sup> respondent, is seeking to restrain the 1<sup>st</sup> respondent from exercising her right under the mortgage agreement. This issue has been finalized by Hon. Hemed, J. in his Decision. The Application is unmaintainable. If the same is granted, it will go to interfere with the Decision of Hon. Hemed, J. over the said properties, against the same person who was given the right to sale by the very same Court. On the face of it, looking at the

circumstances of this Application, this Court is functus officio. The mortgage agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents above, has already been blessed by this Court, hence the Court cannot act otherwise against such Decision. See **Elizabeth William Manyanda versus Stanbic Bank Tanzania Limited & Others**, (supra).

Therefore, the Objection is sustained and the Application is hereby struck out with costs.

It is ordered.



  
**T. N. MWENEGOHA**  
**JUDGE**  
**26/10/2023**