

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO.244 OF 2023**

**ENESIA LWIMUSO MGAYA.....PLAINTIFF**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT**

**GOODLOVE DEMBE T/A LWIMUSO**

**ENTERPRISES.....2<sup>ND</sup> DEFENDANT**

**TAMBAZA AUCTION MART AND GENERAL BROAKERS**

**LIMITED.....3<sup>RD</sup> DEFENDANT**

**JOSEPH MUGANYIZI KARUGENDO.....4<sup>TH</sup> DEFENDANT**

**RULING**

*Date of Last Order: 16.10.2023*

*Date of Ruling: 31.10.2023*

**T.N. MWENEGOHA, J**

In this Ruling, I am invited to decide on the merits or otherwise of the preliminary objection by the 1<sup>st</sup> respondent that, this Court has no jurisdiction to entertain the suit at hand. In his written submissions, Mr. Emmanuel Mbuga, counsel for the 1<sup>st</sup> respondent, gave three reasons as to why the Court lacks the requisite jurisdiction to hear and determine the instant suit.

Firstly, the matter is time barred, as the legality of the mortgage cannot be questioned at this point. It is because the mortgagor has already been

discharged from the mortgage deed. That, the property has already been sold on a Public Auction since 2019, June the 7<sup>th</sup> and the Certificate of Sale was issued on the 17<sup>th</sup> June 2023.

Secondly, that the plaintiff is time barred to challenge the legality of the mortgage as the property in dispute is already in possession of the 4<sup>th</sup> defendant since 2019 as a bonafide purchaser. That, this Court cannot issue substantive orders against the 4<sup>th</sup> defendant as sought by the plaintiff.

Lastly, that the instant case is res judicata to Civil Case No. 33 of 2020. That, in the former suit, the subject matter in dispute including the property in dispute were fully discussed and determined in the counter claim. That, the former Court found the auction to be in violation of the law, but it did not set the same aside. Rather, it gave the 2<sup>nd</sup> defendant a right to ask for damages. Therefore, this Court cannot discuss the same issues again. To support up his arguments he cited the case of **Paniel Lotta versus Gabriel Tanaki & Others (2003) TLR 312.**

In reply, Advocate George Kawemba Mwiga, for the plaintiff, insisted that, the preliminary objection must arise out of pleadings as stated in **Alphonse Buhatwa versus Julieth Rhoda Alphonse, Civil Reference No. 9/10 of 2016, cited in approval in a case of Tanzania Telecommunications Company Limited versus Vedasto Ngwasha & 4 Others, Civil Application No. 67 2009, Court of Appeal of Tanzania.** That, in the plaint in the instant case, there is nothing to suggest that the Court lacks jurisdiction to entertain the matter. That, since there is no point of law to be picked from the pleadings, this preliminary objection lacks merits. That, the matter at hand is within time,

it is not at all time barred and the Court has the powers to grant the remedies sought. That, above all, the matter is not res judicata to any case, including the Civil Case No. 33 of 2020.

In his rejoinder, the 1<sup>st</sup> defendant's counsel reitarted his submissions in chief.

I have considered the arguments of counsels by both parties in this case. The centre of contention in the matter at hand is whether the Court has jurisdiction or not, to entertain this case to its finality. To resolve the issue in question, I will start addressing the issue of res judicata first, before going to examine if the matter is time barred or not.

The first defendant's counsel attached with his submissions a copy of the Judgment given in Civil Case No.33 of 2020, decided by Hon. Mwana J, dated 22<sup>nd</sup> March 2023. I took judicial notice of the same. The issues discussed in the former case are the same as what is contained in the plaintiff's claim under paragraph 4 in this case. The parties and the subject matter are substantially the same. The plaintiff in the instant case is a wife of the defendant in the former case, now 2<sup>nd</sup> plaintiff. Therefore, she is litigating under the same title. Above all, the Court in the former case, declared the sale of the properties in question to be illegal when deciding the counter claim. In this case, the plaintiff wants the same thing again to be done. At page 19 of the Judgment of the former case for example, the issue of spouse consent was well discussed in relation to the mortgage in question. Therefore, in my opinion, the instant case is substantially the same as the former, vide Civil Case No. 33 of 2020. Hence, the case is res judicata, see **Paniel Lotta versus Gabriel Tanaki & Others**, (supra).

For these reasons, I find the objection to be meritorious and sustain it accordingly, without even discussing the remaining two parts of the 1<sup>st</sup> defendant's objection. Findings of the 1<sup>st</sup> objection are capable of disposing the matter.

In the end, I struck out this suit with costs.



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**T.N MWENEGOHA,  
JUDGE,  
31/10/2023**