

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 373 OF 2023

SALOME ANDREW KOMBA T/A SALOME

COMMERCIAL CENTRE PLAINTIFF

VERSUS

INTERNATIONAL COMMERCIAL BANK 1st DEFENDANT

MUNDU COMPANY LIMITED 2ND DEFENDANT

RULING

29/02/2023 & 21/3/2023

A.MSAFIRI, J

In this suit the plaintiff is suing the 1st defendant for breach of a contract on the mortgage of landed property resulting from the loan facility that was advanced to the plaintiff on 07/01/2019 by the 1st defendant for the purpose of constructing a commercial centre at Plot No. 1030 Mbezi Beach, Dar es Salaam.

Having been served with the Plaint, the 1st defendant filed their written statement of defence within which they raised a preliminary objection that:-

- 1. That the suit is not maintainable against the 1st defendant by virtue of Order XXIII Rule 1(3) of The Civil Procedure Code Cap. 33 [R.E. 1019]*

Alle.

for reason that the plaintiff instituted a Land Application No.59 of 2022 in the District Land and Housing Tribunal for Kinondoni against the 1st defendant claiming, among others, a declaration order that the 1st defendant has breached the loan agreement, order for permanent injunction against the sale of mortgaged property on Plot No.1030 Mbezi Kawe area in Dar es Salaam, general damage and costs, reliefs of which are similar to the reliefs claimed in the present suit, whereas the previous suit was withdrawn without prayer for leave to re-file it again.

As it is the rule of law and procedure, the raised preliminary objection has to be disposed of first before continuing with the main proceedings. Hence the preliminary objection was argued orally whereby Mr. Machumu Simon Josephat learned advocate appeared for the plaintiff while Mr. Thomas Rwebangira learned advocate appeared for the defendants.

On his submission in chief, Mr. Rwebangira submitted that this suit is incompetent before this court following the withdrawal of the Land Application No. 59 of 2022 which was instituted by the plaintiff against the 1st defendant in the District Land and Housing Tribunal for Kinondoni.(herein the District Tribunal).

He argued that the parties and reliefs claimed in the District Tribunal are the same as in the instant suit. That, the previous suit was withdrawn on 25/11/2022 in the District Tribunal without leave to refile hence this suit cannot be entertained before this court.

Alls.

He further stated that since Regulation 17 of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003 (herein the Regulations) is silent about this position, then the provisions of the Civil Procedure Code Cap 33, R.E 2019 (herein the CPC) is applicable as provided under Order XXIII Rule 1(3).

He argued that since the said Land Application No. 59 of 2022 was withdrawn without leave to re-file, then that the present suit is not maintainable before this court.

To bolster his point above, he cited the case of **CRDB Bank PLC. & Another vs Aziz Mohamed Aboud & Another**, Misc. Commercial Cause No. 277 of 2015 HC at page 9, **Peoples Bank of Zanzibar vs Naushad Mohamed Suleiman** (1999) TLR at page 271 at para 2, and the case of **Jonathan Mgonya vs Manager Headmaster of Trust Junior** (2001) T.L.R. 316. He urged this court to struck out this suit with costs.

On reply, Mr. Machumu learned advocate submitted that the cause of action in the previous case in the District Tribunal was different from the present suit. He added that that the parties in Land Application No.59 of 2022 in the District Tribunal, also the value of the subject matter, and reliefs sought were all different from the present suit. *Alle.*

He contended that the two cases i.e. Application No. 59 of 2022 before the District Tribunal and Land Case No.373 of 2023 before this court does not have any similarities. That in that regard, the provisions of Order XXIII Rule 1(3) of the CPC are not applicable in this matter. He submitted that that this preliminary objection has no merit hence the same be overruled.

On rejoinder, Mr. Rwebangira reiterated what was submitted in chief.

The issue for determination is whether the preliminary objection raised by the 1st defendant has merit. After a careful scrutiny of the parties' submissions and reading the contents of the pleadings by the rival parties, it is apparent that the plaintiff had formerly instituted a suit over the same subject matter Plot No. 1030 Mbezi Kawe Area Dar es Salaam, in the District Tribunal in Land Application No. 59 of 2022. The application was filed against the 1st defendant and that the same was withdrawn by the plaintiff on 25/11/2022 with intention to settle with the defendant. This is what was recorded in the District Tribunal;

WAKILI ABRAHAM

Mhe.Tunaomba kuondoa shauri ili waweze kusettle na mdaiwa.'

WAKILI THOMAS:

Sina pingamizi lakini naomba gharama.



WAKILI ABRAHAMU.

Sina Pingamizi.

BARAZA:

Kufuatia ombi la wakili wa waleta maombi wakili Abraham Nkenda, shauri hili linaondolewa kwa gharama chini ya Kanuni ya 17 ya Kanuni za Baraza hili Tangazo la Serikali Na. 174/2003.'

From the above proceedings and the Tribunal order, the matter was withdrawn but there was no leave to refile. The counsel for plaintiff Mr Machumu argued that the two suits i.e. one before the District Tribunal and the instant suit are totally different and hence the situation is not covered under Order XXIII Rule 1(3) the CPC.

However, I agree with Mr. Rwebangira that the two suits are the same with the difference of adding the 2nd defendant who was not included in the suit before the District Tribunal. However this does not make the suit different. The subject matter is the same and the cause of action is the same. I agree that the value of the subject matter could not remain the same as it was in the year 2022, as the value of the land might have appreciated but the subject matter is the same.

I understand that the circumstances of this suit and the requirement of withdrawal with leave to refile is not covered under the Regulations, but Section 51(2) of the Land Dispute Court Act, Cap 216 [R.E. 2019] *Alle*

provides that where there is inadequacy in those Regulations the provisions of the CPC will be applicable.

Since Regulation 17 of the Regulations does not provide for the consequences where the case has been withdrawn by the plaintiff with no leave to refile, the proper provision to be adopted is Order XXIII Rule 1(3) the CPC which provides: -

*(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and shall be **precluded from instituting any fresh suit** in respect **of such subject matter** or such part of the claim. (emphasis added).*

It follows that the plaintiff in this suit is precluded from instituting any fresh suit in such subject matter, that is on Plot No. 1030 Mbezi Kawe Area Dar es Salaam, where there was no order to refile.

The issue of necessity of withdrawal with leave to refile was emphasized by my learned brother Hon. Hemed, J. in the case of **Prof. Philip Odoyo Bwathondi & Another vs Abdallah Said Mashaka & 6843 Others**, Misc. Land Application No. 206 of 2023, whereby he observed thus: -

"Before I pen off, let me state clear that leave to re-file is not automatic. Order XXIII Rule 1(2)(b) of the Civil Procedure Code, (supra), provides unequivocally that leave to refile a suit is under the discretion of the Court. It can be granted upon having found that the matter in question is bound to fail due to formal


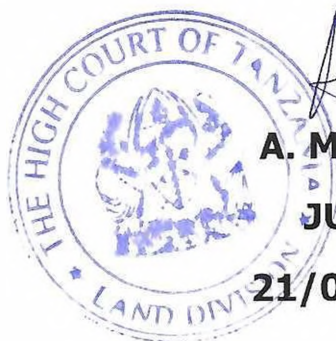
All.

*defects or existence of other grounds. **Leave to refile has to be prayed by a party withdrawing the matter and not otherwise. It should also be known that a party can be at liberty to refile the matter only if leave to refile was granted.*** (Emphasise is mine)

I concur with the above observations which are very persuasive to me. I find that the plaintiff in this suit did not pray for leave to re file when withdrawing the Land Application No. 59 of 2022 before the District Tribunal, hence the same is precluded from instituting any fresh suit over the same subject matter.

To be precise, it is my finding that this suit is incompetent before me and the proper remedy is to strike it out. The preliminary objection is sustained, and I proceed to struck out this suit with costs.

It is so ordered.



A. MSAFIRI
JUDGE
21/03/2024