

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

**MISC. LAND APPLICATION NO. 4952 OF 2024**

(Arising From Land Case No. 4811 of 2024, Land Division)

**JUMA MEHTA KIBONDEI.....1<sup>ST</sup> APPLICANT  
AMALY INVESTMENT COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

***VERSUS***

**KCB BANK TANZANIA LIMITED.....1<sup>ST</sup> RESPONDENT  
SPLIT DECISIONS CO. LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

4<sup>th</sup> to 16<sup>th</sup> April, 2024

**E.B. LUVANDA, J**

This is an application for temporary injunction made under the enabling provisions of Order XXXVII rule 1 and 2, and sections 68(e) and 95 of the Civil Procedure Code, Cap 33 R.E. 2019. Basically, the Applicants above named are seeking for orders of injunction restraining the Respondents named above from attaching and selling by auction of the First Applicant's properties on Plot No. 140 Block "D" with certificate of title No. 101225 Sheriff Shamba Area, Ilala Dar es Salaam, Plot 2188 Block "D" CT No. 145130 Buyuni Area Ilala Dar es Salaam, Plot No. 104 Block "D" with CT No. 82950 Shariff Shamba Ilala, pending hearing and determination of the main suit.

Meanwhile the First Respondent raised a preliminary objection grounded that: the Applicant had filed Land Case No. 175 of 2020 along with Misc. Land Application No. 644 of 2020 seeking for injunctive orders in respect of the same subject matter and parties as in the instant matter, and to the extent that the said Land Case No. 175 of 2020 was conclusively and finally settled before this Court on 21/10/2021 and the decree was issued, this Court has no jurisdiction to entertain this application for being *res judicata* contrary to section 9 of the Civil Procedure Code, Cap 33 R.E. 2019.

Mr. Robert Lawrence Mosi and Godwin Nesphory Nyaisa learned Advocates for the First Respondent submitted in support of preliminary, arguing that the instant application has been filed in abuse of court process as the Applicants had already filed Land Case No. 175 of 2020 along with Misc. Land Application No. 644 of 2020 seeking for injunctive orders in respect of the same subject matter and parties as in the instant matter. They submitted that the said case was conclusively and finally settled before this Court on 21<sup>st</sup> October 2021 before Hon. V.L Makani, J as she then was, and the consent decree was issued. They submitted that, in terms of clause 7 of the settlement deed, parties agreed that both claims in Land Case No. 175 of 2020 and counterclaim were marked settled and no claims of whatsoever

nature pertaining to the settled matters emanating from the credit facilities advanced by the First Respondent to the Second Applicant, may be revived or reinstated by any party in the settlement deed. They invited this Court to take judicial notice of a copy of the deed of settlement, proceedings of this Court and consent decree, annexure BEA-2 to the affidavit. They submitted that the doctrine of *res judicata* is to prevent multiple litigation by reinstatement of a previously decided matter between the same parties where the subject matter is the same. They submitted that adding another party to the present application where the subject matter in dispute is the same, does not defeat the doctrine of *res judicata*, citing **Mulla's** Code of Civil Procedure for a proposition that, parties may not necessarily be physically the same, but they may be claiming or litigating under the same title. They submitted that Split Decisions Co. Limited, the Second Respondent herein, was not a party in the former suit, arguing as an auctioneer, the Second Respondent is an agent of the First Respondent (the Bank), therefore obviously tracing its title from the First Respondent who wants to recover the loan through pledged security therefore litigating under the same title. They cited **Zuberi Paul Msangi versus Mary Machu**, Civil Appeal No. 316 of 2019, Court of Appeal, specifically at page 2, 5 and 6, regarding applicability of the doctrine

of *res judicata* with eventuality of being *functus officio*. They cited in **Jimmy Brown Mwalugelo vs Top Oil Petroleum Ltd**, Misc. Land Application No 940 of 2017 regarding introduction of a new party in subsequent proceedings, arguing this Court still held it being clear case of *res judicata* in terms of section 9 of the Civil Procedure Code (Cap 33 RE 2002). They submitted that the instant matter arises from the credit facilities advanced by the First Respondent to the Second Applicant. They submitted that the said credit facilities were the subject of dispute before this Court in Land Case No. 175 of 2020 along with Misc. Land Application No. 644 of 2020 arguing it was marked settled by this Court on 21st October 2021 before Hon. V.L Makani, J, as per annexure BEA-2 in the counter affidavit. They submitted that in terms of clause 7 of the settlement deed, parties unequivocally agreed that, both claims in Land Case No. 175 of 2020 and counterclaim were marked settled and no claims of whatsoever nature pertaining to the settled matters emanating from the credit facilities advanced by the First Respondent to the Second Applicant, may be revived or reinstated by any party in the settlement deed. The learned Counsels submitted that this Court is *functus officio*, citing the **Black's Law Dictionary**, Nineth Edition at page 743 for a definition of a phrase *functus*

before the High Court was litigated under same title in the suit before this Court; Four, the former court was competent to try the said suit; Five, the former suit before this Court was heard and finally decided. He submitted that the submission by the First Respondent do not meet the test of *res judicata*, for reason that none of five conditions stipulated above meet anywhere in our case at hand. He submitted that there is no proof of existence of Misc Land Application No. 644 of 2020 to have been filed and determined to its finality apart from mere and unsalted words, no attachment of the ruling or decision or order in respect of Misc. Land Application No.644 of 2020 seeking for injunctive orders which are direct and substantially linked with the matter at hand (Misc. Land Application No 4951 (sic, 4951)of 2024). He submitted that the Court can not take judicial notice of a decree or judgment that is not existing or has never been existed nor in any how linked with the case at hand.

In the affidavit in support of the application, the Applicants attached a deed of settlement in respect of Land Case No. 175 of 2020, annexure J2, where clause five, had the following terms,

*'That, in the event of any default in any of the instalments by the Plaintiff to repay the Settlement sum, as pleaded in*

and parties are substantially the same litigating in the previous suit to wit Land Case No. 175 of 2020 and this suit. Therefore, this suit is *res judicata* in terms of section 9 of Cap 33 (supra). The doctrine of *res judicata* bar to sue further suit over the same subject matter involving the same parties.

Section 10 of Cap 33 (supra) provides,

*'Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies'*

Therefore, this application is barred by the doctrine of *res judicata*.

The Application is dismissed with costs.



E. B. LUVANDA  
**JUDGE**  
16/04/2024

Ruling delivered in the presence of Mr. Augustine Kazimoto Advocate holding brief for Mr. Filimon Elibariki Mgonja learned Counsel for Applicant, Mr. Elisa Kiiza Prosper learned Advocate for the First Respondent and in the absence of the Second Respondent.



E. B. LUVANDA  
**JUDGE**  
16/04/2024