

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 26014 OF 2023**

**ZIHIJA SELEMANI MUHEMA..... APPLICANT**

***VERSUS***

**MKOMBOZI COMMERCIAL BANK PLC.....1<sup>ST</sup> RESPONDENT**

**THABIT MALOKA THABIT.....2<sup>ND</sup> RESPONDENT**

**MASS & ASSOCIATES CO.LTD & COURT**

**BROKERS.....3<sup>RD</sup>RESPONDENT**

**THE COMMISSIONER FOR LANDS.....4<sup>TH</sup> RESPONDENT**

**THE REGISTRAR OF TITLES.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL..... 6<sup>TH</sup> RESPONDENT**

**RULING**

*14<sup>th</sup> December 2023 & 16<sup>th</sup> February, 2024*

**L. HEMED, J.**

This is an Application for ***mareva injunction*** brought under section 2(3) of the Judicature and Application of Laws Act, [Cap.358 RE 2019] and sections 68(c) and (e) 95 of the Civil Procedure Code, [Cap.33 R.E 2019].



The Applicant seeks for an order that status *quo* be maintained in respect of Landed Property say Plot No.448/1 and 449/1 Block 6, Keko Mwanga Area, Temeke Municipality, Dar es Salaam pending the expiry of 90 days Statutory Notice of intention to sue the Government.

The Application is supported by the Affidavit of one **ZAHIJA SELEMANI MUHEMA**. The respondents challenged the application through the counter affidavits of **BENEDICTO MAZIKU, THABIT MALOKA THABIT** and **BOAZ A. MSOFFE**. The 1<sup>st</sup> Respondent further raised the preliminary objection on point of law thus:-

*i. That this court lacks jurisdiction to hear and determine this suit.*

When the matter was called on 14<sup>th</sup> December 2023 for necessary orders, I directed the preliminary objection to be argued by way of written submissions. I have noted that parties complied with the said scheduling order. In arguing the preliminary objection, **Mr. Malick Khatib Hamza**, learned advocate, actively represented the 1<sup>st</sup> Respondent while the Applicant enjoyed the service of **Mr. William Yohana Fungo**, learned counsel.



I have gone through the rival submissions and affidavits lodged by the counsel for both parties only to find that the basis of the preliminary objection is the existence of the Judgment on consent of this court in Land Case No.246 of 2015 entered on 23<sup>rd</sup> September 2016, Hon. G. Ndika,J(as he then was).

The learned counsel for the 1<sup>st</sup> Respondent is of the view that this court is *functus officio* to grant the orders sought in the chamber summons of the instantaneous application because under section 139(4) of the Land Act [Cap.113 RE 2019], the mortgagee is barred from seeking same reliefs more than once from the court in respect of the same mortgaged property. He backed his arguments with the decision of the Court of Appeal of Tanzania in **Mohamed Enterprises(T) Limited vs Masoud Mohamed Nasser**, Civil Application No.33 of 2012, that there should be no room open to the court where by one judge enter judgment and draw up a decree in one case, and another judge of the same court, soon thereafter setting aside the said judgment and decree.

In response thereto, Mr. Fungo, counsel for the applicant contended that this court has jurisdiction to determine the application at hand because



it seeks to invite the court to determine and decide on the acts by the respondents after conclusion of Land Case No.246 of 2015. He insisted that the orders sought are intended to restrain the Registrar of Titles from effecting transfer of the suit landed properties in contravention of section 51(1) of the Land Registration Act, [Cap 334. RE:2019]

The counsel for the Applicant has also levelled blames against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents for having contravened the provisions of section 132(4) and 133(1),(2),(3) and (4) of the Land Act, Cap 113. He was of the view that, the said provisions ought to have been adhered to in executing the orders in Land Case No. 246 of 2015. The leaned advocate of the applicant insisted that this court has jurisdiction over the present matter because it, challenges the infringement of the aforesaid provisions which were never subject matter in Land Case No.246 of 2015.

It is settled law that preliminary objection consists of points of law which have been pleaded out of pleadings, which if argued may dispose of the suit. This is pursuant to the decision in **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd**, [1969]



E.A 696. I have perused the affidavit deposed by the Applicant to support the application, in paragraph 5, it readth as follows: -

*"5. That due to the foregoing, I instituted Land Case No.246 of 2015 which ended amicably on the 14<sup>th</sup> day of September 2016 as I entered into a Deed of Settlement with the 1<sup>st</sup> Respondent and in adherence to the deed of settlement and the Court order, I started to repay the loan. Copies of the deed of settlement, the court order and pay in slips are collectively attached hereto and marked as annexure "ZH2"..."*

I must state at the outset that the Deed of Settlement and the Order of this Court in Land Case No.246 of 2015 constitute the decision of this court capable of being executed. I have read the Deed of Settlement which was adopted as consent judgment of this court and found that in paragraph 4, it was agreed and ordered thus: -

*"4. That, **in case the plaintiff defaults and/or fails to repay the sum stated in paragraph 2(i) hereof beyond 30<sup>th</sup> September, 2016**, or, otherwise, upon payment of the sum stated in paragraph 2(i) above, if the Plaintiff defaults and/or fails to repay monthly instalments stated in*



paragraph 2(ii) above for the period of two(2) months consecutively from October, 2016, **the 1<sup>st</sup> Defendant shall have an automatic right to dispose the following mortgage properties, namely:**

(i)...

(ii)...

(iii) **C.T No.43959, Plot No.448/1 and 449/1, Block 6, Keko Mwanga Area, Temeke Municipality, Dar es Salaam City, in the names of Zihija Selemani Muhema.**" (Emphasis added).

The above being the consent orders of this court, then, the disposition process of the suit landed properties was as good as directed by this court *vide* the consent judgment. The question that follows is whether this court can make any injunctive order *vis-a-vis* the consent judgment over the same subject matter? In my firm view the court cannot as it is *functus officio*. The **Black's Law Dictionary**, 8<sup>th</sup> Edition, defines the word '*functus officio*' to mean: -

*"Having performed his her office or an officer or official body without further authority or legal*



*competence because the duties and function have been fully accomplished."*

The definition was amplified in **Bibi Kisoko Medard v Minister for Lands Housing and Urban Development and Another** [1983] TLR 250. This court, the late Mwakibete, J had this to say:-

*"In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."*

The fact that plots Nos. 448/1 and 449/1 Block 6, Keko Mwanga Area, Temeke Municipality, Dar es Salaam were the subject matter in Land Case No.246 of 2015, where it was concluded by a Deed of Settlement which was adopted as Consent Judgment and Decree, then, the orders sought in the instantaneous application cannot be granted against such decision. In view of section 139(4) of the Land Act (supra), this Court is *functus officio*.

In the final analysis, I find merits in the preliminary objection. This court is *functus officio* to grant the *mareva injunctive* orders against the execution of its orders.



The entire application is thus dismissed with costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 16<sup>th</sup> February 2024.

