

TANZANIA / JUDGMENT

Consolidated Land Case No

COURT
TANZLIIDECIDED
1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LAND DIVISION AT PAR ES
SALAAM CONSOLIDATED LAND CASE NO. 16876 AND MISC. LAND APPLICATION No. 17743 OF
2024 OTIENO OLUNG'A IGOGO..... PLAINTIFF VERSUS KCB
BANK TANZANIA LIMITED..... 1STDEFENDANT BIDCITY AUCTION &
ESTATE SALES LIMITED..... ..2ndDEFENDANT UTEGI TECHNICAL ENTERPRISES (ITNL)
LTD..... 3rdDEFENDANT

RULING

Date of last Order: 2/10/2024 Date of Ruling: 07/10/2024 LALTAIKA, J This Ruling resolved a point of Preliminary Objection (PO) raised by Counsel for the Defendants/Respondents Mr. Elisa Abel Msuya to the effect that this Court has no jurisdiction to entertain the matter. The PO was argued orally. Mr. Octavian Mushukuma learned Advocate appeared for the Plaintiff/Applicant. I proceeded to summarize submissions by both parties. Page 1 of 14 Noteworthy, the Plaintiff had instituted a suit against the Defendants jointly and severally in the following orders:

- a. A declaratory order that the advertisement dated 13th June, 2024 in the newspaper titled Zanzibar Leo for purported auction and sale of plaintiff's property CT. No. 47680 for Plot No. 309 Jangwani Beach Area, Kinondoni Municipality in Dar es Salaam City is illegal and void ab initio;
- b. A declaratory order that at the time of purported advertisement for purported auction and sale of the Plaintiff's property, there was no guarantee agreement between the first Defendant and the Plaintiff and therefore there was no liability to the Plaintiff.
- c. An order against the First Defendant to discharge the Plaintiff's Area, Kinondoni Municipality in Dar es Salaam City.
- d. An order for permanent injunction restraining the First and Second Defendants to desist from their illegal and fraudulent acts of intended auction and purported sale of the Plaintiff's property under certificate of title Title No. 47680 for Plot No. 309 Jangwani Beach rea, Kinondoni Municipality in Dar es Salaam City.
- e. An order against the First and Second Defendant for payment of general damages to the tune of JUSD 1,000,000.00 to plaintiff as per paragraph 7

- f. An order against the first and 2nd Defendants for payment of interest at 7% 7 above from the date of judgment to the date of full satisfaction in (e) above
- g. Cost of the suit
- h. Any other reliefs the Honourable Court may deem fit and just to grant Mr. Msuya, Counsel for the Defendants, in support of the Preliminary Objection (PO), sought to emphasize one key point: that a point of law Page 2 of 14 should not be argued in isolation; instead, facts as plainly pleaded must be referenced. He noted that this principle was restated in the case of *Ally Shabani and 48 Others v. TANROADS and Another* (Civil Appeal No. 161 of 2020). Regarding the 1st PO, he humbly submitted that the court lacked jurisdiction to adjudicate the matter. He argued that the plaintiff should have complied with section 38(1) of the Civil Procedure Code (CPC) Cap 33 of 2019, which prohibits filing independent suits for matters relating to execution or satisfaction of a decree between the parties. This provision formed the foundation of their objection. He recalled a decree from Comm. Case No. 1 of 2011, specifically paragraphs 9.1 and 9.2, which outlined that if the judgment debtors failed to honour the terms of the decree, the recovery would be against the securities, including the property in question. In that case, the 2nd Defendant was the 2nd Judgment Debtor, while KCB Bank Ltd, the plaintiff and decree holder, had rights against the 1st Judgment Debtor, who was the 3rd Respondent. Mr. Msuya highlighted that the 2nd Defendant was merely an agent of the 1st Defendant and was not a party in the original suit. Page 3 of 14 He submitted that the cause of action in the present suit substantially involved issues related to the execution of Comm. Case No. 2. As per paragraphs 9.1 and 9.2 of the decree, the 1st Defendant had the right to sell the property, including the one now subject to this suit. He noted that the plaintiff's complaints, pleaded in paragraphs 9, 10, 11, 15, 16, and 17, concerned the manner in which the sale was conducted, with allegations of fraud and illegality. Further complaints were raised in paragraphs 12 and 19(b) regarding the absence of notice prior to the processing of the sale, and another complaint alleged full settlement of the decree, which was raised in paragraphs 12, 19, parts of paragraph 20, and 22. The plaintiff claimed that a sum of USD 450,000 was paid, sufficiently covering the liability of USD 350,000. There was also a complaint that the valuation report had not been provided. Mr. Msuya informed the court that the pleadings acknowledged the existence of the decree. Paragraph 19(c) even stated that the decree had been adjusted in accordance with Order I Rule 7. He reiterated that clause 9.2 of the decree was specific about the consequences if the decree was not settled. He argued that the issue of whether the auction process should have Page 4 of 14 been court-assisted fell within the ambit of section 38(1) of the CPC and referred to the case of *Shell and BP Ltd v. University of Dar es Salaam* (TLR 2002), where it was established that the executing court determines the manner of execution. He concluded by citing the case of *Hassan Twaib Ngonyani v. TAZAMA Pipeline Ltd* (Civil Appeal No. 201 of 2018), where the Court of Appeal of Tanzania (CAT) clarified that the executing court has powers under section 38(2) of the CPC to convert execution proceedings into a suit and resolve factual controversies. Additionally, he referred to the decisions of *Kisanja J. in Abila Estate and Agency Co. Ltd v. CRDB Bank PLC* (Civil Case No. 143 of 2021), which advised the

plaintiff to approach the executing court, and a similar decision in *Abla Estates Developers and Agency Co. Ltd v. KCB Bank Tanzania Ltd and Another* (Land Case No. 9023 of 2024). On the Second PO, Mr. Msuya argued that since the orders sought in the main suit were tied to the execution of the decree in Comm. Case No. 2 of 2011, the court could not issue orders of injunction. He referred to the Court of Appeal decisions in *National Housing Corporation v. Peter Kassidi and 4 Others* (Civil Application No. 243 of 2016) and *Prada Enterprises Co. Ltd v. Joyce Alex Khalid and 2 Others* (Civil Application No. 279/01 of 2020), Page 5 of 14 where it was established that once there is a decree, the appropriate remedy is an application for stay of execution, not an injunction. In conclusion, he submitted that the sale of the suit property was in execution of clause 9.2 of the decree in Comm. Case No. 2 of 2011 and that the court could not issue orders of injunction. Therefore, he prayed that both the suit and the application be struck out. Mr. Mushukuma, Counsel for the Plaintiff, objected to the Preliminary Objection (PO) by addressing both the suit and the application together. He argued that both PO's were misconceived. He cited the well-established principle on what constitutes a PO as set out in the *Mukisa Biscuits* case and referred to the Court of Appeal of Tanzania (CAT) decision in *Jackline Hamson Ghikas v. Mllatie Richie Assey* (Civil Application No. 656 of 2021), where the CAT reaffirmed the three principles laid down in *Mukisa Biscuits* and in *TTCL v. Vedasto Ngaswa and 4 Others* (Civil Application No. 57 of 2009). These principles were that a point of law must either be pleaded or arise as a clear implication, it must be a pure point of law not requiring cross-examination or scrutiny of the pleadings, and it must not depend on the courts discretion. Page 6 of 14 He also referred to the CAT decision in *Mohamed Enterprises TZ Ltd v. Masoud Mohamed Nasser* (Civil Application No. 33 of 2012) and the case of *Charles Chama v. Regional Manager of TRA and 3 Others* (Civil Appeal No. 224 of 2018), which further clarified that where a PO contains facts, it must fail. Mr. Mushukuma argued that, upon reading the PO's, it was evident that they were not pure points of law but a mix of law and facts. Therefore, based on the cited cases, such grounds could not be categorized as PO's because they required evidence to prove the allegations made in the pleadings. He noted that Counsel for the 1st and 2nd Defendants had mentioned that they were executing a decree which the court had taken judicial notice of. However, he submitted that this was not an execution as per clause 9.1 and 9.2 of the decree. He referred to paragraphs 18 and 19 of the plaint, where the plaintiff clearly stated that he did not owe any money to the 1st Defendant (the bank). The plaintiff had guaranteed USD 250,000 to the 3rd Defendant, which had already been repaid as detailed in paragraphs 19(a), (b), (c), and (d) of the plaint. Page 7 of 14 He further submitted that clause 9(2) of the Deed of Settlement allowed the 1st Defendant to realize any remaining securities without recourse to the court. He drew the court's attention to this clause and referred to *Black's Law Dictionary*, which defined "redress" as seeking relief or remedy and "relief" as equitable remedies such as injunctions or specific performance requested from a court. In his view, the requirement in clause 9(2) for the 1st Defendant not to go to court was designed to prevent the institution of a new suit in the event of default by the judgment debtors. He fortified his argument with a decision from this court in *CRDB Bank Ltd v. Rukanga Butchery and General Supplies and 3 Others* (Commercial Case No. 34 of 2001), where it was held that the proper course was to

institute a new suit. The court in that case ruled that "the only way is to file a separate auction," and the current record could only provide evidence if the matter went to trial. He argued that in the present case, the execution was improper and could be challenged by instituting a new suit, as had been done. While Counsel for the 1st and 2nd Defendants cited Abia's case, Mr. Mushukuma contended that there were conflicting decisions on this matter. He referred to the CAT decision in Arcopar (O.M Caps) v. Herbert Marwa & Family and 3 Page 8 of 14 Others (Civil Application No. 94 of 2013), which held that when there are two conflicting decisions, the most recent one must prevail. In his view, the most recent decision cited by the defendants was decided per incuriam, as it wrongly required the decree holder to first go to court and file execution proceedings. He then addressed the cases cited by the defense, starting with Shell and BP (p. 232), where Order XXI Rule 1 allowed a decree holder to execute a decree without involving the court. He submitted that, in the present case, the 1st Defendant needed to file execution proceedings, and without such proceedings, section 38(1) of the CPC did not apply. The only remedy, he argued, was to file a suit against the 1st and 2nd Defendants. In conclusion, Mr. Mushukuma submitted that the PO's were misconceived for failing to meet the Mukisa Biscuits threshold and prayed that the grounds of objection be dismissed with costs. Mr. Msuya, in his rejoinder submission, began by addressing the Court of Appeal of Tanzania (CAT) cases cited earlier. He argued that the Jackline case was distinguishable as it concerned the service of a notice of motion and affidavit, which required evidence. However, in the current case, the Page 9 of 14 issue at hand was jurisdiction. He noted that in Chama (supra), the case was based on the record and the memorandum of appeal. In both decisions, the CAT had made it clear that what was barred was the ascertainment of facts. He pointed out that on page 7 of the Jackline judgment, the CAT held that a PO should not require the examination or scrutiny of evidence. Mr. Msuya argued that, in the current matter, the court was not being invited to examine the evidence but to refer to the pleadings as they were, without alteration. This approach was consistent with the TANROAD's case (supra). Moving on to the second point, Mr. Msuya addressed the CRDB case, which was decided by Hon. Kalegeya, and the contest between this decision and that of Hemed J. in Abia's case (supra). He submitted that if the court accepted the argument by counsel for the Applicant, the court would be bound by the decision in Ab/a, but this principle only applied to CAT cases. He added that the claim of per incuriam did not arise since both decisions were from courts of the same jurisdiction. As for the issue of the contradiction with clause 9.2 of the decree, Mr. Msuya submitted that the interpretation of this clause related to the manner Page 10 of 14 of execution, which was under the jurisdiction of the executing court. He acknowledged the claim that there was resistance that might require the courts assistance but argued that the question was which court should be involved, and he submitted that it was the executing court's responsibility. Regarding paragraphs 18 and 19 of the plaint, where it was claimed that the full amount had been paid, Mr. Msuya maintained that this issue should be determined by the executing court, not through a separate action. In conclusion, he referred to Ngonyani's case, where the powers of the executing court were defined, explaining that the court had the authority to treat questions by converting the execution process into a suit. Finally, Mr. Msuya

addressed Hon. Kalegeya's decision, stating that it was inaccurate for Counsel for the Applicant to claim that the application had been filed under section 39(1). He explained that there was only a reference to the application arising from a summary suit and noted that the applicants had filed a chamber summons. He added that he was aware that execution proceedings are initiated using prescribed forms. However, in Hon. Kalegeya's decision, the court required the filing of a separate action, and Page 11 of 14 while they could not precisely define the word "action," the court had not overruled the powers of the executing court. Mr. Msuya concluded by inviting the court to find that Hemed J/s decision was more relevant to the current application, and he prayed that the court apply it as good law. He then humbly prayed that the application be granted, and the matter be struck out with costs. This Court after hearing and recording the oral submissions summarized above, scheduled the matter for Ruling on the 27/09/2024. However, a few days before Mr. Mushukuma wrote a letter informing the Court that he had come across an authority (case law) he was not aware of during submission. He prayed that counsel for both parties be granted audience to address the court on the same before the Ruling is pronounced. Akin to the Kiswahili saying USIKATAE WITO KATAA NENO, the prayer was granted. I invited Counsel to address me on 2/10/2024. I think I chose the latter "Neno" because their submissions were based on their opinion on comparing two cases of this Court. They unanimously agreed that they are merely persuasive. Page 12 of 14 It is clear from the provisions of the CPC, particularly Section 38(1), that the Plaintiff's claims are indeed closely tied to the execution of the decree in Comm. Case No. 2 of 2011. The Plaintiff has not demonstrated compliance with the necessary procedural steps before seeking relief through this suit, thereby raising legitimate concerns about the Court's jurisdiction to adjudicate the matter as framed. The issues raised by the Plaintiff, particularly those pertaining to alleged fraud and the manner of execution, are intricately linked to the original decree. As indicated in Hassan Twaib Ngonyani r, TAZAMA Pipeline Ltd, (supra) such matters are appropriately handled within the framework of execution proceedings. The case law cited by Mr. Msuya strongly suggests that the appropriate course of action concerning execution matters, once a decree is in place, is to seek a stay of execution rather than an injunction. Therefore, the Court must refrain from granting the orders sought by the Plaintiff concerning injunctions against the Defendants. In light of the aforementioned analysis, I find that the Preliminary Objection raised by Mr. Msuya is well-founded. This Court lacks jurisdiction Page 13 of 14 as the Plaintiffs suit pertains to issues of execution that should be resolved in the context of the existing decree. Consequently, both the suit and the application are struck out for lacking merit. The Plaintiff shall bear the costs of the suit. It is so ordered. Court Ruling delivered this 7th day of October 2024 in the Presence of Mr. Octavianus Mshukuma, learned Advocate for the Plaintiff/Appellant and Mr. Eliezer Msuya, learned Advocate for the Defendants/ Respondents. JUDGE 07/10/2024 Page 14 of 14

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