

TANZANIA / JUDGMENT

Ruling FANAKA FISHNET v STANBIC BANK and another

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA LAND CASE NO 26520 OF 2023 FANAKA FISHNETS(T)
LIMITED.....PLAINTIFF VERSUS

1. STANBIC BANK TANZANIA LIMITED.....1st DEFENDANT
2. ADILI AUCTION MART.....2nd DEFENDANT 3.

RULING

28th May- 16th July & 19th July 2024. ITEMBA, J. In this case, the plaintiff claims against the defendants jointly and severally for specific performance of statutory obligation to carry out valuation of the suit premise Plot No. 11, 12 & 13 Kisesa Mwanza registered under Certificate of Title No.21166 LR MWANZA (the suit properties) for the purpose of ascertaining the current market value of the same as the 1st defendant has a duty of care to the Plaintiff to obtain the best reasonable price at the of sale by public auction. They further claims that the 1st Defendant have failed to serve a statutory default notice to the Plaintiff. Therefore, they are praying for;

- i. An order for specific performance to the 1st Defendant to conduct valuation of the suit premise for purpose to obtain best reasonable price at the time of sale by public auction by the 2nd Defendant. ii. Declaration that the purported by the Defendants is void for failure to serve a statutory defaulters' notice to the Plaintiff iii. General damages and Costs. 1 iv. Any other or further relief(s) as this Honorable Court may deem appropriate. The suit was however opposed by three points of preliminary objections from the defendants that;
- i. The honorable court is functus officio; ii. The plaintiff complaint does not disclose a cause of action against the defendants; iii. The plaintiff's case is an abuse of court process. The points of preliminary objection were argued by way of written submissions. Messrs. Erick Kahangwa and Erick Martin Mutta both learned Advocates represented the plaintiffs and Dr. George Mwaisondola learned Advocate represented the defendants. Arguing in support of the first ground of the preliminary objection, the defendant's counsel submitted that; the doctrine of functus officio operates in the manner that once the court has decided on the matter, it cannot be called to re-open the matter again and decide on it again. If that

happens, the court will be said to be functus officio. That, in the case of Petrolux Service Stations vs NMB Bank plc & Another, Misc Land Application No 86 of 2020 (unreported), at pages 10 it was stated that; 2 ‘... It is settled law that once a decision has been reached and the parties made aware of it, the adjudicating authority becomes functus officio. In Kamundu vs R (1973) the erstwhile East African Court held that the court becomes functus officio upon disposing of a case by passing or making an order finally disposing the case. Thus, the same court cannot reopen a final decision which has been drawn up and entered. “ That, before filing this case, the plaintiff filed at this court Land Case No. 8 of 2023 which had exactly the same claims as the present Land Case. He argued further that, prior to that suit no.8 of 2023, the plaintiff had filed a Land Application No. 415 of 2020 before the District Land and Housing Tribunal at Mwanza, which was settled on 26th February 2021. That, this court dismissed Land Case No. 8 of 2023 therefore it is improper for the same matter to be reopened as one judge cannot correct another judge by substituting the order. That, if the plaintiff was not satisfied with the ruling in Land Case No 8 of 2023, he could have either appealed or file for review at the Court of Appeal of Tanzania, otherwise, this court is functus officio. In reply, the plaintiff’s counsels submitted that, they fully subscribe to the principle of functus officio as elaborated by Mr. Mwaisondola. However, on their part, the suit is quite opposite as the plaintiff does not invite this 3 court to overturn any previous judgement of this court. That, they differ with Mr. Mwaisondola in the sense that this suit is not exactly as Land Case No. 8 of 2023 because one, in this case the cause of action is failure of the 1st defendant to issue mandatory 60 days’ statutory notice before sale and failure to conduct valuation; two, the parties herein are different as on in the present case there are two defendants while in the previous case the defendants were three including Ace Consultant Limited, three, the remedies sought are different. They argued further that, the plaintiff has paid part of the loan and they are currently indebted with TZS 157,000,000/= therefore the 1st defendant was supposed to issue a 60 days’ statutory notice on the said current debt. That, the cited case of Petrolux Service Stations vs NMB Bank plc & Another (supra) is distinguishable to this case at hand. They prayed for this point of preliminary objection to be overruled. It appeared that the plaintiffs were insisting that the present suit is different from land case no.8/2023 because the complaints herein is against the defendants failing to issue them with a 60 days’ notice and that this issue of a notice was not raised in land case no. 8/2023. Following the line of these submissions, this court raised a concern as whether this matter is res judicata against Land Case No 8 of 2023. I invited parties to further address the issue. 4 Mr. Mutta began to submit that their concern is that, 60 days’ notice was never issued, in his opinion the matter is not res judicata because it has never been determined by the court. On his part Mr. Mwaisondola was of the view that, the issue of default notice was determined by the court in general because in Land case no. 8/2023 there was an objection relating to abuse of court process and cause of action because the dispute was determined and parties had settled before the District Land and Housing Tribunal. That, before the tribunal paragraph 6(a)(ix) of the application and relief 7(b) was to be issued by default notice but parties settled on the very same claims. Thus, this issue was settled that is why in paragraph 8 of land case no 8/2023 the plaintiff talks of 14

days' notice and not 60 days because they purposely avoided it. That, if there is settlement there is no right to appeal, review or revision and no need of a new notice. In this, the court was referred to the case of Ibrahim Twahili Kusundwa and another vs Crdb Bank Plc and 3 others, Civil Appeal No. 194 of 2021 (unreported). In rejoinder, Mr. Mutta submitted that, in application no. 415 of 2020 before the tribunal, the applicant filed facility letters following the loan being rescheduled. That, this is a new claim of a new loan. Therefore, the default notice had to be re-issued. Upon being probed by the court Mr. Mutta stated 5 that, the payment rescheduling failed, therefore the loan still stands at the balance of TZS 154,000,000/=. Dr. Mwaisondola was quick to point out that facts about the new facility letter and loan rescheduling are not in the plaint. That, there is no new mortgage. I have considered the submissions for both parties. I will therefore start by assessing whether this matter is res judicata. The principle of res judicata is stated under section 9 of the Civil Procedure Code, Cap. 33 R.E 2019 (the CPC) which says;

9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. Explanation I: n/a Explanation II: n/a Explanation III: n/a 6 Explanation IV: Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Looking at the pleadings and ruling of this court in Land Case No. 8 of 2023, to a great extent in context and form, the plaint in this case is a replica of the plaint filed in Land Case No. 8 of 2023. At paragraph 6 the present plaint the plaintiff is alleging the outstanding balance of the loan to be Tshs. 157,527,280.93/- which was the same figure pleaded by paragraph 7 of the previous plaint. Therefore, the claim of TZS 157,527,280.93 was actually featured in land case no. 8 of 2023. At paragraph 4 of the present plaint, the plaintiff is claiming for specific performance of statutory obligation to carry out valuation of the suit properties to ascertain its current market value and they are faulting the 1st defendant for failure to issue statutory default notice. Again, at paragraph 5 of the previous plaint the plaintiffs were claiming the same issue of valuation while at paragraph 5 they alleged to have been served with 14 days' notice. In the present suit the reliefs sought are, among others, to compel the 1st Defendant to conduct valuation of the suit premise and serve a statutory defaulters' notice to the Plaintiff while in the previous case the plaintiff was 7 among others, praying for the court to appoint a Government Valuer to ascertain the current market value of the suit properties. Considering the circumstances of these two cases, the cause of action in previous and present matter emanates from allegation that the defendants have failed to adhere to mandatory procedure to be followed before sale, further the cause of action arose on the same remained loan balance of Tshs. 157,527,280.93/-. Reverting to the Ruling and reasoning of this court in Land Case No. 8 of 2023, while the court was discussing the preliminary objection on cause of action it stated at page 7 that; "I think the defendants' learned counsel

is correct in his argument. According to paragraph 5 of the plaint, the plaintiff is seeking a declaration that the purported and/or contemplated sale scheduled on nearly 7th March, 2023 is void for failure by the defendants to comply with or observe the mandatory and proper procedural requirement over the valuation of the mortgaged property...to ascertain its current market value...clearly, in filling this suit, the plaintiff is trying to seek the court make a contract for the parties or to go outside their contractual 8 terms. There is no dispute that the plaintiff secured a loan facility from the 1st defendant and has defaulted service it..." (emphasis added) After a further reasoning this court concluded that the plaintiff has no cause of action against the defendants thereat which includes the present defendants. Further, at pages 9 and 10 this court was discussing the issue of abuse of court process, it stated that; "...I am unable to go along with the plaintiff's line of argument, the record is clear that when the plaintiff defaulted servicing the loan, she filed at the District Land and Housing Tribunal at Mwanza, Land Application No. 415 of 2020 and the same was settled on 26th February, 2021 by a deed of settlement and compromise of a suit...My view is that there cannot be parallel proceedings before this court and the District Land and Housing Tribunal..." (emphasis added) Therefore, in previous proceedings this court dismissed the suit based on two points; one, the plaintiff was held to lack cause of action against the defendants herein in the sense that, if the plaintiff have failed to service the loan, the 1st defendant is at liberty to sale the suit properties; and two, if there are any issues arising after the deed of settlement being filed and adopted at the District Land and Housing Tribunal, the plaintiff were at 9 liberty to direct these issues to the same land tribunal instead of opening parallel proceedings before this court. This decision was not challenged and it remains intact. I have considered the views of Mr. Mutta that, the issue of 60 days statutory notice was not discussed in the previous proceedings before this court. I disassociate myself with that reasoning because as shown hereinabove, it is cardinal principle that all matters which ought to have been brought in proceedings are considered to have been finally determined. The plaintiff is not allowed to divide his cause of action into pieces as it will amount to an abuse of the court process. In the case of Sunga Ngayaki and 2 others vs Lyaki Gimbili, Civil Appeal No. 9 of 2023 (unreported) this court at page 15 stated that; "The foregoing position is fortified by the commentary in Mulla's Commentary on Explanation IV of the Indian Code of Civil Procedure (p. 114) in which it was held: The principle underlying Explanation IV that res judicata is not confined to issues which the court is actually asked to decide but covers issue or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of 10 the court to allow a new proceeding be started in respect of the them." Therefore, the plaintiff ought to have stated all matters concerning mandatory procedures to be followed by the 1st defendant before sale, including absence of 60 days' notice. Failure of that the matter becomes res judicata. That being said and done, this suit is res judicata, I proceed to dismiss it with costs. It is so ordered. DATED at MWANZA this 19th day of July, 2024. L. K. J. ITEMBA JUDGE Ruling delivered on 19 day of July 2024 in presence of Advocate Bahati th Kessy for the plaintiff also holding brief for Dr. Mwaisondola for the defendants and Ms. G. Mnjari, RMA. L. K. J. ITEMBA JUDGE 11

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