

TANZANIA / JUDGMENT

Land Case 2868 Ifindu Agribusiness Limited vs TCB AG Pamoja Auction Mart

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TANZLIIDECIDED
14 August 2024

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IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LAND CASE NO. 2866 OF 2024 IFINDU AGRIBUSINESS BANK
PLC.....APPLICANT VERSUS TANZANIA COMMERCIAL BANK
PLC.....1ST RESPONDENT ATTORNEY
GENERAL.....2ND RESPONDENT PAMOJA AUCTION MART AND
COMPANY LTD.....3RD RESPONDENT

RULING

Date: 14 August 2024 & 2 September 2024 SINDA, J.: In this matter, the plaintiff claims jointly and severally against the first, the second and the third defendants for the declaratory judgement to the effect that the auctioning and sale of Plot No. 770 Block Y located at Mwakibete Mbeya and Plot No. 70 with Title No. 51103 Chimala Mbeya (the Mortgaged Properties) the properties of the plaintiff are unlawful and void. The brief facts of the case are that the first defendant and the plaintiff entered into a loan agreement of TZS 600,000,000/=. The Mortgaged 1 Properties were security for the loan. That, before the expiry of the loan period, the first defendant threatened to sell the Mortgaged Properties. As a result, the plaintiff instituted Land Case No. 16 of 2021 at the High Court at Mbeya. In the Land Case No. 16 of 2021, the parties settled the matter and agreed that the outstanding amount will be paid in two seasons of harvesting crops 2021 to 2022 and 2022 to 2023. The parties also agreed that the whole outstanding amount to be paid by December

2023. The Court entered a consent judgement to that effect. The plaintiff failed to pay the outstanding amount as per the consent judgement. The first defendant threatened to sale the Mortgaged Properties. The plaintiff on 1 October 2023, issued a ninety days' notice to the second defendant. Further, on 9 February 2024, the plaintiff received a 14 days demand notice from the third defendant. The plaintiff applied for an order of injunction against the first defendant and also instituted this suit against the defendants. In the Defendants Joint Written Statement of Defense (WSD), the defendants disputed the contents of the plaint and also raised preliminary objections (P.O.) that this matter is a res judicata. It is thus upon this court to determine the P.O put forth, before deciding whether or not to continue with the main suit. 2 At the hearing of the P.O, the plaintiff was represented by Mr. Loth Joseph Mwampagama, Learned Counsel and the defendants were represented by Mr.

Michael Fyumagwa, Learned State Attorneys. The third defendant did not make appearance in court. The matter proceeded in his absence. Mr. Fyumagwa submitted that this matter is a res judicata in accordance with section 9 of the Civil Procedure Code Cap. 33, R.E 2019 (the CPC). He added that in 2021, the plaintiff instituted Land Case No.16 of 2021 against the defendant. He further submitted that the plaintiff was against the intention of the first defendant to sale the Mortgaged Properties. That, during mediation the plaintiff agreed to pay the loan which was due at that time. The consent settlement order was issued by this court on 21 July 2022. He stated further that despite the said consent settlement order, the said loan remains unpaid to date. Mr. Fyumagwa, contended that the first defendant then issued a 14 days' notice to the plaintiff to pay the amount due. After the plaintiff received the notice, he instituted this Land Case that the intended notice of sale of the Mortgaged Properties is unlawful. 3 He argued that this Land Case is based on the same loan agreement between the plaintiff and the first defendant dated 7 May 2020 (the Loan Agreement) which the parties entered a consent settlement order. Mr. Fyumagwa was of the opinion that this Land Case is similar to Land Case No. 16 of 2021. That, the parties and the subject matter which is the Loan Agreement are the same. Thus, the matter is a res judicata as provided under section 9 of the CPC. He prayed that the matter be struck out for being res judicata. In reply to the P.O raised, Mr. Mwampagama submitted that the objection is baseless because it is not on a pure point of law. He argued that the state attorney was referring to the Loan Agreement and the consent Settlement order which are based on evidence. He was of the opinion that such issues should not be brought at this stage. He referred to the case of Mukisa Biscuit Manufacturing Limited, 1969 EA that a P.O. should not include facts which are based on evidence. Mr. Mwampagama, further submitted that it is not true that the plaintiff instituted both cases against the same parties. He argued that in Land Case No. 16 of 2021, the parties are Ifindu Agribusiness Limited vs Tanzania Commercial Bank PLC. While, in the present case the parties are Ifindu Agribusiness Limited, Tanzania Commercial Bank PLC, the Attorney General and Pamoja Auction Mart and Company Ltd. Therefore, the parties are different in the two cases. He contended that, in the Land Case No. 16 of 2021, the consent settlement order stated that the outstanding loan amount plus the accrued interest and penal charges is TZS 681,071,992.61/= Million, however in the present case the outstanding amount plus the accrued interest and penal charges is TZS 1, 229,820,000.00/= Million. Therefore, this is a new case. Mr. Mwampagama, further contended that in Land Case No. 16 of 2021 the cause of action was breach of contract. But, in the present case is unlawful sale of the Mortgaged Properties. So, the cause of action is not similar. He concluded by saying the preliminary objection is baseless and the case is not a res judicata. He prayed the P.O is dismissed. In rejoinder, Mr. Fyumagwa reiterate his submission in chief. He maintained that the cause of action is the same in the Land Case No. 16 of 2021 and the present matter. He added that in this matter the plaintiff is challenging the sale of the Mortgaged Properties and at paragraph 9 of the plaint the plaintiff is referring to the consent settlement order. Mr. Fyumagwa, further stated that both cases are in relation to the Loan Agreement. He maintained that the present matter is a res judicata. 5 Mr. Fyumagwa

further argued that Mr. Mwampagama submitted that the P.O is not a point of law. He was of the view that the statement is not clear because the court when determining a P.O. considers the facts and the annexures in the pleadings without going beyond that. He added that the loan agreement and consent settlement order are part and parcel of the pleadings as annexures. That, the Loan Agreement is annexure IA1 and the consent settlement order is annexure IA2. He stated that there is no any other evidence apart from these two annexures. He maintained that the P.O. is on pure point of law. In conclusion, Mr. Fyumagwa submitted that it is true that in Land Case No. 16 of 2021 the parties were the plaintiff and the first defendant. Yet, after the amendment of the law, it was a requirement to include the Attorney General and Pamoja Auction Mart. Therefore, the parties are similar as to those of 2021. He prayed the matter is struck out with costs for being *res judicata*. I have considered the arguments advanced by the parties in order to determine the merit or demerit of the P.O. raised. The law governing *res judicata* is envisaged under section 9 of the CPC which provides that:

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 6 suit between the same parties or between parties under whom they or any of them claim to litigate 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. In light of the above provision of law, it is clear that, the consent judgment order of this Court was issued by the Court of competent jurisdiction in respect of the same subject matter. In the matter at hand, the subject matter is the Mortgaged Properties in relation to the Loan Agreement where the plaintiff Mortgaged the Disputed Properties which is similar to Land Case No. 2868 before this Court. The Land Case. No. 16 of 2021 was determined to finality and the court issued the consent judgement order. In the matter at hand the subject matter is the Mortgaged Properties in relation to the Loan Agreement which is similar to that in Land Case No. 16 of 2021. See the cases of the Registered Trustees of Chama Cha Mapinduzi vs Mohamed Ibrahim Versi & Sons and Another, Civil Appeal No. 16 of 2008; Peniel Lotta vs. Gabriel Tanaki and Others, Civil Appeal No. 61 of 1999 (2003) TLR Page No. 314 and George Shambwe v Tanzania Italian Petroleum Company Ltd [1995] TLR 21 to that effect. The parties herein are litigating under the same Mortgaged Properties in relation to the Loan Agreement, however, the parties in Land Case No. 16 of 2001 are Ifindu Agribusiness Limited and Tanzania Commercial Bank PLC. In the present case the parties are Ifindu Agribusiness Limited, Tanzania Commercial Bank PLC, the Attorney General and Pamoja Auction Mart and Company Ltd. I agree with the Learned State Attorney that, the parties in these two cases are similar. Yet, after the amendment of the 7 law, it was a requirement to include the Attorney General and Pamoja Auction Mart. Section 6(3) & (4) of the Government Proceedings Act, Cap. 5 as amended by the written laws (Miscellaneous Amendment) Act, 2020 provides that:

3. All suits against the governments shall, upon the expiry of the notice period, be brought against the government, Ministry, Government department, local authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the attorney General shall be joined as a necessary party."
4. Non- joinder of the Attorney General as prescribed under Subsection (3) shall vitiate the proceedings of any suit. As such, it was essential to add the Attorney General as a necessary party after the amendment to the law as envisaged by the provisions of the law above. The term necessary part is defined in the Black's Law Dictionary, 8th Edition to mean: "a party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings." Further, the High Court in the case of Tang Gas Distributors Limited
- v. Mohamed Salim Said & 29 Others, Civil Application for Revision No. 68 of 2011 unreported) when considering circumstances upon which a necessary party ought to be added in a suit stated that: "...an intervener, otherwise commonly referred to as a NECESSARY PARTY, would be added in a suit under this rule...even though there is no distinct cause of action against him/ where: 8
- (b) his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit." Thus, it was also important to add Pamoja Auction Mart and Company Ltd as a necessary party so as to have him bound by the decision of the court in this suit. Therefore, constructively, the parties are litigating under the same Loan Agreement which has been aforementioned above. Moreover, in the case of Moto Matiko Mabanga v Ophir Energy Pic & 6 Others, Civil Appeal No. 119 of 2021, CAT at Dodoma (unreported) on page 14 of the Judgment of the Court it was observed and held that: "At any rate, we hold the view that no preliminary objection will be taken from abstract without reference to some facts plain on the pleadings which must be looked at without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence". As per the above observation of the CAT, it is clear that there was no any harm for Mr. Fyumagwa to refer to the annexures of the plaint that are the Loan Agreement and the consent Settlement order without referring to the examination of any evidence. In the case of Witness Rhobi Elia v Khamis Abdallah Mduma & 2 Others, Land Case No. 300 of 2022, (unreported), the High Court stated that: "In other words, the suit is constructive res judicata, a suit that sets to bar any claims being raised in a later proceeding if the claim (sic) on the same subject matter ought to have been raised and decided earlier." 9 In conclusion, the claims of the plaintiff concerning the Loan Agreement and the Mortgaged Properties was determined to its finality in Land Cas No. 16 of 2021 before this Court. Consequently, this suit is constructive res judicata and this Court is barred to determine it as it abuses the Court process. The suit is dismissed accordingly with costs. DATED at MBEYA on this 2 day of September 2024. A. A. SINDA JUDGE 10

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