

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMM. APPL.NO. 162 OF 2020

(Arising from Commercial Case No. 106 of 2017)

NAWAB ABDULRAHIM MULLA.....APPLICANT

Versus

INTERNATIONAL COMMERCIAL

BANK TANZANIA LIMITED.....RESPONDENT

Last order: 12th April, 2021
Ruling: 17th May, 2021

RULING

NANGELA, J.

This Application was brought under Section 14 (1) and 21 (1) and (2) of The Law of Limitation Act Cap, 89 R.E 2019, by way of Chamber summons supported by an Affidavit of the Applicant herein.

In this Application, the Applicant is seeking for an extension of time within which to file an application to set aside sale of landed property described in the Chamber summons. For an ease understanding of the issues

involved herein, I will set out the brief facts as disclosed in the pleadings.

The Applicant and the Respondent were parties in **Commercial Case No.106 of 2017**, as Defendant and Plaintiff, respectively. The suit was for recovery of a loan advanced to the Applicant by the Respondent. The loan was secured by a legal mortgage over a commercial property with title Deeds No. CT. No.13996, L.O No.18781 and C.T. No.13997, L.O.No.18790, Plots No.1 and 2, respectively, Mbeya Township, registered in the Applicant's name.

In the course of hearing the said **Commercial Case No.106 of 2017**, the parties registered a Compromise of the Suit and a Consent Judgment was issued. Upon Consent Judgment and Decree, it seems that the Judgment Debtor did not satisfy the Decree as agreed.

In order to satisfy the decretal amount, the Respondent (by then the Plaintiff as the Judgment

Creditor) moved ahead and sold the property offered as security for the loan.

According to the Applicant's assertions, the move to execute the Decree was without any execution order of the Court and, without knowledge of the Applicant. It is averred that the Applicant came to the knowledge of the sale on 18th January 2020 after receiving the letter from the Respondent that the mortgaged house was sold on 24th December 2020 to a bona fide purchaser. He was further made aware that the sale did not fetched the amount which could fully satisfy the outstanding loan amount and, therefore, the Respondent was demanding further payment of the un-liquidated amount.

In objection to the application, through the services of Mr Zacharia Daudi, Advocate, the Respondent filed a counter-affidavit. Besides, the Respondent filed a Notice of Preliminary Objections, thereby raising two grounds, to wit, that:

(1) this application is bad in law, abuse of court process and it will lead to filling of a *res judicata* application.

(2) That, this application is incompetent for want of joinder of necessary party (the buyer); consequently, this application should be dismissed with costs.

As the law and practice would require, the matter was scheduled for an oral hearing to dispose of the preliminary points of law raised by the Respondent. On 12th April 2021, the parties appeared before this Court. The Applicant was represented by Mr Paul Mgaya, learned advocate, while Mr Zacharia Daudi, learned advocate stood for the Respondent.

At the hearing of the preliminary legal issues, Mr. Zacharia submitted on the first point in relation to the issue of *res-judicata*. He contended that, the application at hand is bad and constitutes an abuse of the process of the Court in that; the prayers sought by the applicant had been previously dealt with in an application which was

filed at this same Court's (Land Division) as **Land Case No.19 of 2020**.

Mr Zacharia maintained that, that previous matter was dismissed. In view of that, he submitted that, in the mean time, the only remedy available for the Applicant is to appeal against the dismissal of the application and should not have come to this court by way of another application.

To support his assertions, Mr Zacharia placed reliance on the said Land case No. 19/2020 and the case of **Marato S/O Matiku v Wankyo Sanawa [1987] TLR 150 (HC)**. In this latter case, Munyera J., (as he then was), held that, where grounds relied in a latter case filed in Court are the same as those in the former case dismissed by the same Court, then, the latter case is *res-judicata*.

On the basis of that authority, Mr Zacharia submitted that, the Applicant is relying on similar grounds to seek extension of time while the same were considered by this Court in the **Land case No. 19/2020**. He urged

this Court to refuse to grant the application since doing so would amount to a flagrant abuse of the process of this court, taking into account that the application to be filed is *res judicata*.

As regards the second point, regarding the competence of this application due to failure to join the necessary party, it was Mr Zacharia's submission that, it is improper for the Applicant who is seeking to set aside a sale transaction concerning a property which was already sold to a *bonafide* purchaser without joining that purchaser in the matter before this Court as a necessary party.

In his views, the buyer ought to have been joined because any order to be issued by the court will affect the purchaser. He contended, for that matter, that, the innocent purchaser has a right to be heard before this Court proceeds to make any order affecting the property. To fortify his stance, Mr Zacharia cited the case of **Juma B. Kadala v Laurent Mnkande [1983] TLR 103**, and prayed for this application to be struck out with costs.

Responding to that brief submission, Mr. Mgaya, the learned counsel for the Applicant, submitted that, the preliminary objections lack merit. Addressing the first point of objection concerning the issue of *res judicata*, Mr Mgaya contended that, the Respondent's submissions are misconceived because they do not reflect a correct position.

According to Mr Mgaya, the matter before the High Court Land Division, (Land case No.19/2020) was never determined on merit. He referred this Court to page 8 of the ruling of this Court, (Madam Mango, J.,) noting that, the High Court (Land Division) dismissed the matter for lack of jurisdiction. Mr Mgaya argued that, the Court arrived at such a position because it was not the appropriate court to have dealt with the matter in the first place.

He submitted, therefore, that, on that juncture, the Applicant sought to bring this instant application to seek for extension of time with a view to challenge the execution proceedings in **Commercial case No.**

106/2017. He contended further that, earlier the Plaintiff in that suit had gone to a wrong Court but now he has come to the right forum.

To buttress his argument, he referred to this court on the case of **Quality Group Limited v Tanzania Building Agency, Civil Application No. 102/2016 CAT**, (unreported), and insisted that, for a matter to be *res judicata*, it must be heard on merit. Since the earlier hearing was not on merit, he urged this Court to dismiss the first point of preliminary objection as the matter was not *res judicata* as contended.

Concerning the second point of objection, Mr. Mgaya submitted that, it also lacks merit and does not hold water at all. Mr Mgaya contended that, the current application is simply an application for extension of time to bring an application to set aside a sale alleged to have been illegally procured. For that reason, he argued that, the objection was brought rather prematurely. He further contended that the issue of who is necessary party is a matter of fact which calls for evidence.

To strengthen his position, Mr Mgaya relied on the decision of the Court of Appeal of Tanzania in the case of **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman and another, Civil Revision No.6/2017 (CAT) (unreported)** in which a discussion regarding who is a necessary party was carried out.

Mr Mgaya submitted further, that, since the application is not to set aside a sale, but rather to apply for extension of time, it was premature to join the party in this early stage. He thereby prayed that the second point of objection be as well dismissed.

In a brief rejoinder, Mr. Zacharia insisted that a dismissal order is the decision on merit. For that matter, he maintained that its dismissal order of the court in **High Court Land Division, Case No. 106/2020** was a decision on merit.

Concerning, the second point of objection, Mr Zacharia submitted further that, the non-joinder of the purchaser in this application, should not be regarded as a premature argument because, the property he purchased,

is the subject matter of these proceedings. For that matter, he contended that, the buyer has the right to know about any order which will touch on his property. He reiterated his prayer to have this application dismissed by this Court.

I have impassively given my consideration to the rival submissions. The issue I am called upon to resolve is whether the objections raised by Mr. Zacharia are merited. Primarily, the parties are not in dispute regarding the fact that the Applicant filed a **High Court Land Division Case No. 106/2020** and the Court dismissed it.

What they seem to differ from each other is whether the dismissal order had the effect of rendering this application *res-judicata*. I have read the ruling of my learned sister Judge, Madam Mango, J., and, indeed, she dismissed the suit, **Land Division Case No. 106/2020**.

The question now is whether that dismissal can be relied upon to operate as a bar to this application for extension of time to set aside a sale of landed property

which sale was carried out in execution of a decree issued by this Division of the High Court in the Commercial Case No.106 of 2017.

According to Mr Mgaya, the ruling did not determine the merits of the matters filed before the Court. Indeed, looking at the ruling of the High Court (Land Division), it is true that the Court did not entertain the suit filed before it on its merit as argued by Mr Mgaya. What I can observe from the ruling is that, the matter was determined at a preliminary stage following objections raised by Mr Zacharia, who happened to represent the Defendants before that Division of the Court.

As regards the order of dismissal of the suit, it is indeed true that the order of dismissal presupposes that the parties were heard on merit. However, the circumstances that led to the issuance of that order do not tell it that way. That fact, nevertheless, is not in my mandate to correct even if it may be taken to be a slip of the pen since the appropriate order ought to have been the striking out of the suit.

Be that as it may, the point is that, the suit was not heard on merit and, for that matter, the issue of *res-judicata* cannot be a bar to this application. The first objection, therefore, is hereby overruled.

As regards the second ground of objection, the issue to consider out of it is whether the application is defective for non-joinder of the person who purchased the property in dispute at this stage. In my view, the purpose of this application is to seek for extension of time. Mostly, considerations relevant to it would have been whether the Applicant has sufficient reasons to be allowed more time or not. That would have been the end, and nothing more, nothing less.

In the circumstance of this Application, I do not see how such consideration or even orders that may follow thereafter will be said to have prejudiced a third-party, like the buyer who purchased the property in dispute, as argued by Mr Zacharia. I agree with Mr Mgaya, that, the objection filed and argued by Mr Zacharia is somehow misplaced.

In essence, the objection raised by Mr Zacharia ought to have been filed and argued the way it has been argued, if we were to be arguing the anticipated main application which, unfortunately, is to be filed if this first stage is argued successfully by the Applicant, and, if the Applicant does not join the buyer in that application.

The submissions, and, the second objection, therefore, have come rather prematurely and, for that matter the second objection is also hereby overruled. In the final analysis, both points of objection are hereby overruled with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this **17th May 2021**



A handwritten signature in blue ink, appearing to read "Nangela", written over a horizontal dotted line.

**HON. DEO JOHN NANGELA
JUDGE**