

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 127 OF 2023

**EXIM BANK (TANZANIA) LIMITED.....PLAINTIFF
VERSUS
NATIONAL FURNISHERS LIMITED.....DEFENDANT**

RULING

*Date of last order: 14/02/2024
Date of ruling: 04/04/2024*

AGATHO, J.:

This ruling was triggered by the Preliminary Objections (POs) raised by the Defendant against the suit. These were:

1. That the court lacks jurisdiction and indeed it is functus officio having ruled I Misc. Commercial Application No. 248 of 2018 where similar issues as raised in this suit were adjudged that they should be determined by High Court Land Division in Execution proceedings in Land Case No. 210 of 2015.
2. That the suit is bad in law as the subject matter of the suit relates to the execution of the court's decree in land case No. 210 of 2015. That the proper cause of action would have been the same through execution of the said Land Case than instituting this suit.

3. That the suit is res judicata to Misc. Land Application No. 1130 of 2017 of the High Court Land Division read together with Civil Appeal No. 100 of 2020 of the Court of Appeal of Tanzania at Dar es Salaam between the same parties.

The parties were represented by learned advocates. Whereas Mr Gaspar Nyika appeared for the Plaintiff, Mr James A. Bwana represented the Defendant. The POs were heard by way of written submissions.

To set the record straight it worthwhile to sketch the background albeit briefly. The Defendant on 15th July 2015 instituted as suit Land Case No 210 of 2015 against the Plaintiff. In the suit the Defendant was contesting the sale of her mortgaged properties pledged as security for the loan the Plaintiff advanced to her. The parties amicably settled the matter by filing deed of settlement in court that resulted into consent judgment and decree. The Defendant herein defaulted triggering execution process by sale of the two landed properties of the Defendant located at Msasani Peninsula, Kinondoni Dar es Salaam. The Plaintiff participated in the sale and she became the highest bidder and eventually a winner. She thus bought the two properties and deposited 25% of the sale price.

She later applied for set off of decretal sum and the whole balance amount payable under the mortgage secured in favour a Defendant's sister company, Kaw Apartments. The court declined the application. Contrary to the law, the Registrar of the HC Land Division ordered the Plaintiff herein to deposit USD 923,882 into the Judiciary Bank account for execution to proceed.

The plaintiff went on to challenge the Registrar's order, and simultaneously proceeded to seek redress against the Defendant at the HCCD. It was during that time that the Plaintiff realized that the deposited monies, 25% at the Judiciary account have been disbursed to the Defendant, TZS 1, 621, 297, 900/=, Joshua E. Mwaituka, t/a Rhino Auction Mart, TZS 414, 515, 850/= and Jehangir Abdulrasool, TZS 200,000,000/=.

As that is not enough the Plaintiff filed an Application No. 1130 of 2017 at the HC Land Division at DSM against the Defendant, seeking inter alia the disbursement of 25% of sale deposit, accruing from the auction in execution decree of the Land Case No. 210 of 2015, an order directing the Defendant and any other beneficiary benefited from the said disbursement to repay the said amount to deposit the said amount into the Judiciary account No. 9921169726. In event they fail to do so the court be pleased to order sale of the properties belonging to the Defendant and the those who received the disbursed monies. Having heard the application, Opiyo, J dismissed the said application for being incompetent before the court. The dismissal of the application irked the Plaintiff who preferred the appeal to the CAT. That was the Civil Appeal No. 100 of 2020 before the CAT at DSM. The Justice of Appeal having heard the appeal observed that the appeal was incompetent for lacking leave. But seeing the application from which the appeal emanated was clouded with an apparent error the CAT exercised its revisionary power and set aside the dismissal order and substituted it with an order striking out the incompetent application in Misc. Land Application No. 1130 of 2017 at the HC Land Division at DSM.

Sequel to the CAT decision the Plaintiff filed Misc. Commercial Application No. 248 of 2018 arising from Commercial Case No. 186 of 2017. In that application the applicants (amongst the Defendant) sought the court order to depart from scheduling order in Commercial Case No. 186 of 2017 for the applicants/defendants therein to apply for an order to amend the WSD in main suit (Commercial Case No. 186 of 2017). And that the court be pleased allow the defendants therein to amend their joint WSD in Commercial Case No. 186 of 2017. The court having heard the application dismissed it.

But I must state here that it is not clear what was the outcome of Commercial Case No. 186 of 2017. Be it as it may that cannot detain this court from determining the POs raised in the case at hand.

I will start by examining the first PO as if found meritorious may dispose the matter. The first PO is to the effect that the court lacks jurisdiction and indeed it is functus officio having ruled I Misc. Commercial Application No. 248 of 2018 where similar issues as raised in this suit were adjudged that they should be determined by High Court Land Division in Execution proceedings in Land Case No. 210 of 2015.

However, before delving into the substance of the PO, let us revisit the body of the Plaintiff's suit. According to the plaint in Commercial Case No. 127 of 2023 paragraphs 10, 12, and 13 the Plaintiff is claiming from the Defendant among others, payment of USD 1,001,250.00 (Say United States of America Dollars One Million, One Thousand Two hundred fifty and zero cents) or its equivalent in TZS being money deposited by the Plaintiff to the

High Court of Tanzania Land Division and which was unjustly and wrongfully received by the Defendant.

The Plaintiff's view is that Defendant's main objection is that the issues raised by the Plaintiff in the suit at hand are directly and substantially similar with the issues raised in Misc. Land Application No. 1130 of 2017 at HC Land Division and Civil Appeal No. 100 of 2020 the Plaintiff preferred at the CAT. Both latter cases have been concluded.

This court will not restate what the parties have submitted in their submission. But where necessary the parties' submissions will be referred. It is noted in the Plaintiff's submission that in her attempt to distinguish the present suit and the Misc. Land Application No. 1130 of 2017 at HC Land Division submitted that the decision of Opiyo J in that application, and the Civil Appeal No. 100 of 2020 though they were about the same parties did not determine the issue raised in the present suit. In this suit the Plaintiff claims that the Defendant has unjustly enriched itself by withdrawing the sum of USD 1,001, 250.00 from the Judiciary Account. The learned counsel for the Plaintiff submitted that neither the decision of Opiyo, J did nor the CAT decision in Civil Appeal NO. 100 of 2020 determine whether the Defendant's withdrawal of USD 1,001,250.00 was lawful or not. For that reason, these cases are different. The issues are dissimilar. The Plaintiff submits that the issue of unlawful enrichment has not been determined by the court. Therefore, neither doctrine of res judicata nor the functus officio principle applies. It is Mr. Gaspar Nyika's view that this court has jurisdiction to entertain the matter.

The court will concentrate therefore on the first PO and leave the other POs. What is gathered from parties' submissions is that the Plaintiff has completely avoided discussing the issue of execution in Land Case No. 210 of 2017. The court wondered whether it is proper to raise a new claim or suit from the proceedings of execution? The Plaintiff categorically stated in the plaint that the claim is for the money that was deposited in the Judiciary Account as part of execution. Is it therefore proper to file a new suit in such circumstances? The court finds Opiyo, J's reason in Misc. Land Application No. 1130 of 2017 at HC Land Division to be quite appealing. Though her conclusion at page 7 differs from this court's finding in **MIC v Commercial Bank of Africa (T) Limited**, Misc. Commercial Application No. 37 of 2023 HCCD at DSM. The court also concurs with observations of Philip, J in her ruling in Misc. Commercial Application No. 248 of 2018 at pages 15 last paragraph and page 16 first paragraph citing Section 38 and Order XXI Rule 82 of the CPC which provides:

"Section 38 (1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

This court asked itself whether the Plaintiff's claim of USD 1,001,250.00 is connected to execution in Land Case No. 210 of 2015 and the Misc. Land Application No. 1130 of 2017 at HC Land Division. The answer is

drawn from the Plaintiff's plaint para... and her submission that the claimed amount of USD 1,001,250.00 was the money that the Plaintiff deposited in the HC Land Division as part of execution and unjustly and wrongfully received by the Defendant.

There is no dispute that the money claimed by the Plaintiff against the Defendant was deposited as part of execution proceedings in Land Case No. 210 of 2015. Now, a question lingering is whether it is proper to file a fresh suit? That is contrary to what the law provides under Section 38 (1) of the CPC stating that all questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

In fact, the Plaintiff is claiming restitution of USD 1,001, 250.00 the money wrong received by the Defendant from the Judiciary Account. That money was deposited as part of execution proceedings. Although the Plaintiff has claimed that this is unjust enrichment the provision of Section 38(1) of the CPC bars institution of a new suit where the money claimed relates to execution proceedings like in the case at hand.

This court had an opportunity to deal with a slightly similar matter in **MIC v. Commercial Bank of Africa (T) Limited**, Misc. Commercial Application No. 37 of 2023 originating from Commercial Case No. 72 of 2009 in which the applicant was seeking restitution of the money that was deposited in the Court account as part of execution but wrongfully transferred to the respondent's bank account from the court account.

It is the court's settled view that the appropriate application would have been to go back to the executing court and file the application for restitution as done in **MIC's case** (supra) not filing a fresh suit as done here. The court thus concurs with the Defendant that the application is incompetent and cannot be allowed to stand in this court. The first PO is thus sustained. It is needless to proceed examining other POs.

By the way, what is stated in paragraph 15 of the plaint left me wondering whether a suit of unjust enrichment is not a normal tort that could have been filed in another court with competent jurisdiction. And this court may not have jurisdiction as it is not commercial matter despite the plaintiff claiming that it is based on a commercial transaction. But the point of jurisdiction was raised by the court suo motu and the parties have not addressed it. For that reason, it was raised as obiter dictum. But jurisdiction is a fundamental point that can be raised suo motu as per *Richard Julius Rukambura vs. Issack Ntwa Mwakajila and Tanzania Railways Corporation* [2007] T. L. R. 91.

That said, and since the first PO is sustained, the suit is consequently struck out. Each party shall bear its costs.

Order accordingly.

DATED at DAR ES SALAAM this 4th Day of April 2024.




U. J. AGATHO

JUDGE

04/04/2024

Date: 04/04/2024

Coram: Hon. U.J. Agatho J.


For Plaintiff: Libent Rwazo, Advocate

For Defendant: James A. Bwana, Advocate

C/Clerk: E. Mkwizu

Court: Ruling delivered today, this 4th April 2024 in the presence of Libent Rwazo, advocate for the Plaintiff and James A. Bwana, counsel for the Defendant.




U. J. AGATHO
JUDGE
04/04/2024