

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

AT ARUSHA

COMMERCIAL CASE NO. 12 OF 2020

CNBMI TANZANIA LIMITEDPLAINTIFF

VERSUS

KAMALJIT SINGH HANSPAUL 1ST DEFENDANT

JATBIR SINGH HANSPAUL 2ND DEFENDANT

Date of Last Order: 09/07/2020

Date of Ruling: 23/07/2020

R U L I N G.

MAGOIGA, J.

The plaintiff, CNBMI TANZANIA LIMITED instituted this suit in this Court praying for this court to be pleased to jointly and severally enter judgement and decree against the above named defendants in the following orders, namely:-

- a. A declaration that the defendant have breached the agreement with the plaintiff through forgery and fraudulent misrepresentation by registering a Lease Agreement which was not the one signed by the plaintiff;
- b. An order to delete the false and fraudulent memorial entered in the Land Registry to wit file document number 48305, which was presented

by the defendants for registration on the 24/04/2018 purporting to show that the monthly rental is \$2,500= and the signature on the Lease Agreement are genuine;

- c. Refund of all, rents paid which amount to TZS.1,217,700,000=
- d. General damages
- e. For payments of all costs and incidental to this suit
- f. Any other reliefs the court shall be deemed just and fit to grant.

Upon being served with the plaint, the defendants filed a joint written statement of defence disputing the prayers and allegations by the plaintiff and called her to strict proof thereof and simultaneously raised the preliminary objection on points of law to the effect that:-

- i. This honourable Court has no jurisdiction to entertain and determine this suit;
- ii. This suit is bad in law and un-maintainable as it has been overtaken by events;

In the alternative;

- iii. This suit is bad in law for non-joinder of the necessary party namely the Registrar of Titles;

iv. This suit does not disclose a cause of action against the defendants

In order to have better understanding of the present ruling, I find it apt to narrate briefly the background facts leading to this ruling. On 10th April 2018 the plaintiff and defendants entered into a Long Lease Agreement on a property owned by the defendants situated at Plots No. 19, 20 and 1306, Mshono area, Arusha City comprised of certificate of title NO. 56751 for six years from September 2018 up to 31st August 2024 at a reserved rent of \$25,000= per month. The facts go that, the plaintiff paid annual rent from 15th September, 2018 up to 14th September, 2019 and paid other taxes as required by law out of that agreement to relevant authorities. And a second rent covering the period 15th September, 2019 to 14th August 2020 was paid on understanding that the Lease Agreement has been registered. In the course of the agreement, the plaintiff made an official search in order to confirm if the registration that was left to the lawyers of the defendants was done as agreed, but the search revealed that the Lease Agreement was registered under filed document No.48305 with effect from 01/09/2018 was for rent of \$2,500= per month contrary to the agreed rent of \$25,000=and that the signatures of Mr.KUN LIAO and Mr. JING YANG directors of the plaintiff were not genuine. On account of the two predicaments, the plaintiff

decided to institute this suit praying for, among others, declaratory orders that the defendant breached the Lease Agreement through forgery and an order to delete the false and fraudulent Memorial entered in the Land Registry.

The plaintiff at all material time had the legal services of Mr. Andrew Moses Maganga, learned advocate from Arusha based legal clinic of JJM & Co Advocates. On the other hand, the defendants, had the legal services of Mr. Rodgers Godfrey Mlacha, learned advocate from Arusha based legal clinic of Dexter Attorneys.

When this suit was called for hearing of the preliminary objections, all learned advocates for parties were ready to argue for and against the objections. Mr. Mlacha pointed out that, he will argue all four points of objection raised. Starting with the first limb of the objection, the learned advocate for the defendants told the court that, his first limb of objection is premised under section 7(1) of the Civil Procedure Code, [Cap 33, R.E. 2002]. According to Mr. Mlacha, the instant suit, though a civil nature, but its cognizance is expressly or impliedly barred. Mr. Mlacha argued that section 7(1) of the CPC is in pari materia with the section 9 of the Indian Code Civil Procedure in which the two renown Indian authors Mulla (16th edition) and Sakar (12Th

Edition) respectively on the Code Civil Procedure pointed out that, whenever a right is created by a statute and that statute provides a machinery for the enforcement of the right, the civil court's jurisdiction is barred. In support of the above stance, Mr. Mlacha, learned advocate cited the cases of CHINTALA KRISHNAMURTY v. UPPALA RAJLINGAM (1980)AIR 69, STATE OF ANDRA PRADESH v. MANJETI LAXMI KANTHA RAO (2000) and CHURCH OF NORTHERN INDIA v. LAVAJIBHAI RATANJIBHAI AND OTHERS (2003) SCI 9419 by supreme court of India.

Mr. Mlacha implored this court to take wisdom from Indian courts and find out that, this court lacks jurisdiction to determine and entertain this matter because by nature of this suit, is not civil nature because the principle questions at paragraphs 4 and 16 of the plaint, is the wrong memorial entered in the register as a result of the defendants illegal act of forgery, which act do not relate to the plaintiff's right.

According to Mr. Mlacha, on account facts pleaded in paragraphs 4 and 16, gave three reasons why this suit is barred to be entertained by this court; these are, **one**; to avoid criminal acts likely to be implicated in, hence, the suit not qualifying to be a civil suit but criminal suit which is barred from the jurisdiction of this suit. **Two**, is that, the cognizance of this suit is impliedly

barred because the prayers are rectification of the Land register which are taken care of the Land Registration Act, and under section 109 of the Act, the registrar is empowered to destroy all obsolete documents which have ceased to have effect and has powers to order indemnification, including the costs under section 107 of the Act. **Three**, that this suit is improperly preferred because under section 99(1) (b) of the Land Registration Act, same was to be referred by way of application and not by way of a suit. Therefore, failure to prefer the matter by way of application is fatal and outs the jurisdiction of this court. To bolt up his argument the learned advocate cited the case of PARIN A.A. JAFFER AND ANOTHER v. ABDULRASUL AHMED JAFFER [1996] TLR 110.

On the totality of the above reasons, Mr. Mlacha prayed to this court to uphold the first preliminary objection and proceed to dismiss this suit.

In response, Mr. Maganga diametrically submitted in reply that, all the submissions, literature and cases cited are from India are merely persuasive in the interpretation of the statutes and nothing more. Mr. Maganga cited the case of MUKISA BISCUITS DISTRIBUTORS Ltd v. WEST END COMPANY LIMITED [1969]EA 696 in which it was held that a preliminary objection on point of law must be pure point of law, which if, uphold should be able to dispose of the case.

Mr. Mganga, cited article 107A of the constitution and argued that, in exercising the powers of dispensation of justice, courts shall have freedom and are required only to observe the provision of the constitution and the law of the land. On the argument of Mr. Mlacha, learned advocate for the respondent that, the suit is barred under section 7(1) of the CPC, it was the brief reply of Mr. Mganga that, the section do not provide for any stipulation that the court is ousted with jurisdiction to entertain this suit.

An argument that, this suit is pegged on paragraphs 4 and 16 which alleges criminal conduct by the defendants, Mr. Maganga pointed out and replied that, the same is misconceived and demonstration that the learned counsel for defendants read the plaint in piece meals. According to Mr. Maganga, the first prayer is a declaration for breach of agreement through forgery and misrepresentation by registering a contract not signed by the plaintiff and as such occasioning loss of faith.

Further Mr. Maganga argued in reply that the provisions of section 99(1) of the Land Registration Act, [334 R.E.2002] provides for two options for seeking redress, one is to go the Registrar and the second is to come to the High Court. The choice of the plaintiff to come by way of suit is because the Registrar cannot issue an order for breach of contract. As to section 109 of

the Land Registration Act, it was the argument of Mr. Maganga that, is inapplicable to the situation we have because it applies where the reasons for rectification is based on error committed by the government.

On the reasons that, the plaintiff was to come by way of application, Mr. Maganga was brief to the point that, the Act does not prescribe the procedure for rectification and Order XLIII Rule 3 does not embrace application to final orders. To bolt up his argument, Mr. Maganga cited the case of PARRIN A. A JAFFER (supra) and insisted that in that case it was held that, Cap 334 does not prescribe the procedure for rectification, and that, it offers, alternative between High Court and the Registrar of Titles.

On the account of the above reasons, Mr. Maganga prayed that the first limb of objection be overruled with costs.

This court, however, is intending to determine together the merits or demerits of grounds one and two which are interlinked in this suit.

Having carefully considered the rival arguments of the learned advocates for and against the first limb of objection, I am inclined to the stance that the first limb of objection is partially to fail and partially to succeed. I will give reasons to both situations. There are two reasons why partially to fail; **One,**

going by the provisions of section 99 (1) it is crystal clear as day light that when an issue of rectification of the register is at issue, an aggrieved party have two options; one, through Registrar and two, through High Court. **Two**, further as rightly held in the case of PARIN A.A.JAFFER (supra) by the this court cited by both learned counsel, which I find no reasons to differ, no prescribed way of making such application and I hasten to add that it depends on the nature of the prayers which determine which way to come to get the right redress. In the circumstances, even a suit can achieve the very purpose.

One reason why this limb has to succeed and which is interlinked with the second limb of objection, is that, where the rectification has been done by the Registrar for any reason, as in this suit through document no. 54714 dated 21/05/2020, any aggrieved party may appeal to the High Court against such decision and not to institute the suit because the only jurisdiction of the court spared is the hearing of the appeal from the act or omission of the Registrar and not by way of a suit. Guided by the provisions of section 32 read together with section 99(1) of the Land Registration Act [Cap 334 R.E.2002] it is loud the rectification envisaged in this suit, this court cannot entertain it by way of suit but an appeal, hence, this court is not seized with jurisdiction to the prayers sought. The argument by Mr. Maganga that there is prayer of

declaration of the breach of contract, hence this suit can stand, is misconceived because the said prayer has its roots from the entering and rectification of the memorial in the register which has been accomplished by the Registrar.

On account of the above reasons, this court find and hold that the first limb of objection is partly overruled and partially sustained and on account of the last part of sustaining the objection this court hereby find and hold that is not seized with jurisdiction to try this suit by way of a suit but only by way of an appeal if preferred in time from the date of the decision by Registrar.

With the above holding of the court I could have stopped here and dismiss this suit, but for more guidance, the second ground as well raises more pertinent legal issue which this court find to address. In respect of the second limbo of objection that, the instant suit is bad in law and un-maintainable as it has been overtaken by events. The learned counsel for defendant submitted that the whole cause of action in this suit is on wrong memorial entered in the register in respect of the lease agreement. The learned counsel argued forcefully that in terms of section 32 of the Land Registration Act, the application for rectification was presented before the Registrar on 17th April 2020 when the defendant applied for rectification of the register and the

instant suit was instituted on 15th May 2020. According to Mr. Mlacha, section 32 of the Act, time for rectification starts to count on the date of application and not on date the inscription was made on register.

More so, the learned advocate for the defendant argued that guided by the provisions of section 5 of the Act, the court is to take judicial notice of the date of application and found that, the rectification, according to the law, was effected on 17th April 2020, and that, by 15th May 2020, when this suit was instituted, it has already been overtaken by events. It is on account of the above chronological of events that Mr. Mlacha submitted that the suit has been overtaken by events and consequently prayed that same be dismissed with costs.

On the other adversary part, Mr. Maganga argued in reply that the suit was filed on 15th May 2020 and the defendants were served on 20th May 2020 and the allegations of rectification was done on 21st May 2020 as clearly shown in the deed of rectification filed document no 54714 at 1pm. It was further submission of the learned counsel for plaintiff that, on 15th May 2020 a caveat was filed by the plaintiff on document no 41 at 1pm. Therefore, according to Mr. Maganga by 15th May 2020, no rectification has been done and the argument by the learned counsel that rectification was done on presentation

of the same is intended and calculated to circumvent the judicial process initiated by the plaintiff to file the suit. Another reason given by Mr. Maganga is that a suit is not overtaken by events because it encompasses the breach of contract which is separate from the claim of rectification, which is among other prayers in the suit.

The learned counsel for plaintiff argued that section 5 of the Act was quoted out of context and that section 32 of the Act is inapplicable in this situation because the only document referred to was the deed of registration which clearly shows the same was registered on 21st May 2020 and it is the day which the 30th day of notice lapsed issued on 17th April 2020.

On the above reasons, Mr. Maganga argued that, this preliminary objection is misconceived and misguided because it will involve looking at documents and as such falls outside the purview of the preliminary objection. To bolt up his arguments, Mr. Mganga cited the cases of THE REGISTERED TRUSTEES OF SHADHITY v. SALUM OMAR [2017] TLSR 262 AND EDNA JOHN MGENI v. NBC AND ANOTHER [2016] TLSR 446, underscore the point. Conclusively, Mr. Maganga prayed that the instant preliminary objection be dismissed with costs.

In rejoinder, Mr. Mlacha submitted that there is no dispute that rectification was done and section 32 is clear the same is to start from the date of application for rectification and not the date of inscription. According to Mr. Mlacha, the plaintiff was notified of the application and instead of objecting, he preferred to file a caveat which was out of context and of no effect. Therefore, the rectification was done without any objection and same has to be considered done on 17th April 2020 before even filing the suit. The learned counsel for defendants distinguished the cases cited by the learned advocate for the plaintiff as distinguishable. On that account, the learned advocate for the defendants insisted and prayed that this preliminary objection on point of law be upheld and same be dismissed with costs.

I have dispassionately considered the rival arguments of the learned minds of the parties and the relevant provisions of the law [Cap 334 R.E.2002] on this point very careful and I am of the considered opinion that, this point is merited in the circumstances of this suit. In the circumstances, I find it apposite to reproduce the provisions of section 32 and 99 (1) of the Act hereunder for easy of reference and for better understanding how the two sections relates.

Section 32(1) A document presented for registration or entry in the land register which satisfies the requirement of this Act, and of any other relevant law **shall be deemed to have been registered or entered, as the case may be, at the moment when it is presented, notwithstanding that the actual inscription in the land register may be delayed.** (emphasis mine).

Section 99(1) **Subject to any express provision of this Act, the land register may be rectified pursuant to an order of the High Court or by the Registrar, subject to an appeal to the High Court, in any of the following cases:-** (Emphasis mine)

From the wording of the above two provisions, in particular, section 99(1) of the Act, has to be read together with the express provisions of section 32 that the date of registration or entering the record in the memorial or rectification is the date of application.

That being the case, then, I will try to explain why I took the above stance. **One,** there is no dispute that the alleged land register allegedly wrongly entered for whatever reasons, has been rectified by the Registrar by a document No. 54714 at 1 pm on 21st May 2020 upon application made on 17th

April 2020 by the defendants. The effect of this rectification is that under the provisions of section 99(1)(f) of the Land Registration Act [Cap 334 R.E. 2002], in my considered opinion, is that, the aggrieved party by the order or act or omission of the Registrar, in the circumstances, is to appeal to the High Court and not to institute a suit. In deed the prayer (b) in the plaint which is the basis upon which the plaintiff claim the breach of lease agreement which is prayer (a) in the plaint has seriously been overtaken by events upon rectification that was done on 17th April 2020.

Two, as rightly argued by Mr. Mlacha and rightly so in my considered opinion, the provisions of section 32 quoted above are very clear that application for registration or entry in the land register shall be deemed to be registered or entered, as the case may be, at the moment when it was presented, notwithstanding that the actual inscription in the land register may be delayed. **Three**, all the arguments by Mr. Maganga on this point and cases cited are of little help on their part, despite there being allegations of breach of lease agreement, that this suit can stand, are far from convincing this court to hold otherwise because in the absence of document No.48305 which becomes obsolete by registration of documents 54714 and as such even prayer (a) is equilly overtaken by events. **Four**, in the light of MUKISA

BISUCUITS MANUFACTURERS LIMITED v. WEST END DISTRIBUTORS LIMITED [1969] EA 696 at page 701 where it was held that:

"... a preliminary objection consists of the point of law which have been pleaded or which arise by clear implication out of the pleadings and which if argued as preliminary objection may dispose of the suit.

..... a preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which if argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Guided by the above holding, and upon going through the ascertained facts pleaded which are not in dispute between parties, then the moment the rectification was made, then the only jurisdiction of this court spared is that of entertaining an appeal from the decision of the Registrar and not by way of a suit. Therefore, it is the considered opinion of this court that, not only that this suit is overtaken by events but same is misconceived for under section

99(1) is very clear how to go about when the two options are employed by the parties to a dispute.

On the totality of the above reasons, this suit is in law un-maintainable for being overtaken by events and want of jurisdiction to entertain the prayer of rectification on the party of the plaintiff. These two grounds suffice to dispose of this suit without going into the rest of the objections, which becomes redundant. That said and done, the instant suit is hereby found to have been overtaken by events and misconceived for want of jurisdiction and same is hereby dismissed with costs.

It is so ordered.

Dated at Arusha this 23rd day of July, 2020.



A handwritten signature in black ink, appearing to read "S.M. Magoiga". The signature is fluid and cursive, with a prominent initial "S" and "M".

S.M. MAGOIGA

JUDGE

23/07/2020