IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 265 OF 2019

BADUGU GINNING CO. LTD ..... APPELLANT

VERSUS

CRDB BANK PLC .....1ST RESPONDENT
MEM AUCTIONEERS AND GENERAL BROKERS .....2ND RESPONDENT
MOHAMED ENTERPRISES TANZANIA LIMITED.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 21st day of December, 2018
in
HC Land Case No. 1 of 2018

JUDGMENT OF THE COURT

19th April & 3rd May, 2021

LEVIRA, J.A:.

The appellant, BADUGU GINNING CO. LTD has preferred the current appeal against the decision of the High Court of Tanzania at Mwanza (Bukuku, J.) of 21st December, 2018 in Land Case No. 1 of 2018. In the said decision, the High Court dismissed with costs the appellant's suit subject of the present appeal on the ground that, the same was res judicata following parties' (some of them being the appellant and 1st respondent) settlement in Civil Case No. 147 of 2012 which was registered by the High Court. The applicant has presented before us a two-ground memorandum of appeal.

Before dealing with the current appeal, we find it apposite to briefly narrate the background of this appeal. It is on record that sometimes between the year 2008 and 2012, the appellant was advanced loan facilities by the 1st respondent which totaled six billion Tanzanian Shillings (Tshs. 6,000,000,000/=) for a term of 120 months ending in the year 2020 and the appellant mortgaged her property situated at Plots No. 90 -99 Block "A" Baruti Area at Musoma Township, with Certificate of Tittle No. 7352 LR Mwanza (hereinafter referred to as "the disputed property") so as to secure the said loan. However, the appellant failed to service the loan as agreed, an act which prompted the 1st respondent to institute Civil Case No. 147 of 2012 in the High Court of Tanzania (hereinafter referred as "the former suit") against the appellant and 6 others who appeared to be the guarantors of the appellant but they are not parties to the current appeal.

The record of appeal reveals further that on 11th July, 2014, the appellant and the 1st respondent entered in a mutual agreement to settle their dispute in the former suit out of court by signing a Memorandum of Settlement under Order XXIII Rule 3 of the Civil Procedure Code, (Cap 33 of the Revised Edition, 2002) (the CPC). It was agreed in the said Memorandum of Settlement that the appellant and one Ezekiel Mchinga

(one of the appellant's director) would dispose of the disputed property to M/S HOPER LOGISTICS LIMITED at the agreed purchase price in the sum of Tshs. 600,0000,000/= within 90 days from the date of recording by the court of the settlement deed. It was also agreed that the purchase price should be paid directly to the 1st respondent as part of the payment of the loan advanced and interest. Parties agreed further that after the payment of the purchase price to the 1st respondent, she would release and discharge the Certificate of Title in respect of the disputed property under power of sale. Also, it was agreed that the appellant and Mr. Ezekiel Mchunga shall pay the 1st respondent the sum of Tshs. 150,000,000/= within twelve months from the date of payment of Tshs. 600,000,000/= in full settlement of claims of the 1st respondent in the said suit. That the 1st respondent would withdraw the suit against other defendants (2nd, 3rd, 5th ,6th and 7th) who are not parties to this appeal; with leave to file a fresh suit against them in the event of failure by the appellant and Mr. Ezekiel Mchunga to pay the sum of Tshs. 150,000,000/= referred to above.

The parties to the agreement agreed and filed in court the said agreement as a Decree of the Court to be enforced in the event of

default. It has to be noted that the decree of the High Court was issued on 9th April 2015.

According to the record of appeal, the appellant failed to sale the disputed property in time. Therefore, on 2nd June, 2016 the 2nd respondent under instructions of the 1st respondent advertised the sale of the disputed property. On 19th June, 2016 the 2nd respondent conducted an auction of the said property where a company known as KEM LOGISITIC became a successful (highest) bidder at a price of Tshs. 600,000,000/=, the second highest bidder was Nyakilangányi Construction at a price of Tshs. 550,000,000/= and the third highest bidder was an individual by the name Hellebhulla Mwitondi at a price of Tshs. 500,000,000/=. However, the highest bidder (KEM Logistics) after being issued with a bid note failed to make a down payment of 25% on the offer price after the auction as required by the rules of auction and indeed, failed to make good of his offer of Tshs. 600,000,000/=. In lieu thereof, the disputed property was sold to the 3rd respondent for a consideration of Tshs. 600,000,000/=.

On 29th January, 2018 the appellant received a notice from the Assistant Registrar of Titles Lake Zone dated 22nd December, 2017 notifying him of the presentation for transfer of the disputed property

under power of sale to the 3rd respondent with the effect of changing ownership to the 3rd respondent within 30 days.

These facts prompted the appellant to institute Land Case No. 1 of 2018 (the subsequent suit) in the High Court claiming against the respondents jointly and severally for:-

i. A declaration that the sale of disputed property was unlawful hence void.

ii. A declaration that the appellant is still the lawful owner of the disputed premises.

iii. An injunction restraining the respondents and their agents from completing the sale of the disputed property, transferring it to the 3rd respondent, registering the sale documents and transferring in any way the disputed property.

Upon being served with a copy of plaint, the 1st and 2nd respondents filed their joint Written Statement of Defence (WSD) in which they raised a counter claim and a preliminary point of objection to the effect that, the appellant's claim was res judicata. The 3rd respondent filed her WSD and raised a preliminary objection on jurisdiction of the High Court in determining the matter before it and that the appellant had no cause of

action against the respondents. On her part, the appellant also raised a preliminary point of objection against the 1st and 2nd respondents' counter claim to the effect that, the same was res judicata. As it is required, the High Court determined the preliminary points of objection first. The learned High Court Judge upheld all the preliminary objections raised by the parties to the effect that the subsequent suit was res judicata and thus dismissed it. The appellant was aggrieved by that decision and hence the current appeal, in which two grounds have been raised as follows: -

> *"1. That the Honourable trial Judge erred both in law and fact to hold that the suit was res judicata.*
>
> *2. That the Honourable trial Judge misdirected herself on the failure to consider the submissions of the Appellants' advocate especially on the point that Execution of the decree being the last stage of any civil litigation was not observed by 1st respondent in Civil Case No. 147 of 2012 before the High Court of the United republic of Tanzania at Dar es Salaam."*

Basing on those grounds, the appellant urged the Court to allow the appeal, quash and set aside the Ruling and Order of the High Court and remit the suit to the High Court to be tried on its merits by another Judge.

It has to be noted at the outset that on 16th September, 2019 the 1st respondent filed a notice of cross appeal containing two grounds to the effect that: -

> *"1. That the trial judge erred in law and fact for failure to take into account the consideration of waiver made by the 1st respondent.*
>
> *2. That the trial judge erred in law and fact for failure to take into account Tshs. 40,000,000/= unpaid claim by the appellant to the 1st respondent."*

At the hearing of this appeal, the appellant was represented by Mr. Paul Kipeja, learned advocate, the 1st and 2nd respondents had the services of Mr. Mugisha Mboneko, learned advocate and the 3rd respondent was represented by Mr. Elisa Abel Msuya, assisted by Ms. Zakia Rias Ally, both learned advocates.

Before commencement of hearing of the appeal, Mr. Msuya withdrew a notice of preliminary objection against this appeal which he had filed in Court on 9th April, 2021. Therefore, hearing of the appeal proceeded.

Submitting in support of the appeal, Mr. Kipeja combined both grounds of appeal and stated that, the High Court erred in holding that the subsequent suit was res judicata following the consent judgment and the Decree of the High Court in the former suit. According to him, the

gist of the former suit was recovery of loan on which the parties therein entered consent agreement as indicated above.

He submitted further that, the appellant failed to pay the 1st respondent the agreed amount due to the fact that it took long time for the deed of settlement to be registered as Decree of the High Court. However, it was his contention that, the sale of the disputed property to the 3rd respondent did not follow the procedure and thus urged us to declare the sale void.

According to Mr. Kipeja, the High Court did not apply properly the conditions under the principle of res judicata as provided for under section 9 of the CPC in reaching her decision that the appellant's suit was res judicata. In support of his argument, he referred us to the decision of the Court in **Esther Ignas Luambano v. Adriano Gedam Kipalile,** Civil Appeal No. 91 of 2014 (unreported) in which the Court quoted with approval its decision in **Peniel Lotta v. Gabriel Tamaki and two others,** Civil Appeal No. 61 of 1999 (both unreported) where it was stated as follows:

> *"The scheme of section 9 therefore contemplates five conditions which when co-existent, will bar a subsequent suit.*
>
> *The conditions are:*

(i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.

(ii) The former suit must have been between the same parties or privies claiming under them.

(iii) The parties have litigated under the same title in the former suit.

(iv) The court which decided the former suit been competent to try the subsequent suit.

(v) The matter in issue must have been heard and finally decided in the former suit."

Expounding on the above-mentioned ingredients, Mr. Kipeja submitted that by the phrase '*the matter in the subsequent suit, must be directly in the former suit'*, it entails that the cause of action has to be considered. He argued that in the former suit the cause of action was payment or recovery of loan advanced by the 1st respondent to the appellant. While the subsequent suit intended to challenge the unlawful sale of the disputed property conducted by the 1st and 2nd respondents in recovery of the said loan. He went further explaining that the disputed property which the appellant urged the Court to declare it as his property was the same property which was used as a security in the former suit. However, he said that the subject matter in those two cases (the former

and the subsequent) was not directly and substantially the same. The property was the same in both suits but the cause of auction was different, he insisted.

Regarding the second condition that the parties must be the same, Mr. Kipeja argued that parties in the former suit and the subsequent suit were not the same, as the second and third respondents in the subsequent suit were not parties in the former suit.

Submitting on the third condition that parties must have litigated under the same title in the former suit, Mr. Kipeja argued that since parties were different in those two cases, they were not litigating under the same title. In support of his argument, he cited the decision of the Court in the **Registered Trustees of Chama cha Mapinduzi v. Mohamed Ibrahim Versi and Sons and Ali Mohamed Versi,** Civil Appeal No. 16 of 2008 (unreported).

In regard to the fourth ingredient concerning the competence of the court which decided the former suit, he said, this is in affirmative because the High Court had jurisdiction to hear the case.

As regards to the fifth and last condition, Mr. Kipeja argued that the former suit was not decided into its finality but it adopted an

agreement between the parties therein. It was his further argument that a compromise decree cannot be taken as res judicata. In support of his argument, he referred us to the Book by C. K. Takwani, **Civil Procedure**, Sixth Edition, 2009 in which it was observed that res judicata is not applicable in case of a compromise decree because compromise decree is not a decision by a court. Therefore, he urged us to consider that the decree in the former suit was a compromise decree which could not be taken as res judicata by the High Court when the appellant instituted the subsequent suit. Finally, he urged us to allow the appeal with costs.

In reply to the grounds of appeal Mr. Mboneko for the 1st and 2nd respondents opposed the submission made by the counsel for the appellant. He supported the decision of the High Court that the subsequent suit was res judicata. He submitted further that in deciding whether or not a matter is res judicata, the court has to consider the pleadings and decision reached. To support his contention, he cited the decision of the Court in **Dr. Bhakilana Augustine Mafwere t/a Baklina Animal Care v. Annael Gideon Orio & 3 Others,** Civil Appeal No. 33 of 2016 (unreported).

Basing on the decree by the High Court in the former suit, Mr. Mboneko argued that in the said suit, the matter was decided to its finality because the disputed property which was the subject matter in that suit was required to be disposed of. Therefore, the same subject matter cannot be relitigated in the subsequent suit by the appellant. It was his further argument that in the subsequent suit the issue was on the price and how the auction was conducted.

However, he said, the issue of price was conclusively determined in the former suit that it should be sold at Tshs. 600,000,000/= within 90 days. Failure to do so, the 1st respondent had to sale it. According to him, the appellant admitted that she failed to sale the disputed property as per the decree, that the sale was conducted and the highest bidder's price was Tshs. 600,000,000/=. He went on submitting that the 4th bidder (the 3rd respondent herein) was the one who bought the disputed property after enhancing the bid following the highest bidder's failure to pay the bid price. Mr. Mboneko insisted that the 1st respondent was authorised to sale the disputed property regardless of the price. However, the property in dispute was sold at Tshs. 600,000,000/=, the agreed price. Therefore, the appellant was not prejudiced.

It was Mr. Mboneko's argument that as the decree gave the 1st respondent power to sell the property in dispute, the irregularity in auction does not affect the innocent purchaser. As for him, the cause of action in both suits (the former and the subsequent) was the same and the sale of the disputed property was adjudged to its finality. In the premises, he argued that what the appellant intends to be nullified was already decided in the former suit. He argued further that if the appellant was affected by the sell, he had a remedy to sue for damages but not to sue for nullification of the sale which was adjudicated conclusively by the High Court.

Regarding the requirement that the parties should be the same in the former and the subsequent suit, Mr. Mboneko submitted that the parties were the same. According to him, in the subsequent suit the 2nd respondent who sold the disputed property was the agent of the 1st respondent and the 3rd respondent bought the said property. Therefore, they share common interest and hence the privy principle is met.

Submitting on the requirement that the matter must be determined conclusively, Mr. Mboneko stated that this condition was also met. In addition, he said, the consent judgment is the best judgment because parties themselves decide on their rights as in the case at hand.

Clarifying on how the suit was conclusively determined, Mr. Mboneko submitted that following the decree in the former suit, the suit against the appellant and the 1st respondent was finally determined except against other defendants who are not parties herein whose suit was withdrawn.

In the alternative, Mr. Mboneko submitted that, if the Court will find that the suit against the 1st respondent was not determined to its finality, then the waiver (raised in cross appeal) of Tshs. 17,044,228,857.14/= by the 1st respondent has to be resurrected.

Mr. Mboneko argued that the counsel for the appellant did not submit in respect of the second ground of appeal and thus it should be considered that he has abandoned it. He concluded his submission by stating that the consent decree determined the parties' rights and therefore they are estopped in litigating on it again as stated in the book of Takwani (supra). In the end, he urged the Court to dismiss the appeal with costs.

On his part, Mr. Msuya replied to the appeal by stating that the dispute between the parties in the former suit was conclusively determined by the High Court. According to him, the compromised

decree referred in the book of Takwani cited by the appellant's counsel is distinguishable from a decree of the court because a compromised decree is not a decree of the court. He referred us to page 11 of the record of appeal where the decree in question is found. As such, he said, the decree under consideration was signed by the High Court Judge and it was stamped and thus become a court decree. He insisted that since the decree was issued by the court, the matter at hand was conclusively determined.

Regarding the other condition that the matter must be litigated by the same parties, Mr. Msuya submitted that this condition was also met because section 9 of the CPC is very clear about the parties and their proxies.

It was his contention that the 2nd and 3rd respondents became parties in this matter because they were proxies since the 2nd respondent is the agent of the 1st respondent and the 3rd respondent is a buyer of the disputed property. He thus argued that the parties were the same in the former and subsequent suits.

Arguing on the condition that the matter directly and substantially in issue in the subsequent suit must have been directly and substantially

in issue in the former suit, Mr. Msuya submitted that in the subsequent suit the appellant complaint is based on how the auction was conducted but the pleadings at page 8 of the record of appeal, the appellant prays for the sale to be declared void and the appellant as the owner of the disputed property. He paused a question trying to imagine what will happen to the consent judgment if the Court will grant the appellant's prayers in this appeal and in the subsequent suit. According to him, this is where the issue of res judicata came in.

He argued that, if the auction was not conducted in accordance with the decree then, the remedy is to go back to the High Court in terms of section 38 (1) of the CPC but not to file a separate suit as happened in the case at hand. He added that the decree in the former suit is very particular in respect of the appellant and the fourth defendant therein as their rights were conclusively determined. According to him, the High Court Judge was right to hold that the matter was res judicata. Thus, he prayed for the appeal to be dismissed with costs.

Regarding the cross appeal, Mr. Msuya submitted that the counter claim is res judicata as the 1st respondent will not be allowed to claim for Tshs. 17,044,228,857.14/= which was already determined to its finality

in the former suit and the 1st respondent has already received Tshs. 150,000,000/= from the appellant.

In a brief rejoinder, Mr. Kipeja reiterated his submission in chief, emphasising that it was not correct for the High Court Judge to hold that the subsequent suit was res judicata. He argued vehemently that there was no lawful sale of the disputed property by the 1st respondent after failure of the highest bidder to pay the bid price. He maintained his argument that the act of the 1st respondent to contact the 3rd respondent to buy the said property is unacceptable and section 38 (1) of the CPC cited by the counsel for the 3rd respondent was cited out of context because in the current matter there was no executing court. In addition, he said, if there was a valid auction the appellant could sue for the damages but that is not the case in the current matter and the case of **Godebertha Rukanga** (supra) cited by the counsel for the 1st & 2nd respondents is inapplicable for the same reason.

Regarding the counter claim by the 1st and 2nd respondents, Mr. Kipeja rejoined that, if the Court will find that the 1st respondent acted out of agreement, then the waived money should be returned. Finally, he urged us to allow the appeal with costs.

We have dispassionately considered the submissions by the counsel for parties, record and grounds of appeal. We wish to observe at the outset that the counsel for parties have put more energy to argue as if the Court is determining the validity of the auction, the subject of the subsequent suit. We are alert and thus not prepared to be swayed away by tempting arguments and prayers herein. For that reason, our decision shall focus on the decision of the High Court subject of the current appeal. In particular, we shall determine whether it was correct for the trial Judge to hold that the subsequent suit was res judicata.

Section 9 of the CPC provides for circumstances under which courts are barred from entertaining suits for being res judicata. It reads:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same 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 issue has been subsequently raised and has been heard and finally decided by such court."*

In the book by Mulla **'Code of Civil Procedure'**, 13th Edition, Vol. 1 (hereinafter referred as Mulla), the phrase 'matter directly and substantially in issue' is expressed at pages 55-56 in the following words:

"The law is accordingly well settled that to invoke the bar of res judicata, it is not necessary that the cause of action in the two suits should be identical. It is only required that the matters are directly and substantially in issue should be the same in both suits.... ***Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue."*** [Emphasis added].

In the current appeal, it all started with the loan advanced to the appellant by the 1st respondent which the appellant failed to service. As a result, her mortgaged property (disputed property) had to be sold by the 1st respondent. The sale of the said property was preceded by the Settlement Agreement between the appellant and the 1st respondent which eventually was registered by the High Court and became a decree.

Section 3 of the CPC defines a decree as:

"The formal expression of an adjudication which, so far as regards the court expressing it, ***conclusively determines the rights of the parties*** *with regard to all or any of the matters in controversy in the suit. ..."*[Emphasis added].

The above definition of a decree suggests that since in the present appeal the decree was issued, the matter in controversy between the appellant and 1st respondent was conclusively determined. In the decree

of the High Court in the former suit found on pages 11-14 of the record of appeal, the appellant was given the first opportunity to sell the disputed property at the agreed price of Tshs. 600,000,000/= within 90 days from the date of recording of the settlement and that after the payment of the purchase price, the 1st respondent would release and discharge the Certificate of Title in respect of the disputed property under power of sale.

It was ordered further that in the event of failure by the appellant to sell the said property and pay the purchase price to the 1st respondent as agreed, the 1st respondent should be at liberty to exercise her power of sale of the disputed property at the market price and or forced market price and the price obtained regardless of the amount, should be retained by the 1st respondent towards settlement of the loan and interest advanced to the appellant by the 1st respondent.

Despite being given the opportunity to sell the disputed property, the appellant failed to do so and therefore the 1st respondent had to sell it; fortunately, at the agreed price of Tshs. 600,000,000/=. This fact is not disputed by the parties. However, vide the subsequent suit the appellant intended to challenge how the 1st respondent conducted the auction of the disputed property. The High Court Judge having

considered all the circumstances in the former suit, found that the subsequent suit was res judicata.

As we intimated earlier on, in terms of section 9 of the CPC quoted above, there are conditions which when co-existent, bar a subsequent suit. Those conditions were also stated in **Esther Ignas Luambano** (supra).

Going by the conditions, it was the argument of counsel for the appellant that the first condition did not exist in the subsequent suit, the argument which was opposed by both counsel for the respondents. The issue which we need to consider here is whether "the matter" in respect of which the appellant claimed relief in the subsequent suit was the same as in the former suit? It is clear in the record of appeal that, in the former suit the 1st respondent claimed to recover the loan which she advanced to the appellant. It was agreed that she would recover it through sale of disputed property following failure by the appellant to service the said loan and/ or sell the said property. The 1st respondent recovered the agreed amount through sale which the appellant intended to challenge through subsequent suit subject of the current appeal.

apply to the High Court to set aside that sale. We agree with Mr. Msuya that the law provides that all questions relating to the execution of the decree shall be determined by the court executing the decree and not determined as a separate suit (see section 38 (1) of the CPC).

Having so stated, we find section 133 (2) of the Land Act, Cap 113, R.E. 2002 (the Land Act) cited by the counsel for the appellant to be irrelevant to the current matter as it provides for the procedures of conducting public auction. For easy of reference, it reads:

> *"Where a sale is to proceed by public auction, it shall be the duty of the lender to ensure that sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are, as near as may be, followed in respect of that sale."*

In the present appeal, there is no dispute that public auction was conducted and the highest bidder succeeded to bid to the agreed, amount of Tshs. 600,000,000/=. However, she failed to pay the bid price and as a result, the disputed property was sold to the 3rd respondent who was the fourth bidder but upgraded his bid to the level of the 1st bidder. As intimated above, the question as to how the same was sold to

It was contended by Mr. Kipeja that for the court to satisfy that the first condition is met, the cause of action has to be considered, which he said, the High Court did not. We are unable to agree with Mr. Kipeja's line of argument because the disputed property which he claimed that it was sold unlawfully due to non-compliance with some of the procedures is the same disputed property in the former suit as the same was put as a security for the loan secured by the appellant from the 1st respondent. In our considered opinion, the question as to whether or not the sale of the disputed property followed the procedure could not be answered through the subsequent suit. The reason being that, the said sale was conducted in execution of the decree. If the appellant was of the view that the same was improperly conducted, she had a remedy under Order XXI Rule 88 (1) of the CPC which provides:

> *"Where any immovable property has been sold in execution of a decree, the decree holder, or any person entitled to share in rateable distribution of assets, or* ***whose interests are affected by the sale, may apply to the court to set aside*** *the sale on the ground of a material irregularity or fraud in publishing or conducting it."* [Emphasis added].

In the light of the above provision, the avenue which the appellant ought to have taken if she found that her interests were affected was to

the 3rd respondent, we think, would not be answered by the subsequent suit.

Regarding the second condition that in the former and subsequent suits parties litigating must have been the same or privies claiming under them, the **Black's Law Dictionary,** 8th Edition 2004, at page 3798 defines the term "privy" to mean: -

> *"A person having legal interest of privity in any action, matter or property; a person who is in privity with another."*

As regards the matter at hand, in the former suit parties were the 1st respondent who was the plaintiff and the appellant was the 1st defendant sued together with her guarantors. Mr. Kipeja argued that the parties in the former suit are not the same as in the subsequent suit because the 2nd and 3rd respondents were not parties in the former suit. This argument was also opposed by the counsel for the respondents who submitted that those two respondents became parties because of their status. They said, the 2nd respondent was an agent of the 1st respondent who was assigned to effect sale of the disputed property and the 3rd respondent is privy due to the fact that she bought the disputed property and hence, parties were the same.

In **Mulla** (supra) at page 77, circumstances under which a person becomes privy are clearly underscored as follows: -

> *"To make a person a **privy** he must have acquired an **interest in the subject matter of action** by inheritance, succession or **purchase** subsequently to the action".* [Emphasis added].

Applying the above illustration to the current matter, we find that the disputed property being the subject matter in the former suit was sold by the 1st respondent through the 2nd respondent to the 3rd respondent. Since the 3rd respondent was a purchaser of that property, she has an interest in the subject matter and hence privy. It is our considered opinion that had it been that in the subsequent suit the appellant had sued the 1st respondent alone, for instance, claiming the same reliefs, there could be non-joinder of parties which could lead to impracticability in the enforcement of the decree at the end of the day. By adding the 2nd and 3rd respondents in the subsequent suit does not change the fact that substantially parties in the former suit are the same parties in the subsequent suit. Therefore, we are unable to agree with Mr. Kipeja that parties are not the same in the former and the subsequent suit.

Regarding the third condition that parties must have litigated under the same title (same parties), this entails persons whose names are on the record at the time of the decision or a party who intervened in the suit as a co-defendant. (See **Mulla** (supra) at page 78). It is apparent on the record of appeal that the appellant and the 1st respondent were litigating under the same title in the former suit. The 2nd and 3rd respondents appear in the subsequent suit as parties (co-defendants) as the reliefs sought by the 1st respondent in the former suit would not be realised without involving them. As we intimated while dealing with the second condition regarding the status of the 2nd and 3rd respondent, it is our finding that parties were the same even if those two did not appear in the former suit, still the doctrine of res judicata would apply in the circumstances.

On the fourth condition regarding the competency of the Court, we do not need to take much of our time on this. Counsel for both parties were at one, and we agree, that the High Court which had decided the former suit was competent to try the subsequent suit.

In the last condition that the matter in issue must have been heard and finally decided in the former suit, counsel for parties had different views. While the counsel for the appellant argued that the suit between

the parties in the former suit was not determined to its finality on account that the auction of disputed property was not properly conducted and therefore void, the counsel for the respondents were firm that the same was finally decided basing on the fact that the decree was issued following consent judgment. It is noteworthy that according to the record, the agreement between the appellant and his colleagues and the 1st respondent was made under Order XXII rule 3 of the CPC. The same was registered and eventually became the decree which is a court's formal expression of an adjudication conclusively determining the rights of the parties with regard to any matter in controversy. It is our considered view that the matter in controversy between the 1st respondent and the appellant in the former suit regarding the recovery of loan advanced to the appellant through sale of the disputed property was conclusively determined. At any rate, we do not find the argument by Mr. Kipeja to be valid.

On account of what we have endeavoured to discuss above, we think, the grounds of appeal raised by the 1st respondent in cross appeal would stand had it been that the High Court entertained the subsequent suit on merit and not in this appeal.

Having stated as above, it is our finding that indeed, the subsequent suit before the High Court was res judicata and the High Court was justified to so hold.

For the above reason, the appeal before us is unmerited. Accordingly, we dismiss it with cost.

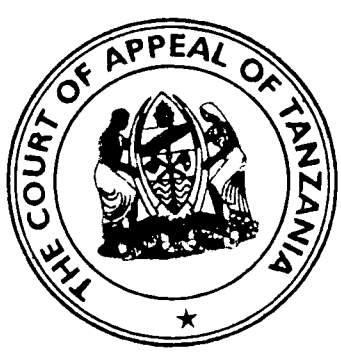
DATED at **MWANZA** this 30th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 3rd day of May, 2021 in the presence of Ms Scolastica Teffe, counsel for the appellant, who is also holding brief for Mr. Mugisha Mboneko for the 1st and 2nd respondent also holding brief for the Elisa Abel Msuya for 3rd respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL