IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 71 OF 2005

LEILA SHEIKH.....PLAINTIFF

Versus;

1. HELMAN LUPOGO.....1ST DEFENDANT
2. THE EXECUTIVE CHAIRMAN
   OF TANZANIA COMMISSION
   FOR AIDS (TACAIDS).....2ND DEFENDANT.
3. THE PERMANENT SECRETARY
   OF THE PRIME MINISTER'S OFFICE.....3RD DEFENDANT.
4. THE HON. ATTORNEY GENERAL..... 4TH DEFEDNANT

RULING

06/09/2011 & 18/02/2013

Utamwa, J.

This is a ruling on a preliminary objection (PO) against this suit. In this matter the plaintiff **Leila Sheikh** sued the four defendants **Helman Lupogo, the Executive Chairman of Tanzania Commission for Aids** (TACAIDS), **the Permanent Secretary of the Prime Minister's Office** and the **Hon. Attorney General** (1st, 2nd, 3rd and 4th defendants respectively or defendants collectively) for various reliefs. But according to the record of this suit, it is indicative that

following the previous preliminary objection raised by the same defendants and disposed of through the ruling of this court delivered on the 08/05/2009 (Kalegeya, J as he then was) it was directed *inter alia* that the suit should proceed on claims for defamation only. This is thus a suit for defamation. For purposes of clarity I will brand the PO decided earlier as the previous PO and the one under consideration as the current PO or the PO in short.

The current PO was raised by the 2nd – 4th defendants basing on three points as demonstrated hereunder. Parties argued the PO by way of written submissions. The joint submissions by the defendants were signed by an undisclosed State Attorney from the fourth defendant's office. The plaintiff's submissions in reply were signed by one H. H. Sheikh learned counsel of Sheikh's Chambers of Advocates. The defendants declared that they did not wish to file any rejoinder submissions; hence this ruling which is admittedly overdue following the extremely tight schedule of official duties on my part and the exchange of various hands of judges in managing this case before it was finally assigned to me.

In the first limb of the PO the defendants argued that this suit is *res-judicata* and cannot thus be re-tried by this court vide S. 9 of the Civil Procedure Code Act, Cap. 33 R. E. 2002. The learned State Attorney contended that the plaintiff had filed a petition before this court on the same matter and the said petition was dismissed in 2004, she cannot thus bring this suit for defamation because the petition was conclusively determined by a competent authority. The learned State Attorney supported his stance by the decisions in **Karshe v. Uganda Transport Co. (1967) EA 774 and Ner Bruswick Railways Co. V. British and French Trust Corporation Ltd (1938) 4 All E. R. 747.**

As to the second branch of the PO the learned State Attorney for the defendants contended that the plaint is incurably defective for contravening the provisions of Order VI rule 14 of Cap.33 that requires a plaint to be signed by the plaintiff and his/her advocate (if any). He thus argued that this suit is liable for being dismissed for breaching these mandatory provisions of the law because the plaintiff's advocate did not sign the plaint.

The third limb of the PO was that, the suit is incompetent for contravening S. 6 (2) of the Government Proceedings Act, Cap. 5, R. E. 2002 which directs that no suit against the Government can be instituted and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General. The learned State Attorney also charged that the plaintiff in the case at hand did not serve the ninety days notice to the Government. The suit cannot thus stand for breaching the mandatory provisions of the law, he submitted.

For the three limbs of the PO the learned State Attorney pressed this court to dismiss the suit with costs.

In reply to the first limb of the PO, the learned counsel for the plaintiff did not dispute the force of the doctrine of *res-judicata* as per S. 9 of Cap. 33. She however, argued that the same is not applicable in this suit. She submitted that though the defendants did not disclose the citation of the allegedly former suit between the parties, they might have meant Misc. Civil Cause No. 21 of 2004. She also submitted that this former matter was essentially a complaint (petition) by the plaintiff against violations of her basic rights and freedoms under S. 4 of the Basic

Rights and Duties Enforcement Act, Cap. 3, R. E. 2002. Again, she contended that unlike the former matter, the present suit (Civil Case No. 71 of 2005) is an ordinary civil case based on defamation as its cause of action.

It was also the submissions by the learned counsel for the plaintiff that according to S. 4 of Cap. 3 the plaintiff was not precluded by the former suit to file this present suit even if it were on the same subject matter. Her reasons for this view were that the former matter (petition) was not finally decided by the panel of three judges because they held that they had no jurisdiction to decide it and the petitioner (now plaintiff) had other adequate means of redress in the ordinary courts, hence the present suit is not *res-judicata.* She cited the case of **Shaku Haj O. Juma v. The Attorney General and 2 others [2000] TLR. Page 49** to support her arguments.

The learned counsel for the plaintiff thus submitted that, the three important conditions for the applicability of the doctrine of *res-judicata* are not met in this suit, she enlisted the conditions as follows; the judicial decision in the former suit must have been pronounced by a court of competent jurisdiction, the subject matter and issues in the former suit must be the same in the subsequent suit and the decision in the former suit must have been final.

As to the second limb of the PO the learned counsel for the plaintiff argued that the defendants want to mislead the court because all the three counsel for the plaintiff signed the plaint at its bottom (at page ten). She alternatively contended that even if it was true that the plaint was not signed by the plaintiff's counsel that defect could not affect the merits of the case and the court's jurisdiction because the plaintiff had duly signed it. She referred the court to the decisions in **Transgem Trust v. Tanzania Zaisite Corperation Limited [1968] HCD. n 501** and **Victor**

Bushiri and 135 others v. AMI Tanzainia Limited, CAT Civil Application No. 64 of 2000 (unreported) to support the contention.

The learned counsel also charged that as the plaint is not evidence, the complaint by the defendants cannot be weighing because the defect (if any) could not prejudice the defendants in any way. Furthermore, she submitted that the court must consider the provisions of article 107 A (2) of the Constitution of the United Republic of Tanzania 1977, Cap. 2 R. E. 2002 which require courts to administer justice without undue technicalities. She added that these constitutional provisions were underscored by the Court of Appeal of Tanzania (CAT) in the case of the **NHC v. Etienes Hotel, Civil application No. 10 of 2005.**

The plaintiff's counsel further reminded this court of the principle that procedural rules are handmaidens of justice and should not be used to defeat justice as underscored in the cases of **General Marketing Company Limited v. A. A. Shariff (1980) TLR. 61** (at page 65), **Rawal v. Mombasa Hardware (1968) E. A 393** and **Manji Limited v. Arusha General Stores (1991) TLR. 165.**

Replying to the third limb of the PO the plaintiff's counsel put it that her client in fact gave the requisite notice as per S. 6 (1) of Cap. 5 and this same point was raised by the defendants in the previous PO and was dismissed by the court (Kalegeya, J as he then was) for want of merits as evidenced at pages 16 and 18 of the ruling. She also pressed that the defendants cannot thus raise the same point of objection for this court is *functus officio* to entertain it; otherwise this will be an abuse of court process.

In deciding this matter I will consider the points of PO one after another. As to the first limb of the PO the point for determination is *whether or not this suit is res-judicata.* I shall first revisit the law in respect of the doctrine of *Res-Judicata*

before I examine the issue. According to S. 9 of Cap. 33 the existence of which is undisputed by the parties, no court shall try any suit or issue in which the matter directly and substantially in issue was also directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim 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. This doctrine was underlined in the cases cited by the parties (supra) and in many others like **George Shambwe v. Tanzania Italian Petroleum Co. Ltd. [1995] TLR 20** (HC), **Zaruki Mbokemize v. Swaibu Omari & Francis Adolph [1988] TLR 160 (HC), Esso Tanzania Limited v. Deusdedit Rwebandiza Kaijage [1990] TLR 102 (CAT)** and the recent decision by a panel of three judges of this court in **Tanzania Telecomms Co. Ltd and Consolidated Holdings Corporation v. Boniface Mjenjwa and 13 others, High Court (HC) Misc. Civil Appeal No. 2 of 2010, at Dar es Salaam** (unreported).

As rightly put in the case of **Tanzania Telecomms Co. Ltd and Consolidated Holdings Corporation v. Boniface Mjenjwa and 13 others** (supra) I am of the view that for a PO based on the principle of *Res-Judicata* to be successful, the following five main conditions precedent must be established cumulatively and not alternatively.

a) There must be two disputes involved into a discussion, one termed as former suit and the other as a latter or subsequent suit.
b) That the subject matter which is directly and substantially in issue in the subsequent suit must have been also directly and substantially in issue in the former suit.
c) The parties in the former suit must be the same in the subsequent suit, or they must be litigating under the same title.

d) The court/s involved in both the former and subsequent suits must be/have been competent court/s to try the suit at issue.

e) That the matter at issue in the subsequent suit must have been finally heard and decided by such competent court in the former suit.

This doctrine is very vital in the administration of justice because it curbs abuse of court process by restraining the parties to court proceedings from re-filing decided disputes between the same parties in courts of law.

As rightly argued by the learned counsel for the plaintiff in the case at hand, the respondents did not cite the former suit, and they did not attach its ruling as promised in their joint written submissions. I thus accept the argument by the counsel for the plaintiff that the alleged former suit was in fact a petition filed under S. 4 Cap. 3 in Misc. Civil Cause No. 21 of 2004. Moreover, the defendants did not prefer to file any rejoinder to rebut this particular argument. I had an opportunity of reading that ruling in the record of this case and I agree with the counsel for the plaintiff that the former suit (the petition in Misc. Civil Cause No. 21 of 2004) was indeed not finally determined by this court for want of jurisdiction and it was actually dismissed (see page 13 of the typed version of the ruling). For this reason alone, the doctrine of *res-judicata* can not apply in the matter at hand because the allegedly former suit was not finally heard and decided by a competent court. The conditions numbered **d)** and **e)** above have not thus been established for the doctrine to apply. I found previously that the conditions numbered **a) – e)** stipulated above must be met cumulatively for the doctrine to apply, I thus find no need to test if the rest of the conditions have been established in this matter because the two conditions have not been established.

Certainly the defendants might have been confused by the last phrase of the court in the ruling of the former matter (Misc. Civil Cause No. 21 of 2004) which

was couched thus "Accordingly the petition is dismissed with costs". I understand that there is a great difference between an order dismissing a matter before a court on one hand and an order striking out a matter on the other. It was held by the CAT to the effect that a Dismissal order follows a hearing of a matter on merits while an order striking it out is based on technicalities such as improper filing or incompetence of the matter before the court, see **Zaid Sozy Mziba v. Director of Bradcasting, Radio Tanzania Dar es Salaam and another, CAT Civil Appeal No; 4 of 2001, at Mwanza** (unreported) and **Bernard Malinga v. Presidential Parastatal Sector Reform Commission (PSRC) and another, CAT Civil Appeal No; 65 of 2007, at Mbeya** (unreported).

For the stance of the law just highlighted above one would expect this court in Misc. Civil Cause No. 21 of 2004 to strike out the petition instead of dismissing it because it had not heard it on merits for want of jurisdiction. However, I cannot agree with the envisaging by the defendants that as long as the court ordered a dismissal of the petition instead of striking it out then it meant that the petition had been finally determined on merits for purposes of the applicability of the doctrine of *res-judicata*. Justice is not administered that way. In law an order of court is interpreted as a whole and not in piecemeal. One cannot thus consider the final pronouncement of an order of a court alone and leave the reasoning thereof because the final pronouncement is in his favour as the defendants are trying to envisage in the matter at hand.

For the above reasons I agree with the arguments advanced by plaintiff's counsel and this limb of the PO fails, hence the point of determination set above is negatively answered to the effect that this suit is not *res-judicata*.

As to the second limb of the PO the issue is *whether or not the plaint is incurably defective for not been signed by the plaintiff's advocates*. Having read the plaint in the record I agree with the plaintiff's counsel that all the three counsel for the plaintiff signed the plaint at the bottom of page ten. Their respective signatures were appended to their disclosed firms as advocates who drew and filed the plaint. The firms of advocates involved are R. K. Reweyongeza & Co. Advocates, Nyangarika & Company (Advocates) and Sheikh's Chambers of Advocates. If the copies of the plaint served to the defendants were not so signed by the plaintiff's advocates, that omission will not be fatal because the original plaint in court record is properly signed.

Again, I agree with the contention by learned counsel for the plaintiff that even if it was true that the counsel for the plaintiff had not signed the plaint that would not be a fatal omission because the plaintiff herself signed the same. I will paste the provisions at issue (i. e. Order VI rule 14 Cap. 33) for a readymade reference, they are couched thus;

> "Every pleading shall be signed by the party and his advocate (if any); provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf".

My view is that the aim of these provisions was to make the plaint as a pleading authentic by being signed by the plaintiff and his/her advocate (if any). As rightly argued by the learned counsel for the plaintiff, the directive being a procedural rule it cannot defeat justice as long as the plaint in this case is authentically signed by the plaintiff.

On the other hand I agree with the argument made by the learned State Attorney for the defendants that procedural rules must be observed because they

were not made for cosmetic purposes. However, he must be alerted that any breach of a procedural rule must be gauged by its effect to justice. The major test is *whether or not the breach complained of causes any miscarriage of justice*. If the answer to this issue is in the affirmative then that breach is fatal and a court of law must decide in favour of the complaining party and make the necessary orders for the sake of justice. However, if the issue is negatively determined then the breach is minor and the court can close eyes and proceed with the case for the sake of seeking substantial justice. This is the essence of article 107A of the Constitution (cited by the plaintiff's counsel supra). The defendants in this matter however, did not disclose the miscarriage of justice (if any) that would have been caused by the alleged breach of Order VI rule 14 of Cap. 33.

I also agree with the learned State Attorney for the defendants that Order VI rule 14 of Cap. 33 is couched in a mandatory form by involving the term "shall". However, if its breach does not cause any miscarriage of justice to the parties the position of the law is as I have just demonstrated above. The contemporary approach in defining the term "shall" is to the effect that where the word is used in statutory provisions, it implies an obligation only if failure to comply with the provisions at issue will occasion a miscarriage of justice, see S. 53 (2) of the Interpretation of Laws Act, Cap. 1, R. E. 2002 and the cases of **Mkamangi Elifuraha v. Mwinyishehe Mwinyishehe [1991] TLR 191** (CAT, at pages 192-193), **Bahati Makeja v. The Republic, CAT Criminal Appeal No.118 of 2006, at Mwanza** (unreported), **Peter Thomas *alias* Peter Toshi v. Republic [1996] TLR 370** (HC) and many others. This definition thus supports the major test of any breach of procedural rule I demonstrated herein above.

For these reasons, I again agree with the learned counsel for the plaintiff that this point of the PO cannot stand. I thus determine the issue posed above

negatively to the effect that the plaint in this suit is not incurably defective for the reasons alleged under the second point of the PO.

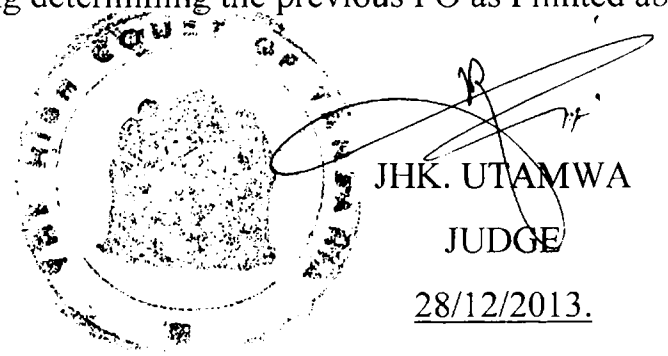
I now test the third point of the PO. In this respect the main issue between the parties is *whether or not this suit is incompetent for contravening S. 6 (2) of Cap. 5.* Following the argument by the plaintiff's counsel that the court is *functus officio* to entertain the third ground of the PO the sub-issue which rises at this juncture is *whether or not this court is functus officio* to test that third ground of the PO. If this sub-issue will be negatively answered I will then test the main issue framed above. Having read the ruling in respect of the previous PO (by Kalegeya J, as he then was) I totally agree with the plaintiff's counsel that the issue of *whether or not the plaintiff served the requisite notice to the defendants* was tried and decided upon the defendants raising this same point of the PO that the plaintiff did not comply with S. 6 (2) of Cap. 5. The court dismissed this point of the previous PO. The defendants cannot thus be heard raising the same point of law as rightly argued by the learned counsel for the plaintiff.

The doctrine of *functus officio* is a sister principle to that of *res-judicata* discussed previously. It is to the effect that where a court finally decides a matter between the same parties, it is taken that it has discharged its duty and it cannot re-decide it, see the envisaging in various decisions like **Kamundi v. R [1973] EA 540, Abraham s/o Lukali v. Republic [1973] LRT n. 18, John Mgaya & 4 Others v. Edmund Mjengwa & 6 Others. CAT Cr. Appeal No; 8 (A) of 1997 at Dar es Salaam, Tanzania Telecommunications Company Limited and others v. Tri Telecommunications Tanzania Limited [2006] 1 EA 393** and **Knight Supports (T) Ltd v. Regional Labour Officer, HC Civil appeal No. 12 of 2006, at Mbeyea.** This doctrine is very fundamental in the administration of justice and its rationale is not far to fetch. It curbs abuse of court process by restraining

adjudicators from re-entertaining decided matters without adequate legal grounds. If courts disregard this doctrine matters in courts will never come to an end and the law will never become stable, certain and predictable, hence chaos will thus triumph because the doctrine of *stare decisis* will never operate smoothly.

Having observed as above, I answer the sub-issue in respect of the third ground of the PO positively to the effect that this court is indeed *functus officion* to test that third ground of the PO. I am thus legally incompetent to test the above posed main issue of *whether or not this suit is incompetent for contravening S. 6 (2) of Cap. 5.* Like the other two preceding grounds of the PO the third point of the PO also fails.

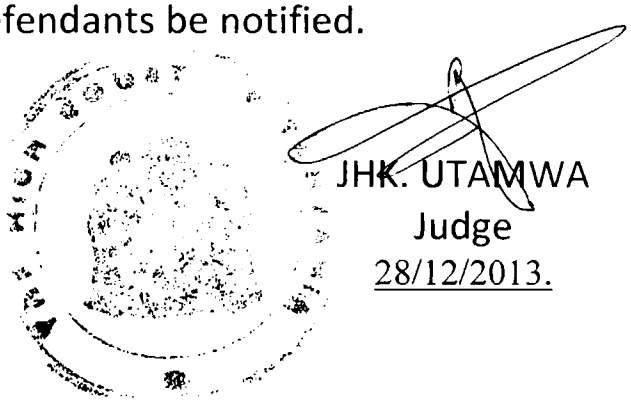
For the foregoing reasons and for the consideration that the learned State Attorney for the defendants opted not to file the rejoinder submissions, I overrule the PO raised by the defendants. I consequently order this suit for defamation to proceed as previously ordered by my predecessor, Kalegeya J, (as he then was) in his ruling determining the previous PO as I hinted above. It is so ordered.



JHK. UTAMWA
JUDGE
28/12/2013.

Date; 28/12/2013
Coram: Hon. Utamwa, J.
For plaintiff; Ms. Anna Maleale advocate.
For defendants: Ms. Anna Maleale advocate for Mr. Biseko advocate.
CC: Mrs. Kaminda;

Court: Ruling delivered in the presence of Ms. Anna Maleale Counsel for the plaintiff also holding briefs for Mr. Biseko advocate for the first defendant, in chambers, this 18th day of February, 2013. The second to fourth defendants be notified.



JHK. UTAMWA
Judge
28/12/2013.