IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 30 OF 2012
(Arising from Civil Case No. 137 of 2012)

ADONCHIUS MULOKOZI ..... PLAINTIFF

Versus

JOHN MALLYA ..... DEFENDANT

Date of Ruling: 02/04/2014

RULING

F. Twaib, J:

The applicant (plaintiff in the suit) has filed a claim against the respondent (defendant in the suit), seeking for orders permanently restraining the respondent from interfering and trespassing into landed property known as Plot No. 272, Bahari Beach, Dar es Salaam, and general damages.

The applicant has also filed an application for injunctive orders to restrain the respondent (defendant in the main suit) from interfering in his possession and occupation of the suit property pending determination of the main case. On 21st November 2012, I granted the applicant an *ex parte* restraining order pending hearing and determination of the application *inter partes*.

The respondent has raised three points of preliminary objection. I would paraphrase them as follows:

1. The application is bad in law as it offends the mandatory provisions of Order V rule 3 of the Civil Procedure Code;

2. The Court has no jurisdiction to entertain the application, since the ownership of the subject matter has already been decided in favour of the respondent by the Kunduchi Ward Tribunal and the High Court of Tanzania, Land Division; and

3. The application is incompetent for wrong dating of the affidavit.

Counsel for the rival parties have made lengthy and wide-ranging submissions in buttressing their respective clients' positions on these points. While I appreciate counsel's industriousness and attempts at being exhaustive, I do not think it necessary to discuss the various sub-points they have canvassed. This is not out of discourtesy. It is because, as I hope shall be clear from this ruling, the issues arising out of them can be conveniently and adequately determined by discussing only some of the many arguments advanced.

Counsel for the respondent has argued that under Order V rule 3 of the CPC, Cap 33 (R.E. 2002) ("the CPC") every summons must be accompanied by, among other things, a copy of the Plaint. However, when the summons was served on the defendant, no copy of the plaint was served with it. Instead, the respondent was only served with copies of the summons, the application for injunctive orders, and the *ex parte* restraining order.

It was for this reason that the respondent has raised the first point of preliminary objection. It was after they were served with a copy of the preliminary objection that the applicant's advocates hurriedly served them with a copy of the Plaint, argues counsel for the respondent. The respondent thus contends that the application is bad in law and should be struck out.

Counsel for the applicant denies that they served the Plaint on the respondent's advocate after receiving the notice of objection. It is their case that the Plaint was served together with the summons. Unfortunately, none of the parties has been able to establish when exactly was the Plaint served on the respondent or his advocate. It is trite that the burden of proving service lies on the party who is supposed to serve the other. In the absence of such evidence, I am inclined to agree with counsel for the respondent that the Plaint was indeed served on them not with the summons, but after they had filed their notice of objection.

What would be the result of this omission? The respondent has insisted that the application should be struck out. Before going any further, I wish to point out that this point of objection is misplaced, in as much as it seeks to strike out *the application* rather than *the suit*, because Order V rule 3 CPC relates to the service of the Plaint and not the application. However, given the orders that I am about to make, it would be of no significance either way.

I do not think that the remedy for such omission is an order striking out anything—whether it be the application or the suit. What it really means is that the Plaint has not been properly served. An order of re-service would have to be made. But since the respondent has in fact already been served, such an order would not be necessary.

In the second point of preliminary objection, the respondent argues what is essentially a plea of *res judicata*. It is provided for under section 9 of the Civil Procedure Code, Cap 33, which states:

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

Hence, for the principle of *res judicata* to apply, four elements must be present:

1. The matter directly and substantially in issue has been directly and substantially in issue in a former suit;

2. The two suits must be between the same parties or between parties under whom they or any of them claim litigating under the same title;

3. The trial court must be a Court of competent jurisdiction to try such suit;

4. The issue must have been raised, heard and finally decided by such court.

The issue is whether these elements are present in the present suit so as to render it *res judicata*.

Counsel for the respondent contends that the issue of ownership of the suit property has thrice been decided in his favour by the Kunduchi Ward Tribunal, the District Land Tribunal, and the Land Division of this Court. The Ward Tribunal is said to have dealt with the same matter in Application No. 173 of 2008. The applicant was advised to refer the matter to the District Land and Housing Tribunal, which he never did.

Counsel for the respondent has referred to Annexure A to his submissions in support of this argument. My perusal of the said Annexure (dated 2nd September 2008) revealed that the matter was not determined at the Ward Tribunal, which simply noted that the matter had been the subject of an earlier case that was decided in the respondent's favour. The Ward Tribunal then referred the matter to the District Land and Housing Tribunal.

Those events cannot make the matter *res judicata*. They lack the requisite finality for *res judicata* to apply. They also lack the necessary particulars to enable this Court to determine whether *res judicata* could be invoked. In any case, I doubt if the Ward Tribunal had powers to entertain the matter in the first place.

Then there is Annexure B to the submissions. It is a "Handover Order" issued by the District Land and Housing Tribunal purporting to execute an order of the Ward Tribunal dated 7th December 2004 in favour of the respondent. The said order was itself not annexed. Furthermore, the judgment debtor in that case was one Moses Benjamin. Whatever that order was meant to be, it obviously did not involve the applicant. It cannot, therefore, be the basis for the present case to be *res judicata.* For the same reason, I do not consider the "Drawn Order" given by the Land Division of this Court in Land Case No. 20 of 2011 to render the present

suit *res judicata*. It is a case in which the applicant was not a party. See *Village Chairman--K.C.U. Mateka v Anthony Hyera* [1988] TLR 188.

The above findings mean that the second point of preliminary objection is without merit, and I would dismiss it.

The last point of preliminary objection is to the effect that the affidavit in support of the application is wrongly dated, rendering the application incompetent. Counsel for the respondent submitted that the affidavit is dated 19th November 2012, while the same was filed on 7th November 2012. That anomaly would render the affidavit defective, argues counsel.

While I have no issues with counsel's submissions on the law, all I needed to resolve this issue was to peruse the record of the Court to see what date is reflected in the affidavit that is in the Court record. That affidavit is correctly dated 7th November 2012. Since the Court record is the official, authentic version in case of any dispute of this nature, I take it that there is no defect in the date of the relevant affidavit. Consequently, this preliminary point of objection is, like the other two, devoid of any merit.

In the result, all the three points of objection are dismissed. The application for injunctive orders shall proceed for hearing and determination on the merits.

Costs to follow events in the application.

DATED AT DAR ES SALAAM this 2nd day of April, 2014.

Fauz Twaib
Judge