

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT ARUSHA

LAND CASE NO. 52 OF 2017

RHODICE SIMON MOSHI.....PLAINTIFF

VERSUS

- 1. NIC BANK (T) LTD.....1ST DEFENDANT**
2. FLAMINGO AUCTION MART CO. LTD.....2ND DEFENDANT
3. M/S PARADISO MINERALS (T) LTD.....3RD DEFENDANT
4. MR. PHILIP MKENGA KABWE.....4TH DEFENDANT

RULING

Date of last Order: 15/03/2018

Date of Ruling: 03/08/2018

BEFORE: S.C. MOSHI JUDGE

The Plaintiff RHODICE MOSHI filed this suit claiming for the following reliefs:

- a) An order declaring sale on 17th August, 2014 on the properties, Plots No. 42, Block A Njiro, Arusha City with certificate No. 5853, Plot No. 742 located at Olosiva Village, Arusha with certificate No. 13989, Plot No. 741 at Olosiva Village Arusha City with certificate No. 13987 Plot No. 740 at Olosiva Village Arusha with Certificate No. 13988 were illegal, unlawful ab-initio and it be nullified.
- b) An order setting aside the sale conducted on 17th August, 2014 of the suit properties by the 2nd defendant to the 3rd and 4th defendants.

- c) An order declaring that the defendants are trespassers to the suit properties listed under paragraph 7 of the plaint.
- d) An order declaring the transfer of the suit properties if any to be illegal and thus null and void.
- e) An order for general damages for unlawfully sale of the suit properties.
- f) An order for eviction of the 3rd and 4th defendants from the suit properties.
- g) An order for vacant possession of the suit properties to the plaintiff.
- h) Any other order/further relief(s) this Honourable Court deems fit and just to grant.

In their joint statement of Defence by the 2nd, 3rd and 4th defendants have raised four points of preliminary objection as follows:

- i) That the current suit is Res Judicata vis a vis the High Court Commercial Case No. 23 of 2013.
- ii) That the suit is bad in law for offending Order XXI Rule 90 (3) of the Civil Procedure Code, Cap 33 R.E. 2002.
- iii) That the suit is bad in law for offending Order XXI Rule 101 of the Civil Procedure Code, Cap. 33 R.E. 2002.
- iv) The suit is improperly before this court and is complete abuse of the court process.

I have gone through the written submissions by the defendants counsel on the first preliminary objection; their argument was that, the current suit before this court is res judicata as the parties appearing on the commercial

Case No. 23/2013 are the same in present case, and that the decisions of the High Court Commercial Case No. 23/2013 has finally decided the matter and the plaintiff herein has never challenged that decision in the Court of Appeal of Tanzania since 19th day of February, 2014 when the decision was issued by Makaramba, J.

It was their submission that, in case No. 23/2013 at the High Court Commercial Division the parties were litigating on the same title which is also the subject matter in this case.

While opposing the preliminary objection, in his reply to objection regarding the fact that the suit is "Res Judicata" the plaintiff counsel briefly submitted that, the first preliminary objection does not fit as preliminary point of law as Res Judicata is not a point of law as it needs evidence to prove the existence of the previous suit. In his submissions he cited the case of **The Soitsambu Village Council Vs Tanzania Breweries Limited and Another**. Court of Appeal No. 105 of 2011. Where the Court of Appeal found the issue of Res Judicata does not qualify to be point of law.

I will first deal with the preliminary point of objection on the issue of Res Judicata. The doctrine of Res Judicata is set out in Section 9 of the Civil Procedure Code Cap, 33 R.E. 2002, as follows:

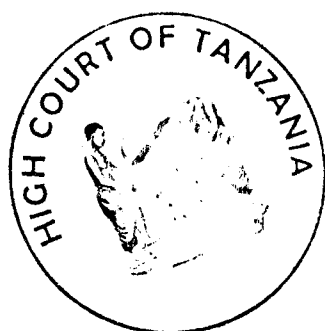
"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them


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."

In essence therefore, the doctrine implies that for a matter to be res judicata, the matter in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of Competent Jurisdiction.

Applying the foregoing to the present case, I noted that there was a High Court Commercial Case No. 23/2013 which was between the Plaintiff and the 1st defendant and the High Court issued a decree in favor of the 1st defendant who executed the decree and the properties were sold by the 2nd defendant to the 3rd and 4th defendants. The High Court Commercial Division has finally decided the matter on the four landed properties which is the subject matter to the present suit.

This Court finds that the case at hand is Res Judicata as the matter was determined by the High Court Commercial Division. The Preliminary Objection as regards the issue of "res judicata" is sustained. Since the said preliminary objection suffices to dispose of the present suit. I will not deal with the rest of preliminary points of objections. Consequently, the suit is dismissed with costs.




S.C. MOSHI
JUDGE
03/08/2018