

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
LAND CASE NO. 33 OF 2015**

**THE REGISTERED TRUSTEES OF THE FREE
PENTECOSTAL CHURCH OF TANZANIA (FPCT).....PLAINTIFF**

VERSUS

MIKA KAMATA.....1ST DEFENDANT

PATRICE KULINGANILA.....2ND DEFENDANT

THE REGISTERED TRUSTEES OF KANISA

LA PENTEKOSTE ARUSHA.....3RD DEFENDANT

RULING

DR. M. OPIYO, J

On 21st November, 2017 the plaintiff named above filed a suit against the defendants claiming among other reliefs; for an order that this court declare the Plaintiff as be a lawful owner of the suit property commonly known as Plot. 14 A, Area B, Land Office No. 3264, Kanisa Road comprised in Certificate of Title No. 055010/36, located at Arusha City and permanently restraining the defendants from unlawfully interfering with the Plaintiff's peaceful occupation and quiet use and enjoyment of the suit property.

Consequently, the defendants filed a Written Statement of Defence to the Amended Plaint and the third defendant inserted a Counter Claim against the plaintiff as (1st defendant) and The Assistant Registrar of Titles Moshi as (2nd defendant) claiming for a declaratory order against the 1st defendant that the plaintiff is entitled to the suit property or land by way of adverse possession and an order against the 2nd defendant for rectification of the register of titles held under Certificate of Title No. 055010/36 be registered in the name of the plaintiff as the holder and owner of the right of occupancy in the place of The Registered Trustees of the Pentecostal Churches Social Association in Tanganyika.

Following that, the 1st defendant (in the counter claim) filed a Written Statement of Defence to the Counter Claim containing points of preliminary objection to the effect that;

- (a) The counter claim is res judicata thus in contravention of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2002] and this Honourable court should not try this suit because the issue of ownership of the disputed land in this suit was directly and substantially in issue in this same court in Civil Case No. 22 of 1993 between the same parties and was finally decided and permanent injunction was issued against the Plaintiff to this counter claim as per ANNEXURE "K" to this defence.

- (b) The counter claim is bad in law for violation of section 37 (5) of the Law of Limitation Act Cap. 89 R.E 2002 cited in the Counter Claim and which does not require the 2nd defendant to be joined.
- (c) The counter claim is bad in law for violation of section 37 (5) of the Law of Limitation Act, Cap. 89 R.E 2002 by failure to join the Commissioner for Lands and the Registered Trustees of Pentecostal Churches Social Association in Tanganyika.
- (d) The counter claim is bad in law for violation of section 2 (2) (a) and section 37 (5) of the Law of Limitation Act, Cap. 89 R.E 2002 read together with section 6 (1) and (2) of the Government Proceedings Act, Cap. 5 R.E 2002 that require a 90 days notice of intention to sue the Government (the Registrar of Titles) to be served.
- (e) The counter claim is bad in law for violation of section 2 (2) (a) and section 37 (5) of the Law of Limitation Act, Cap. 89 R.E 2002 read together with section 6 (1) and (3) of the Government Proceedings Act cap. 5 R.E 2002 for failure to join the Attorney General.

- (f) The counter claim is bad in law for violation of Order VII rule 1 (a), (b) and (c) read together with Order VIII rule 9 (2) and rule 10 (2) of the Civil Procedure Code, Cap. 33 R.E 2002 for failure to mention name of the court and description of residence of the Plaintiff and 1st defendant.

In this matter, the plaintiff (the 1st defendant in the counter claim) is represented by Stolla learned counsel while the defendants (plaintiff – counter claim) is represented by Ojare learned Senior counsel assisted by Makiya learned counsel . On 5th day of February, 2018 this court ordered the preliminary objection to be disposed by way of written submissions whereby the plaintiff's submission was ordered to be filed by 19/2/2018, the defendants' submissions by 5/3/2018 and rejoinder if any to be filed by 12/3/2018. Both parties filed their submission accordingly, thanks for the enormous efforts put in by learned counsels as they extensively submitted on the points of objection.

Arguing the first preliminary objection, the 1st defendant's counsel submitted that the counter claim is *res judicata* thus, in contravention of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2002]. He thus urged this court not to retry this suit because the issue of ownership of the disputed land in this suit was directly and substantially in issue in this same Court in Civil case No. 22 of 1993 between the same parties and was finally decided and permanent injunction was issued

against the Plaintiff to this counter claim. He referred this court to Annexure "K" to the Amended Plaint, which was adopted vide paragraph 4 of the Written Statement of Defence to the Counter Claim, the High Court Decree (a decision of this Court), thus, forming part of the matters the court is obliged to take judicial notice upon in terms of section 58 and 59 of the Evidence Act. He argued that, section 58 of the Evidence Act provides for facts that do not require proof and which the court takes judicial notice. It is his argument that, in 1993, the Plaintiff to the Counter Claim (The Registered trustees of Kanisa la Pentekoste Arusha) instituted a suit (Civil Case No. 22 of 1993 in the High Court of Tanzania at Arusha) against the Predecessor of the First Defendant to the counter claim (the Pentecostal Churches Social Association of Tanzania (PCSAT). The PCSAT filed a written statement of defence with a Counter Claim therein. The substantive suit was withdrawn by the Plaintiff for being overtaken by events thus remaining with a Written Statement of Defence with uncontested Counter Claim against the Plaintiff. On the Hearing date that was 6th day of February, 1995 the High Court, Nchalla J (as he then was) entered the judgment to the effect that the 1st Defendant's Predecessor, PCSAT, was a lawful owner of the disputed land (Certificate of Title No. 055010/36). He further submitted that, in addition to the declaration of the 1st Defendant to the counter claim as the lawful owner, the High Court issued a permanent injunction against the Plaintiff to the Counter Claim. He argued that, the said decree in Annexure "K" was the final

determination of the suit and the decision was never appealed against. He therefore submitted that, the Plaintiff is precluded from instituting another case between the same parties claiming under the same title, on the same court and in respect of the same subject matter, land registered under certificate of title Number 055010/36. To substantiate his argument, he cited the case of **Tanganyika Motors Ltd. vs Trans-continental Forwarders and Another** [1997] TLR 158 where it was stated that;

These prayers are exactly the same as the plaintiff in his plaint in the present case. This means that the matter which is directly and substantially in issue in both cases is the same and that the said matter has been finally determined by the ex-parte judgment issued in the previous case.

In conclusion the preliminary objection that the suit is res judicata is upheld hence the said suit is dismissed with costs.

He also cited the case of **George Shambwe vs Tanzania Italian Petroleum Co. Ltd.**[1995] TLR 20 where it was stated that;

I should reiterate that for res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties, but it must also be shown that

the matter was finally heard and determined by a competent court.

He therefore submitted that the counter claim should be dismissed with costs for being *res judicata*.

In reply to the first point of objection, the plaintiff's counsel started by submitting on what constitutes a "**preliminary objection**" referring to the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited**(1969) EA 696 where at page 700 it was held that;

"....that a preliminary objection consist of point of law which have been pleaded or which arise by clear implication out of the pleadings and which if argued as preliminary objection point may dispose of the suit without the need of hearing."

Further at page 701 paragraph B the court stated that;

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

He further contended that, the case of **MUKISA BISCUITS** has subsequently been followed in many cases including the case of **Cotwu (T) Ottu Union and Another v. Honourable Iddi Simba, Minister of Industries and Trade and Others**(2002) T.L.R. 88 where it was held that;

"A preliminary objection should raise a point of law which is based on ascertained facts, not on fact which has to be ascertained; and if sustained, a preliminary objection should be capable of disposing of the case."

Also in the case of **MusangaNgandwa v. Chief JaphetWanzagi and Eight Others**(2006) TLR 351 at page 352 it was held that;

"The expression preliminary objection has been used in our jurisdiction to refer to objection to the jurisdiction of the Court, a plea of limitation and the like; it contains a point of law which, if argued as preliminary point, may dispose of the suit; a preliminary objection cannot be raised if any fact has to be ascertained, that is it cannot be based on unascertained factual matters."

He then submitted that, the said annexure "k", which is a purported decree of this court in Civil Case No. 22 of 1993 as pleaded in paragraph 19 of the 1st defendant's (to the counter claim) amended

plaint; vide paragraph 9 of the plaintiff's written statement of defence to the amended plaint, the said purported decree is contested and disputed to be nullity which cannot..... property. He further submitted that, on the basis and from the standpoint of the referred pleadings of the parties; the authenticity and legal effect of the said purported decree in the said Civil Case No. 22 of 1993 is disputed and contested and therefore will need to be proved through viva voce evidence during a full blown trial. Thus, it cannot therefore be or form a basis for the fronted preliminary point of objection of *res-judicata* and referred this court to the case of **Bikubwa Issa Ali vs. Sultan Mohamed zahran**(1997) T.L.R. 295 at page 296, wherein it was held that;

"In determining whether the suit was time-barred or not, time could not be computed from the time when the deed of transfer was purportedly made because the alleged maker is the respondent. That deed was itself an issue which needed to be proved one way or the other and it could not be relied upon to dispose of the suit on a preliminary objection based on the law of limitation."

Concluding on the issue of *res judicata*, he submitted that the Court of Appeal in the case of **Soitsambu Village Council vs Tanzania Breweries Ltd and Another**, Civil Appeal No.105/2011 (unreported) at page 7 held that;

"A preliminary objection should be free from facts calling proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such issue cannot be raised as a preliminary objection on point of law. The Court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as preliminary objection only those point that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavit or other documents accompanying the pleadings to support the objection such as exhibit.

On that basis, he stated that the first preliminary point of objection lacks merit and prayed the same be dismissed with costs.

Before going further with the submission on other points of objection, I prefer to deal first with the first preliminary objection that counter claim that the counter claim is *res judicata*, because if so founded it has the effect of finally disposing the matter. The principle of *res judicata* is provided under section 9 of Civil Procedure Code, Cap. 33 R.E 2002 which provides that;

"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 an 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."

The above principle was discussed in *extension* the case of **Engen Petroleum (T) Ltd vs. Phantom Group and Another**, Commercial Case No. 233 of 2001, HC - Commercial Division where my learned brother Bwana, J (as he then was) stated that;

"...simply put, res judicata means that the issue has been adjudicated already. The logic behind it is that litigation has to have an end. Parties should not be allowed to wrangle against each other in court of law for an indefinite period over the same issues, claiming the same object. Should that be entertained, it adds unnecessary costs to the parties and above all, it may result into an abuse of process. Generally, it is stated that res judicata implies three aspects. The fourth one is usually excluded. I will include it herein. The said aspects are that the matter presently before the court has been heard before involving;

- 1. The same parties (or their privies if I may add).*
- 2. The same issues (or I should make it more complete by adding – as Sarka's Law of Evidence at p. 486 adds – "issues that are the same or are directly and substantially or constructively the same")*

3. The same object.

4. The suit has been adjudicated upon by a court of competent jurisdiction."

When all the four elements are established, then the parties shall not be heard to say the same thing twice over in successive litigation. The subsequent judge (or court) must give effect to the former judgment/ruling, He need not and indeed he is not expected or bound to hold whether the former judgment/ruling was right or not as he is not hearing an appeal or review proceedings. It is a settled principle of law that in such a situation the parties (and or their privies) are precluded from re litigating such facts in subsequent proceedings although for a different purpose or object."

The above case speaks all about the principle of re judicata. Now, going through the matter at hand, starting with (i) the parties; in the previous case Civil Case No. 22 of 1993, this court was told by the plaintiff to the main suit that parties were, The Registered Trustee of the Pentecostal Churches Association of Tanzania (P.C.A.T) (the predecessor of now, The Registered Trustees of the Free Pentecostal Church of Tanzania (FPCT) as the Plaintiff vs. The Registered Trustees of Kanisa la Pentecoste – Arusha and The Registrar of Titles Land Registrar – Moshi as the 1st and the 2nd defendants respectively. Also in the present counter claim, parties are The Registered Trustees of Kanisa la Pentekoste Arusha as Plaintiff vs. The

Registered Trustees of The Free Pentecostal Church of Tanzania (FPCT) and The Assistant Registrar of Titles Moshi as the 1st and the 2nd defendants respectively. Hence parties in the previous suit and the present counter claim are exactly the same. Coming to (ii) the issues; in the previous case the matter in issue was ownership of land held under Certificate of Title No. 055010/36 in which the plaintiff prayed for a declaration that the purported transfer of right of occupancy in the name of the 1st defendant was null and void and another issue was rectification of the register of titles in respect of Certificate of Title No. 055010/36. As well in the present counter claim, the issues are the same that is declaration of ownership and rectification of the register of titles in respect of Certificate of Title No. 055010/36. (iii) Same object; the objects are the same in respect of the previous suit and in the present counter claim. In both suits, the subject matter or object is land property held under Certificate of Title No. 055010/36. (iv) The previous suit has been adjudicated upon by this same court which was competent to try the matter. Thus, all four criteria that exist on the principle of *res judicata* apply in this matter.

The counsel for the plaintiff to the counter claim argues that this objection is not on pure point of law in terms of **Mukisa Biscuits** and **Soitsambu Village Counsels** cases (supra) as it calls for ascertainment of some facts to determine it, thus it should not be determined at this preliminary stage. The basis of his argument is

that the preliminary objection is based on annexure 'K' to the amended plaint, the decree in the said Civil Case No. 22 of 1993 for which authenticity and legal effect is disputed and contested and therefore will need to be proved through viva voce evidence during a full blown trial. With due respect, I am in disagreement with the counsel on this argument, that this preliminary objection calls for evidence. My disagreement is based on the fact that the said annexure "k" is a decree in respect of Civil Case No. 22 of 1993 which is a document of the this court that the court takes judicial notice of its existence, thus requires no proof. In the circumstances, it is my view that the circumstance of those two cases, **Mukisa Biscuits and soitsambu** are distinguishable with the circumstances in the case at hand. It follows therefore that, in terms of section 42 and 43 of the Evidence Act, Cap 6 RE 2002, after this court takes cognizance of the said decree this court cannot validly hold a subsequent trial over the same matter as the parties and issues are the same. The sections provides:-

"42.-The existence of any judgement, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

43.-(1) A final judgement, order or decree of a competent court,..., which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant.

(2) A judgement, order or decree referred to in subsection (1) is conclusive proof–

(a) that any legal character which it confers accrued at the time when such judgement, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgement, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgement, order or decree declares that it had ceased or should cease; and

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgement, order or decree declares that it had been or should be his property.

On that footing,I hasten to hold that the counter claim is res judicata, hence I hereby dismiss it.

After finding the counter affidavit being *res judicata*, the issue remains on the competency of the main suit. Could it not suffer the same fate of being *res judicata*? The court called upon the parties' counsels to address it on this issue on 18/5/2018. In addressing the court, Mr Stolla, counsel for the plaintiff/first defendant in counter claim argued that in the decree in annexure K, it is his client who by then won the ownership of the disputed property against the third defendant/plaintiff to the counter claim, making the current counter claim *res judicata*. He however maintained that the current suit is not *res judicata* as it comprises of additional two parties (Mika Kamata and Patrice Kulinganilwa, as first and second defendants) who were not parties in the Civil Case No. 22 of 1993, thus they could never be evicted by way of execution of decree in annexure K. Thus, requirement of a new suit against them. Mr. Ojare, counsel for the third defendant/plaintiff in the counter claim argued that the authenticity of that decree is in question as it is not clear as to who was a winning party in that suit and the reliefs that were granted were not enumerated therein, making it difficult for the court to determine if the decree finally and conclusively determined the rights of the parties. The other reason for his contention is that, the said decree is not in conformity with provision of order XX rule 7 of the Civil procedure Code, Cap. 33 RE 2002 in that it has been signed by Register and not the judge who determined the matter.

In my view what the above arguments challenge is the eligibility, authenticity and interpretation of the decree in question, rather than existence of the same. Thus, the existence of the decree is not well challenged. This court's take is that, the decree really existed and rights of these same parties were determined, as argued by the counsel for the plaintiff. In the circumstances, in terms of what was stated in the case of **Engen Petroleum (T) Ltd** (supra) this subsequent case is inevitably res judicata for desiring this same court to re determine the same rights between the same parties. This reality prevents this court from holding another trial, but rather to take cognizance of the decree in question (see section 42 of the Evidence Act). This is notwithstanding existence of the two supposedly 'new' parties, Mika Kamata and Patrice Kulinganila as the two claim no independent title to the disputed property, but derive their title from the same source, The Registered Trustees of Kanisa la Pentekoste Arusha, the 3rd defendant to the amended plaint and plaintiff to the counter claim. Thus, the suit cannot stand against the first and second defendants alone in absence of the third defendant from whom they derive the title. Under section 9 of the Civil procedure Code all the three defendants are considered the same, since the section recognize sameness of parties to include original parties or parties under whom they or any of them claim litigating under the same title.

For that reason, the suit (land case no 33 of 2015) is equally dismissed for being res judicata with the direction that the parties to shall seek to give effect to the former decree instead of urging and expecting this court to hold whether the former was right or not while it cannot hold hearing an appeal or review proceedings

(SGD)

DR. M. OPIYO,

JUDGE

14/6/2018

I hereby certify this to be a true copy of the original.




DEPUTY REGISTRAR

ARUSHA.

05/07/2018