

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

**LAND CASE NO:28 OF 2019**

**THOMAS A. LYIMO.....PLAINTIFF**

**VERSUS**

**1. AGNESS TUMSIFU SAWE.....1<sup>st</sup> DEFENDANT**

**2. JUBILATE TUMSIFU SAWE.....2<sup>ND</sup> DEFENDANT**

**RULING**

**MASABO, J.L.:-**

The ruling is in respect of a preliminary objection on point of law raised by the Defendant the effect that this suit is res judicata. The background of the suit, as discernible from the pleadings is that: The suit has its genesis in the a suit filed in this court in 1996 and registered as Civil Case No. 362 of 1996 in which the husband of the 1<sup>st</sup> Defendant and father to the 2<sup>nd</sup> Defendant, one Tumsifu Eliah Sawe (now a deceased) sued a company by the name of *Tommy Spades Manufactures Limited* (owned by the plaintiff) for nuisance. The conflict was resolved amicably whereby on 14<sup>th</sup> May 1999, the deed of settlement was recorded and decreed accordingly. Among other things, the parties agreed that the Defendant (the Plaintiff herein) will construct a residential house for the said Tumsifu Eliah Sawe at Kimara (in a plot owned by the Plaintiff) and pay him Tshs 6,000,000 in the implementation of the terms of the deed, the plots along Morogoro road was declared to be have been devised from a road area hence unavailable for private development. On the other hand, the Defendants being heirs of Tumsifu Eliah Sawe and

administrators of his estate have assumed ownership of the plots at Kimara. In 2001, the plaintiff herein moved the court to review the terms of the settlement but the application was later withdrawn in 2004. Later, on 18/1/2005 he filed another application for extension of time to apply for review but the same was dismissed for lack of good cause (Oriyo, J). Following this decision, he retreated until 4<sup>th</sup> May 2019 when he filed this suit. He is suing Agness Tumsifu Sawe and Jubilate Tumsifu Sawe as joint administratrices of estate of Tumsifu Eliah Sawe.

The preliminary objection was argued in writing to accommodate the Defendant who do not have legal representation but depend on legal assistance from the Legal and Human Rights Centre.

In their joint submission the defendants, having narrated the background of the suit, prayed that the suit be dismissed as it is res judicata in that, The Plaintiff and the deceased husband signed a deed of settlement which was decreed by this court and the said decision was unsuccessfully challenged by the plaintiff hence it has remained in force. They argued that, further that the consent judgment concerned the disputed land, the same plaintiff and the defendant hence it cannot be reopened. That, if the plaintiff is aggrieved by the ownership of the disputed land the appropriate remedy to challenge Civil Case No 362 of 1996 and not institute a fresh suit. In support, the defendants cited the case of Peniel **Lotta V Gabriel Tanaki and Others** [2003] TLR 312 (CAT).

In reply, Mr. Frank Killian, counsel for the Plaintiff submitted the instant suit is not res judicata to civil case No. 362/1996 because the cause of action in Civil case No 28 of 2019 and Civil case No 362 of 1996 is different and exclusive. He further submitted that, the submission that the instant suit is res judicata to the application above stated is misleading as the application dismissed by Orio, J was in respect of extension of time to apply for review of the deed of settlement whereas in Civil case No 28 of 2019 the plaintiff seeks the a declaratory order that the disputed plots belong to the plaintiff and a permanent and perpetual injunction restraining the from interfering with the suit land. In support of his submission, Mr. Killian cited the case of **Gerald Chuchuba V Director, Itaga Seminary** [2002] T.L.R in which it was held that res judicata applies only where the subject matter and issue decide are substantially the same as the issue in the subsequent suit and that the judicial decision was final and that it was in respect of the same parties litigating under the same title. He also cited the case of **George Shambwe V Tanzania Italian Petroleum Co. LTD** Civil Case No 74 of 1992, and **Paniel Lotta V Gabriel Tanaki and Others** [2003] T.L.R 312 (CAT) and concluded that since the question of ownership the disputed land was never adjudicated upon in Civil. case No 262 of 1996, the principle of res judicata is inapplicable.

I have carefully considered both parties submissions in support and against the preliminary objection. There is only one issue to be determined by this court which is whether or not the matter in this suit is res judicata.

The principle of *res judicata*, as provided for under section 9 of the Civil Procedure Code Cap 33 RE 2002, states 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 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, *res judicata* bars any court to entertain a suit to which the matter in issue was directly in issue between the same parties - which was finally decided by a competent court. The provision has been extensively interpreted. The case **George Shambwe V Tanzania Italian Petroleum Co. Ltd** (supra) and **Peniel Lotta vs Gabriel Tanaki and others** (supra) as cited by the parties herein suffice the parameters of the principle as it applies in our jurisdiction. As rightly submitted by Mr. Killian, in **George Shambwe** it was held that *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 show that the matter was finally heard and determined by a competent court.

The decision in **Peniel Lotta vs Gabriel Tanaki and others**, cited by both parties, gives a more nuanced explanation, which I will quote in extenso. The Court of Appeal while considering the applicability of this rule held that:

“The doctrine of res judicata is provided for in S. 9 of the CPC, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.”

The court amplified further that:

“the scheme of S.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 is issue in the former suit. (ii) The former suit must have been between the same parties or privies claiming under them. (iii)The parties must have litigated under same the title in the former suit. (iv)The court which decided the former suit must have been competent to try the subsequent suit and, (v)The matter in issue must have been heard and finally decided in the former suit.

Guided by these principles, I now revert to the submission by the parties. For a better grasp of the background and the issues involved, I will start with the 2<sup>nd</sup> criteria as to whether the parties in the former suit were similar to those in the instant case. Looking at the title of the suit one could think that the parties in the instance suit are different from those in Civil Case No. 362

of 1996 because the former suit was between Tumsifu Eliah Sawe and Tommy Spades Manufactures Limited, whereas the current suit is between Thomas A. Lyimo as plaintiff and Agness Tumsifu Sawe and Jubilate Tumsifu Sawe. However, in essence this is not correct because, the defendants in the instant case are representing the interest of the Tumsifu Eliah Sawe (now deceased) who was the plaintiff in the former suit. On the other hand, for the reasons best known to the plaintiff he has craftly sidestepped Tommy Spades Manufactures Limited which was the defendant in the former suit. It is on record that the Plaintiff being the owner of the company, executed the deed of settlement (on the company's behalf) in which he surrendered the ownership of the suit land to the said Tumsifu Eliah Sawe through a deed of settlement which the two voluntarily executed and caused it to be recorded in court and a settlement deed thereto was issued. The sidestepping of Tommy Spades Manufactures Limited conceals the link between this suit and the former suit.

Regarding the first criteria as to whether the matter in this case is directly and substantially in issue with that in Civil Case No. 362 of 1996; Fardunji Mulla in **Mulla: The Code of Civil Procedure (18th Edition, 2011)** defines the "direct and substantially in issue" in the following terms (page 168):

"The words 'directly and substantially in issue' are used in contra-distinction to the words 'incidentally and collaterally in issue', That means that ..... there is identity of the matter in issue in both the suits meaning thereby, that the whole of the subject matter in both the proceedings is identical and not

merely one of the many issues arising for determination  
[Emphasis added]

In our jurisdiction, in **Jeremy Woods & Anor Vs Robert Choudury & Another**, Commercial Case No. 18 of 2007 (unreported) this Court has held that:

“[It] does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy. It is not enough that one or more issues are in common. The subject matter in the subsequent suit must be covered in the previous suit and not vice versa. [emphasis added]

In the instant case the plaintiff argument is that this suit is not res judicata to Civil Case No 362 of 1996 because the subject matter in the former suit was nuisance emanating whereas in the instant case, the matter is ownership of the suit land thus, the subject matter in the instant case is different from the subject matter in former suit. With respect, I do not agree with this view. Looking at these two issues, one may be tempted to agree with the plaintiff’s counsel and hold that the two issues are substantially different. A scrutiny of the backgrounds of this suit, would however reveal a different picture all together. While it is true that the issue of ownership was not the cause of action in the former suit, it is on record that the ownership of the suit plots vested in the Defendant as a result of an execution of a lawful decree of this court.

In essence, therefore, what is being challenged here is a decree entered by this court over twenty years ago after the Plaintiff herein and the 1<sup>st</sup> Defendant's husband voluntarily executed a deed of settlement 14<sup>th</sup> May 1999, through which the Plaintiff herein being the lawful owner of the suit land surrendered the ownership of the suit property in favour of the 1<sup>st</sup> Defendants husband through a deed of settlement voluntarily executed by the Plaintiff on behalf of his company. Pursuant to Order XIV Rule 6 and 7, having being executed by the parties, the deed was recorded and a decree thereto pronounced. The ownership of the suit land, therefore, vested in the Defendants as result of execution of a lawful decree of this Court. Thus, if the instant suit is entertained and the court finds merit in the Plaintiff's case thereby granting the main prayer marshaled by the Plaintiff, it will impliedly be nullifying its previous order and in doing so it will be acting *functus officio*. It is on record that prior to filing this suit, the Plaintiff made two attempts to challenge the decree by way of review. The first attempt being through an application for review filed in 2001 but withdrawn latter in 2004. The 2<sup>nd</sup> attempt was an application for extension of time within which was rejected by Oriyo J for lack of good cause. After this attempt, and having retreated for over 14 years, the plaintiff has changed cause and filed this suit.

The circumstances of this case draws me closer to the interpretation of the principle of res judicata stated in the case of **Kamunye and others v The Pioneer General Assurance Society Limited (1971) EA263**, which I find it pertinent to reproduce here:

"The test whether or not a suit is barred by res judicata seems to me to be - is the plaintiff in the



second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of resjudicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time -  
Greenhalgh Mallarc (1947) 2 ALL ER 255.

The facts of the instant suit correspond very well with the authority above. In my considered view, the plaintiff is fully aware that the suit is meant to challenge the deed of settlement over the disputed land which decreed by this court in Civil Case No. 362 of 1996 but has decided to craftly side step Tommy Spades Manufactures Limited so as to conceal the connection between the current suit and the former suit. His two futile attempts to challenge the decree bears testimony of the Plaintiff's of not only the knowledge of the effect of deed of settlement between him and Tumsifu Eliah Sawe but also the appropriate avenues to challenge the court's decree. The plaintiff is certainly fully aware that the decree which vested ownership of the suit property on Tumsifu Eliah Sawe being the decree of this court is not subject to the scrutiny of this court save by way of review, the avenue which he exhausted with no fruition. What he is now doing is to reinstate the matter through a back door and this this no better name than a blatant abuse of the court processes, which in my view should not be entertained

as that would defeat the notion which the principle of *res judicata* is meant to cure.

Guided by the above principles I find merit in the defendant's preliminary objection and I hereby dismiss the suit with costs.

DATED at DAR ES SALAAM this 10<sup>th</sup> day of February 2020.



**J.L. MASABO**

**JUDGE**

Judgment delivered this this 10<sup>th</sup> day of February 2020 in the presence of Mr. frank Killian, counsel for the Plaintiff, the Plaintiff and the 2<sup>nd</sup> Defendant present in person.



**J.L. MASABO**

**JUDGE**