

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 178 OF 2019**

**OMARY MTALIKA ..... PLAINTIFF**

**VERSUS**

**ETS MAUREL ET PROM ..... DEFENDANT**

**RULING**

30<sup>th</sup> July & 04<sup>th</sup> Sept 2020.

**E. E. KAKOLAKI J**

This ruling is in respect of the preliminary point of objection raised by the defendant challenging the competence of the suit before this court. It is the defendant's contention that the Plaintiff is incurably defective as it contravenes the provision of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2002].

Briefly the plaintiff is suing the defendant for tortious action of malicious prosecution committed to him by the defendant hence claiming a total sum of Tanzanian Shillings 300,000,000/= being damages for tarnishing his image and respect as well as expenses incurred to hire legal services. Further to that a total sum of Tanzanian Shillings 400,000,000/= is claimed as general damages and school fees. Prior to institution of this suit the plaintiff had sued the defendant before the Resident Magistrates Court of Dar es

salaam at Kisumu in Civil Case No.105 of 2018 for the same cause of action and damages claimed in the present suit. The defendant successfully raised a preliminary objection against him as the suit was dismissed after the court had sustained the objection for want of pecuniary jurisdiction. No appeal or revision was preferred against the said dismissal order of the suit and in turn another same suit was preferred in this court hence the present preliminary objection.

When the matter came for hearing of the preliminary objection parties were represented. The plaintiff had the services of Mr. Martin Godfrey learned advocate whereas the defendant was defended by Mr. Paul Makang'a learned advocate. The court ordered parties to dispose the preliminary point of objection by way of written submission the order which was complied with.

Submitting on the preliminary point of objection Mr. Makang'a for the defendant argued that, the present suit contravened the provisions of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2019] for being Res Judicata. He had it that, the plaintiff instituted the suit against the defendant before the Resident Magistrate Court of Dar es salaam at Kisumu in Civil Case No. 105 of 2018 claiming against the defendant Tshs. 700,000,000/= being specific and general damages purportedly arising from malicious prosecution occasioned unto him by the defendant. That, the said suit was adjudicated by Hon. Mtega, PRM and dismissed after sustaining the preliminary objection on point of law raised by the defendant. He invited the Court to pay a look at the alleged plaint and the ruling of the Court.

Mr. Makang'a went on to submit that, the dismissal of the suit by the Resident Magistrates Court of Dar es salaam at Kisutu amounted to conclusive determination of the suit. That, since the suit was dismissed the defendant is denied with an opportunity to refile it. He cited to Court the case of **Olam Uganda Limited (*Suing through its Attorney United Youth Shipping Company Limited*) Vs. Tanzania Habours Authority**, Civil Appeal No. 57 of 2007 (CAT-unreported) and **Henry Mtei and Others Vs. Waziri Maneno Choka**, PC Civil Appeal No. 86 of 2018 (HC-unreported) to support his stance. Mr. Makang'a added that the only available remedy for the defendant when the suit was dismissed was to either appeal against or file a revision or review applications to have the dismissal order set aside and not to bring a fresh suit against the defendant. For the foregoing he implored this court to dismiss the suit for want of jurisdiction.

Opposing the preliminary objection raised, Mr. Geoffrey for the plaintiff fronted his argument by contending that, section 9 of the CPC does not apply to the circumstances of this suit as for the matter to be Res Judicata parties must be fully heard by adducing evidence and verdict given by the competent court. He said, in Civil Case No. 105 of 2018 the trial court lacked jurisdiction and therefore did not determine the case by hearing the evidence from both parties, so to him the only available remedy is to re-open or file the case in a proper jurisdiction and not to set aside the dismissal order as proposed by the defendant. To say the least, he was surprised by the defendant's proposition of setting aside the dismissal order issued in the ruling by way of appeal terming it to be strange to him. He therefore invited this court to dismiss the objection with costs and proceed to hear the suit on

merits. Submitting in rejoinder to the plaintiff's submission, Mr. Makang'a reiterated what he had stated earlier in his submission in chief and stressed on the authorities he had referred the court to, inviting the court to sustain the objection and dismiss the suit in its entirety.

Having reduced down both parties submissions let me now turn to consider and determine the raised point of objection. In order to resolve these competing submissions as to whether this suit is res judicata or not, it is instructive that I quote the provisions of section 9 of the CPC. It provides:

*9. 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. (emphasis supplied).*

Relying on the above provision it is Mr. Makang'a submission that, the cause of action and the reliefs sought in the present suit are substantially the same as the ones in the Civil Case No. 105 of 2018 which was dismissed therefore conclusively determined. Thus, the matter is Res Judicata as per section 9 of the CPC. The plaintiff is of the opposite view that, the matter is not res judicata as the alleged decided case was not decided on merit by receiving evidence and verdict given on it, thus the only remedy is to refile it. I am in agreement with Mr. Makang'a's submission that this matter is res judicata as

provided under section 9 of the CPC since the claims in the present suit are directly and substantially the same as the ones in Civil Case No. 105 of 2018 which were determined by the court when dismissed the suit. My finding is fortified by the decision of the Resident Magistrates Court of Dar es salaam at Kisutu dated 11/12/2018 when the trial court stated:

*Therefore, I concur with the submission of the Defence counsel that this court had no pecuniary jurisdiction to hear the matter, because the plaintiff in his Complaint shows that is claiming a total sum of Tshs. 300,000,000/ only as the specific damages for malicious prosecution. This court has pecuniary jurisdiction to hear the matter of that nature to the tune of Tshs. 200,000,000/=. If that is the position I accordingly sustain the 3<sup>rd</sup> point of preliminary objection and consequently **the suit is dismissed with costs.***

*It is so ordered.*

*Sgd.*

*J.H.Mtega*

*Principal Resident Magistrate*

*11/12/2018*

***(emphasis supplied)***

There is no dispute therefore that the suit in Civil Case No. 105 of 2018 was dismissed for want of jurisdiction. It is settled law that once the matter is

dismissed the same is considered to have been determined conclusively. This position of the law was well spelt by the Court of Appeal in the case of **Olam Uganda Limited** (supra) when stated:

*"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same Court or on appeal or revision by this Court."*

Basing on the above authority I have no doubt to hold that, Mr. Geoffrey's submission that, since the matter was not heard on evidence and verdict given on it the only remedy is to refile it, is misconceived. I so hold because when the suit in Civil Case No. 105 of 2018 was dismissed, it was found by the trial court not to be legally sustainable. The only available remedy for the plaintiff as per **Olam Uganda Limited** (supra) was to either appeal or file a revisional or review application against the dismissal order. Since no action was taken by the plaintiff then the decision of lower court remained valid. This court is of the finding therefore that, plaintiff cannot file a fresh suit unless and until when the dismissal order in Civil Case No. 105 is vacated. Thus the present matter is res judicata.

In the circumstances and for the foregoing reasons, I sustain the preliminary point of objection raised by the defendant. The suit is therefore struck out for being res judicata.

Costs be taxed to the plaintiff.

It is so ordered.

**DATED at DAR ES SALAAM** this 04<sup>th</sup> day of September, 2020.

  
E. E. Kakolaki  
**JUDGE**  
**04/09/2020**



Delivered at Dar es Salaam this 04<sup>th</sup> day of September, 2020 in the presence of Plaintiff, Mr. Paul Makang'a learned advocate for the defendant and Ms. Lulu Masasi, court clerk.

Right of Appeal explained.

  
E. E. Kakolaki  
**JUDGE**  
**04/09/2020**

