

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL CAUSE NO. 3 OF 2019**

**BONIFACE VICENT MUHORO AND 4 OTHERS.....PETITIONERS
VERSUS
THE ATTORNEY GENERAL.....RESPONDENT**

RULING

Date of last Order: 20/02/2020
Date of Ruling: 19/03/2020

MLYAMBINA, J.

The issue in controversy in this matter is; *whether the principles of res-judicata as applies in normal civil cases have the same effect on public litigation cases. If yes, whether this matter is incompetent for being res-judicata.*

The background of this matter is that the Petitioners filed their case before the Court challenging the provisions of *Section 36 (2) of the Economic and Organized Crimes Control Act Cap 200 (R.E. 2002).*

The Petitioners alleged that Section 36 (2) (*supra*) is unconstitutional hence null and void.

In reply to the Petition, the Respondent raised a *plea in limine litis* namely:

That, the Petition is untenable and bad in law for seeking reliefs which are res-judicata.

When arguing the legal objection, the Petitioners appeared in person. The Respondent was judiciously represented by learned state attorney Daniel Nyakiha. In considering the essential element of *res-judicata*, Mr. Nyakiha, was of firm view that the Petition should be dealt with by looking at the public interest litigation, meaning that, if the provision is decided in whatever way, it will not only affect the Petitioners but the public at large.

In view of Mr. Nyakiha, the presence or removal of *Section 36 (2) (supra)* will affect the entire public including the Petitioners and the Respondents. In buttressing the concept of public litigation, Daniel Nyakiha referred this Court to the decision in the case of *Fikiri Liganga, Carlos J. Cuthbert (Petitioners v. the Attorney General and Tanganyika Law Society*, Misc. Civil Cause No. 5 of 2017 at page 18. While referring to the case of the *State of Karnataka and Another v. All Indian Manufactures Organization and Others* AIR 2006 SC 186, the Court stated:

As a matter of fact, in public interest litigation, the Petitioner is not agitating his individual rights but represents the public at large as long as the litigation is bonafide, a judgement in a

previous public interest litigation would be a judgement in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue which had been raised on earlier occasion by way of a public interest litigation.

Mr. Nyakiha told the Court that *Section 36 (2) (supra)* was decided in the case of *Gidion Wasonga and 3 Others v. the Attorney General and 2 Others* Misc. Civil Cause No. 14 of 2016. Such case finally and conclusively determined the issue of constitutionality of *Section 36 (2) (supra)*. Mr. Nyakiha submitted that, bringing again the Petition challenging the constitutionality of *Section 36 (2) (supra)* makes the Petition *res-judicata* because it has been decided by the Court that such provision is constitutional. To bolster up the submission, Mr. Nyakiha cited the recent decision in Misc. Civil Cause No. 32 of 2018 between *Emmanuel Symphonia Massawe v. the Attorney General*.

In that case this Court while relying on the decision in the case of *Gidion Wasonga and 3 Others v. The Attorney General* and the concept established in the case of *Fikiri Liganga and Another* on the concept of public litigation, the Court struck out the same matter which wanted for analyzing the provision of *Section 36 (2) (supra)*.

To wind up his submission Mr. Nyakiha prayed the Petition be dismissed for being *res-judicata*.

In response, the 2nd Petition submitted that the notice of preliminary objection raised by the Respondent is pre-mature because it contravenes the provisions of *Section 7 (1) of the Basic Rights And Duties Enforcement Act (BRADEA)* and it contravenes Rule (6) (1) and 7 (1) of BRADEA Practising and Procedure Rules of 1994.

The 2nd Petitioner pointed out that the procedure of filing cases in this Court starts with originating summons. Thus, it is the mandatory requirement of the Petitioner to serve person whose redress is sought as per *Section 2 (1) of the BRADEA (supra)*. In this matter, in view of the 2nd Petitioner, the Attorney General was served on 10th April, 2019, the Director of Public Prosecution was served on 11th April, 2019 but the Respondents prematurely filed a counter affidavit and a notice of preliminary objection on 9th April, 2019. For that reason, the 2nd Petitioner prayed the preliminary objection be dismissed and for an order that the Petition be heard on merits.

The 1st Petitioner on his part joined hand with the 2nd Petitioner's submission. He further addressed the Court on the doctrine of *res-*

judicata according to the 1st Petitioner, *Section 9 of the Civil Procedure Code Cap 33 (R.E. 2002)* which was borrowed from Section 11 of the Indian Civil Procedure Code have six cumulative conditions.

One, there are must be a matter which is directly and substantially in issue in the former suit. *Two*, the issues must be between the same parties or between parties under whom or any of them claim litigating. *Three*, the parties must have litigated under the same title. *Four*, the suit must have been dealt by the Court of competent jurisdiction. *Five*, there must be two suits. The former suit and the subsequent suit. *Six*, the issue must have been determined conclusively.

The 1st Petitioner went on to concede that in this Petition they are challenging the constitutionality of *Section 36 (2) of the Economic and Organized Crimes Control Act Cap 200 (R.E 2002)* which was dealt with in the cited case of *Gidion Wasonga*. On that note, the 1st Petitioner agreed that the 1st condition of *res-judicata* has been fulfilled, but in his view, the second condition has not been fulfilled.

The reason is that the Petitioners in this case were not the parties in *Wasonga's case*. As such, the Petitioners had no right of appeal. To back up such position, the 1st Petitioner cited the case of *Magu*

District Council and Another v. Mhande Mkwabi TLR 1997 at page 286 High Court Mwanza, the Court held:

No provision of the law allows the joining of the party as appellant in appeal proceedings who has not been a party in the original proceedings whose judgement and decree were subject of the appeal

As to when a person can be a party to the suit, the 1st Petitioner referred the Court to the book titled. "*The Code of Civil Procedure 5th edition by Dr. T.P Tripath at page 76*" in which he states:

So, for parties to the suit are concerned a person is a party to the suit if his name appears on the record of the suit at the time of the decision.

The 1st Petitioner conceded that the Court was competent to try the matter and it is true one is the former suit and this is the subsequent suit.

On the last principle, the 1st Petitioner, submitted that this case is *res-subjudice* and not *res-judicata*. As regards the *Fikiri Liganga case*, the 1st Petitioner submitted that the parties and the controverted issues are not the same.

In finalizing his reply submission, the 1st Petitioner cited the case of *ESO Tanzania Ltd v. Deusdedit Rwebangira Kaijage Court of*

Appeal of Tanzania TLR 1990 at page 102. At page 103 the Court held:

At the hearing Prof Shivji submitted that the question of jurisdiction as raised in ground 1 was finally decided by this Court on appeal from the decision of the high Court in Civil Appeal No. 10 of the same suit between the same parties.

The 5th Petitioner on his part supported the argument of the 1st and 2nd Petitioners on *res-judicata* doctrine. He amplified that currently *res-judicata* plain meaning is covered under *Section 9 of the Civil Procedure Code* but in order to get the proper meaning of the law. According to the 5th Petitioner, one needs to read *Order I Rule 8 (1) and (2) of the Civil Procedure Code*. It is through that Order the public litigation principle can be found.

The 5th Petitioner distinguished the case of *Fikiri Liganga* of which was cited in the case of *Symphorian Masawe* on the reason that most of the cited cases therein are Indian cases which do not fit Tanzanian environment.

According to the 5th Petitioner, in India, cases involving basic rights and duties follow Civil Procedure Code. To support that argument, the 5th Petitioner cited the case of *Forward Construction Co. and ORS v. Probhat Mandal* at page 5.

It was submitted by the 5th Petitioner that *Articles 30 (3) and 26 (2) of the Constitution* does not give procedure on condition to notify the public. Even the BRADEA as well as the regulation does not give such condition. In his view, in cases of basic rights and duties, the doctrine of *res-judicata* is not applicable.

The 5th Petitioner added that the rule of conformity binds the other Court but not the Court itself. He gave example of the Court of Appeal of Tanzania decisions which do not bind the Court of Appeal of Tanzania itself. On that point, the 5th Petitioner cited the Case of *Jebra Kambole v. the Attorney General* Misc. Civil Cause No. 22 of 2018 at page 14 where the Court was bound by the rule of conformity by referring to the decision in *Mbushuu case*.

Equally, the 5th Petitioner submitted that the rules of uniformity does not bind the Court of Appeal itself. He cited the case of *Juwata v. Kiwanda cha Uchapishaji cha Taifa*, TLR 1988 at page 146 (ii) and (iii).

The 5th Petitioner conceded that the decision in *Wasonga's case* is *res-subjudice* but not *res-judicata*. If it will be decided by the Court of Appeal of Tanzania will bend the lower Court on the doctrine of *stare decisis*.

The 5th Petitioner therefore prayed this Court to depart from the position reached in *Fikiri Liganga* and *Symphorian case* because do not follow under the doctrine of *stare decisis*, they are just under uniformity rule.

In rejoinder, Mr. Nyakiha responded that questioning legality of the preliminary objection at this stage is an afterthought which does not cure the preliminary objection raised by the Respondent.

On *res-judicata* principle, Mr. Nyakiha maintained that in public interest litigation, the Court has to ascertain the effect of the Petition and the public interest while re-citing the case of *State of Karnataka v. All India Manufactures Organization and Others* at page 10. Mr. Nyakiha told the Court that in public interest litigation, the Petitioner is not agitative of his individual rights but represents the public at large. Mr. Nyakiha maintained that it is the same public interest litigation principle the High Court of Tanzania borrowed in the case of *Fikiri Liganga*.

On *res-subjudice* principle, Mr. Nyakiha submitted that the Petitioners cannot escape the fact that *Section 36 (2) of the Economic and Organized Crimes Control Act* is already determined by this Court. Doing the same is barred by the concept of *res-*

judicata and public interest litigation as elaborated in *Fikiri Liganga case (supra)*.

In the light of the above extensive arguments of both parties, this Court is of profound view the legality of the preliminary objection raised cannot be determined by ascertaining facts even if this Court join hands with the Petitioners that the objection raised by the Respondent is incompetent for being prematurely lodged, yet the same point can be raised by this Court at any stage because the point of *res-judicata* goes to the jurisdiction of the Court.

Indeed, parties themselves cannot give a Court jurisdiction on matters already determined by the same Court on the same issue of the same parties. (See, *TanESCO Ltd v. IPTL and Others*, Consolidated Civil Applications No. 19 of 1999 and 27 of 1999, Court of Appeal of Tanzania).

The central point, therefore, is; *whether the instant matter is res-judicata with the case of Fikiri Liganga*. Prior answering that question, there is a main issue; *whether the principles of res-judicata as applies in normal civil cases have the same effect on public interest litigation cases*.

A survey to answer the afore issue starts with the understanding of the term *res-judicata*. Black Law Dictionary 8th Edition Bryan A.

Garner, 2004 defines *res-judicata* as a thing adjudicated. It is an issue that has been definitely settled by judicial decision. That means, the doctrine of *res-judicata* means the matter is already judged.

In Tanzania, the principle of *res-judicata* as governed under *Section 9 of the Civil Procedure Code (supra)* is meant to bar multiplicity of suits and guarantee finality to litigation. Section 9 of the Civil Procedure Code provides:

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.

Explanation I: the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: for the purposes of this section, the competence of a Court shall be determined irrespective of any

provisions as to a right of appeal from the decision of such Court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantial in issue in such suit.

Explanation V: any relief claimed in the plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The provisions above, in particular explanation VI to Section 9 of the Civil procedure Code (*supra*), bars the trial of an issue in which the matter directly and substantially in issue has been adjudicated upon in a previous matter. In the case of *Kamunye and Others v.*

the Pioneer General Assurance Society Ltd (1971) EA 263 the principle of *res-judicata* was enunciated that:

The test whether or not a suit is barred by *res-judicata* seems to me to be is he 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 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 res-judicata* 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.

Though the Kamunye case was not on public interest litigation issue, the object of *res-judicata* doctrine remains the same in either normal suits cases or public interest litigation cases. In the instant matter, both parties do not dispute at all that the constitutionality of *Section 36 (2) of the Economic and Organized Crimes Control Act* was conclusively determined by the same Court in the case of Fikiri Liganga.

Since the Petitioners are litigating on public interests' basis, they are privies on the same issue. As such, the principles of *res-judicata* as applies in normal civil cases have the same effect in public interest litigation.

The Petitioners have called upon this Court to depart from its earlier decision in *Fikiri Liganga*. However, there are no new factors being stated by the Petitioners for this Court to do so.

The Petitioners have also distinguished the *Fikiri Liganga* and the *Symphorian cases (supra)* for relying on Indian cases which are of different environment, but there are no clear legal principles being stated by the Petitioners that differentiates the Indian environment with the Tanzania environment as far as safety and interest of the public is concerned. Public litigation Worldwide are litigation requiring to consider the intent of public at large. No matter it is in India, Tanzania or elsewhere.


The intent of public at large over *Section 36 (2) (supra)* was considered conclusively by this Court in *Fikiri Liganga case*. In absence of new factors, the same Court cannot re-consider the same public interests brought by privies of the former case.

Further, the definition of "a party" to a case offered in the book titled *The Code of Civil Procedure 5th edition (supra)* has to be

interpreted widely to encompass privies to a case in both normal suit and public interest litigation cases. If the definition is interpreted narrowly, as the Petitioners wants this Court to do, there can be a danger for the Court to have conflicting decisions over the same issue.

Moreover, Order VIII Rule 1 and 2 of the Civil Procedure Code is about Written Statement of Defence and counter claim. It has nothing to do with the principle of *res-judicata* as enunciated under *Section 9 of the Civil Procedure Code (supra)*.

In the end, the preliminary objection is hereby upheld. Consequently, the matter is marked dismissed for being *res-judicata*. Considering the nature of the matter, let costs be shared. It is so ordered.



Y. J. MLYAMBINA
JUDGE
19/03/2020

Ruling delivered and dated 19th March, 2020 in the presence of the 1st 4th and 5th Petitioners in person, in the absence of the 2nd and

3rd Petitioners and in the presence of Daniel Nyakiha State Attorney
for the Respondent.



Y. J. MLYAMBINA
JUDGE

19/03/2020