

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 148 OF 2015**

**SALUM SAID MATUMLA.....PLAINTIFF**

**VERSUS**

**ECOBANK TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT**

**BILOSTAR DEBT COLLECTORS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Date of last Order:** 01/09/2020

**Date of Ruling:** 12/10/2020

**MLYAMBINA, J.**

*Section 9 of the Civil Procedure Code*, herein after referred to as *Civil Procedure Code, 1966 (R.E. 2019)* prohibits the Court if: **One**, the matter was directly and substantially in issue in the former suit. **Two**, the issues are between the same parties or between parties under whom or any of them claim litigating. **Three**, the parties have litigated under the same title. **Four**, the former suit was determined by the Court with competent jurisdiction. **Five**, there are two suits, the former suit and subsequent suit. **Six**, the issue has been determined conclusively. The position is supported by Sarkar, who in his Book **Sarkar's**

**the Law of Civil Procedure, 8<sup>th</sup> Edition** Vo. 1, at page 53 states:

*The doctrine of res judicata was recognized much earlier... rests on the principle that one should not be vexed twice for the same cause and that there should be finality of litigation.*

In other words, the principle embodied in *Section 9 of Civil Procedure Code* and in the Sarkar's Book prohibit the Plaintiff to relinquish and re-institute another case in which the subject matter was directly and substantially in issue in the subsequent suit and have been heard and finally decided in the former suit. In case of **Lotta v. Tanaki and Others** [2003] 2 EA 556 at Page 557 the Court of Appeal in illustrating the test of *res judicata* in connection to *Section 9 of Civil Procedure Code* states that:

*The object of the principle of res judicata 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 the Court of competent jurisdiction in the subject matter of the suit.*

In this suit, after closure of the Plaintiffs' case and prior defence hearing, the Defendant, Ecobank discovered that there is a judgment delivered by this Court on 18<sup>th</sup> April, 2018 through his

Lordship Mruma J. in *Commercial Case No. 33 of 2016* between **Ecobank and Ahmed Freight and Salum** as one of the Defendant. As such, the 1<sup>st</sup> Defendant raised *a plea in limine litis* to the effect that; *this Court lacks jurisdiction to determine the instant suit based on the principle of res judicata.*

In order to address the objection raised in line of the doctrine of *res judicata* stated in the introductory part of this ruling, I will revisit the claim of the Plaintiff in his plaint.

The Plaintiff's claimed against the Defendants jointly and severally among other things for a declaration that Defendants conduct, actions and omissions complained of in this suit are wrongful and unlawful; a declaration that the seizure and continued detention or holding of the Plaintiffs motor vehicles with Registration Number T901 ASJ and T199 AUS are wrongful and illegal; an order for immediate release of the motor vehicles with Registration Numbers T901 ASJ and T199 AUS all of Scania make; payment of Tanzanian Shillings Sixty Million (TZs. 60,000.00) per month being loss of revenue for the entire period the motor vehicles will remain wrongfully and unlawfully seized and detained by the Defendants will such period the same will be released to the Plaintiff in good working conditions and payment of general damages.

The Plaintiff has claimed that he is the registered and lawful owner of the commercial motor vehicles with registration numbers T901 ASJ and T199 AUS. That the said vehicles were purchased from one Ahmed freight limited and ownership from the said previous owner into his name was effected accordingly.

It was also claimed that from the date and time the Plaintiff acquired the said two vehicles, the same have remained under his possession and his registration and has been using them for business of carriage of goods for reward from Dar es Salaam to any other point be it to neighboring Regions and or Countries and *vice versa*.

The Plaintiff was of further claims that on or about 3<sup>rd</sup> September, 2015 while the Plaintiffs' motor vehicles were under their daily routine, the said motor vehicles were attached, seized towed and unlawfully detained by the second Defendant claiming to be acting under the instructions of the first Defendant.

The 1<sup>st</sup> Defendant has submitted that, in *Commercial Case No. 33 of 2016 (supra)*, Ecobank was seeking orders against Salum for repossession and sell of the Chattels issued by Salum under the Chattel Mortgage, payment of TZs 610, 066, interest on the

decretal amount at the rate of 7% costs of the suit and other reliefs.

According to the 1<sup>st</sup> Defendant, the Judgement in Ecobank's Commercial Case was delivered in favour of Ecobank against Ahmed Freight and Salim and the High Court, *inter alia*, ordered Salum to pay Ecobank a sum of TZs 610,066, 197.01 being the principal amount interest at the rate of 17% per annum chargeable on the decretal sum from the date the principal amount became due to the date of payment, interest at the Court's rate of 7% and cost of the suit.

The 1<sup>st</sup> Defendant cited among other authorities, the decision of the Court of Appeal of Tanzania in the case of **Gerard Chuchuba v. Rector, Itaga Seminary** [2002] TLR 213 where the Court cited with approval the decision of **Karshe v. Uganda Transport Company** [1967] E.A 774, which analyzed the essential elements that must exist to establish *res judicata*. In the said decision the essential elements to be proved or satisfied were analyzed to be:

1. The judicial decision was pronounced by a Court of competent jurisdiction.

**Gideon and 3 Others**, dated 06 April, 2020 (unreported) where the Court of Appeal, in determining whether a former suit filed by the Appellant and the subsequent suit was barred by the principle of *res judicata* as they involved the appellant's claims on alleged breach of agreement, held at page 14 of the Judgment that:

*The subject matter directly and substantially in issue in the former suit was also directly and substantially in issue in the subsequent suit as collect observed by the trail judge at page 99 of the record of appeal.*

Further, the 1<sup>st</sup> Defendant referred this Court to a case of **Umoja Garage v. NbC Holding Corporation** [2003] TLR 339, where the Court of Appeal held that:

*The facts giving rise to the appellant's subsequent suit were known to the appellant at the time of filing the previous suit then the matter raised in the subsequent case are deemed to have been a matter, directly and substantially, in issue in the previous case and the principle of res-judicata applied in the appellant's subsequent suit.*

It was the 1<sup>st</sup> Defendant's submission that the facts in **Salum's Case** were known to Salum at the time of filing Ecobank's Commercial Case and hence the matter in **Salum's Case** are

deemed to be matters directly and substantially the same with Ecobank 's Commercial Case and hence the principle of *res-judicata* should apply to aid multiplicity of conflicting decisions.

As regards the 1<sup>st</sup> and 4<sup>th</sup> principles, whether the former and subsequent suits are in respect of the same parties, the judicial decision was pronounced by a Court of a competent jurisdiction and that the judicial decision was final, the 1<sup>st</sup> Defendant submitted that the parties in Ecobank's Commercial case are **Ecobank, Ahmed Feight, Salum and Two Others** and the parties in **Salum's Case** are **Salum, Ecobank, Ahmed Freight and another.**

In view of the 1<sup>st</sup> Defendant, **Salum's Case** and Ecobank's Commercial Case involves the same parties and the Judgment and Decree in Ecobank's commercial case was pronounced by a Court of competent jurisdiction since the high Court of Tanzania, Commercial Division at Dar es Salaam had the jurisdiction to determine **Ecobank's case** and also **Salum's Case.**

On the 3<sup>rd</sup> principle, the 1<sup>st</sup> Defendant submitted that the Judgment and Decree in Ecobank's Commercial Case is final since Salum has neither appealed against the said decision nor applied for the same to be set aside.

In response, the Plaintiff distinguished the cases of **Gerald Chuchumba v. Rector, Itaga Seminary** (*supra*) and the case of **Dr. Bhakkilana Augustine Mafwene** (*supra*) as the subject matters in those two cases at hands are quite different on facts. In a similar vein the Plaintiff distinguished the case of **Umoja Garage v. NBC Holding Corporation** [2003] TLR 239 in the sense that it is Civil Case No. 148 of 2015 which was first filed. It commenced earlier, so it can't be termed as a subsequent suit whereas *Commercial Case No. 33 of 2016* was filed subsequently and in total disregard of the principle of *res-subjudice* as contained under *Section 8 of the Civil Procedure Code, 1966 Cap. 33 (R.E 2002)*.

On the principle whether former and subsequent suits are in respect to the same parties, the judicial decision was of the Court of the competent jurisdiction and that the judicial decision was final, the Plaintiff replied that, *Civil Case No. 148 of 2015* was filed first as opposed to *Commercial Case No. 33 of 2016*. Parties in these two cases are different as Civil Case No. 148 of 2015 there is **Bilostar Debt Collectors** and one of the issues is framed against her while that is not the case in the Commercial Case. Further to that, the Plaintiff contended that, the said



Commercial Case contains two parties that **is Anwar Ahmed Abdallah and Munir Abdallah Ahmed** which do not form part of the record in *Civil Case No. 148 of 2015*.

Again, in *Civil Case No. 148 of 2015* which was filed earlier than *Commercial Case No. 33 of 2016*, the bank admitted in its amended Written Statement of Defence that this Court has jurisdiction to determine the case. The Plaintiff cited *Section 123 of the Evidence Act, Cap 6 (R.E 2002)* provides as follows:

*When one person has, by his declaration, Act or omission, intentionally caused or permitted another person they believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his or his representative, to deny the truth of that thing.*

According to the Plaintiff, the 1<sup>st</sup> Defendant is estopped by virtue of the provisions of *Section 123 of Tanzania Evidence Act*, to make u-turn and dispute the jurisdiction of this Court to determine this case.

The Plaintiff reminded the Court not to lose sight that in *Civil Case No. 148 Of 2015* there are two cases, that is the Main Case and a Cross Suit. In his view, a Counter Claim is an independent

case from the Main Case. But all two cases are to be determined on facts pleaded as well as evidence to led. Further, while the Cross Suit talks of Tshs. 610,066,197.00 the Main Case is totally on something else. So, in view of the Plaintiff, by necessary implication the 1<sup>st</sup> Defendant's Counter Claim does not materially affect the Plaintiffs' Main Case by any standard.

It is also on record in *Commercial Case No. 33 of 2016* that the 3<sup>rd</sup> Defendant in this case was advanced with several credits that USD 500,000, USD 600,000, and restructuring was equally done but the record of *Civil Case No. 148 of 2015* regarding the Counter Claim does not provide so. The Plaintiff cited the provision of *Section 85 and 87 and 95 of the Law of Contract Act, Cap. 345* which provide:

*Any variance, made without the surety's consent in terms of the contract between the principal debtor and the creditor, discharges the surety as to the transactions subsequent to the variance.*

*A contract between the creditor and the principal debtor by which the creditor makes a composition with or promise to give time to, or not to sue, the principal debtor discharges the surety, unless the suety assents to such contract.*

In view of the Plaintiff, even if the Plaintiff could have guaranteed the 3<sup>rd</sup> Defendant, which is disputed anyway, restructuring of the principal debtor's liability without his consent discharged him from liability in law. The Plaintiff cited the case of **National Bank of Commerce Ltd v. Mustapha Issa Sigh and Hussein Ibrahim Hancha**, Commercial Case No. 221 of 2002 (Reported in Commercial Court Manual Reports, 2002) pages 327 and 328.

It was maintained by the Plaintiff that he was not aware of the pendency of *Commercial Case No. 33 of 2016*. He could not have reacted on something he was unaware of.

Having considered the afore submissions and records at length, it is no doubt that both parties do not dispute that the doctrine of resjudicata is meant among others to guarantee finality to litigation. In case of **Lotta v. Tanaki and Others**, [2003] 2 EA 556 at page 557, the Court of Appeal in illustrating the test of *res judicata* in connection to *Section 9 of Civil Procedure Code* stated that:

*The object of the principle of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgement between the same*

*parties or their privies on the same issue by the Court of competent jurisdiction in the subject matter of the suit.*

In order to analyse on whether the doctrine of res-judicata has been met in this case, I will start with its first principle. As properly submitted by the 1<sup>st</sup> Defendant and largely not denied by the Plaintiff, there existed *Commercial Case No. 33 of 2016* in which the Plaintiff herein was one of the Defendant. The 1<sup>st</sup> Defendant herein was the Plaintiff. Though it is true that in *Commercial Case No. 33 of 2016* there are other two parties **Anwar Ahmed Abdallah and Munir Abdalha Ahmed** who are not parties in the instant case, still it is undeniable fact that the herein Plaintiff and the 1<sup>st</sup> Defendant were the parties in *Commercial Case No. 33 of 2016*. As such, the suit is *res-judicata* between them.

It is also true that Billostar debt collectors was not a party in *Commercial Case No. 33 of 2016*. However, Billorstar is a mere agent. The suit cannot proceed against it alone without its principal. Even the framed issue cannot rightly be determined in absence of its principal, the 1<sup>st</sup> Defendant.

On the second principle of *res judicata*, I agree with the Plaintiff that this suit was filed earlier than *Commercial Case No. 33 of*

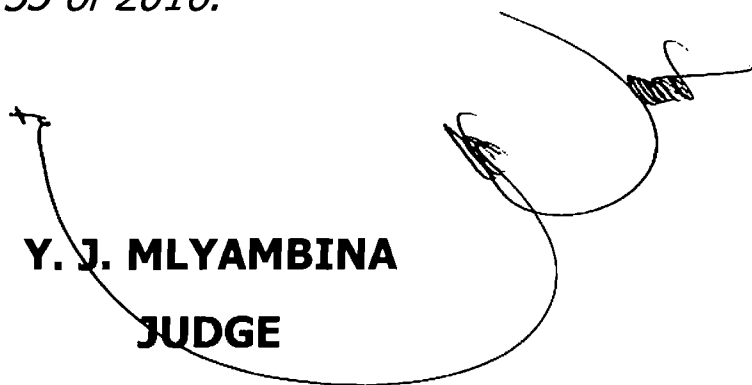
2016. However, *Commercial Case No. 33 of 2016* was determined prior this case. Worse, there was no objection in *Commercial Case No. 33 of 2016* based on *res-subjudice* principle. The fact that *res-judicata* principle is coned on finality of decision, the instant suit fits within the parameters of *res-judicata*. The other reason is that there is already a decision over the same parties, same subject matter by the competent Court.

As regards the 3<sup>rd</sup> and 4<sup>th</sup> principle of *res-judicata*, I have noted true, as submitted by the 1<sup>st</sup> Defendant, in both this suit and *Commercial Case No. 33 of 2016* the dispute revolves about the Chattel Mortgage issued by the Plaintiff to the 1<sup>st</sup> Defendant. Indeed, the Judgment in *Commercial Case No. 33 of 2016* is final for lack of any appeal or any revision or any application for review. The cited decision in the case of **Dr. Bhakilana Augustine Mafwere** is applicable in all aspects of this suit. Equally, the **Umoja Garage Case** (*supra*) applies in this suit. The instant suit can be termed subsequent suit because there is already a pending decision in respect of the same parties over the same property. *Commercial Case No. 33 of 2016* cannot be termed *res-subjudice* at this stage unless its decision is nullified by the Court of appeal. Otherwise, the Court is *functus officio* to entertain this suit. If the Court is to overrule the raised *plea in*

*limine lits*, there can be a danger of having conflicting decisions over the same parties litigating under the same subject matter.

I further agree that a Counter Claim is an independent suit. However, both Main Suit and Counter Claim in this case revolves over the sale legality of Chattel Mortgage. As such, both suits falls within the ambit of *res-judicata*.

In the upshot, *the plea in limine litis* is sustained. The Suit and Counter Claim are dismissed with costs for being *res-judicata* with *Commercial Case No. 33 of 2016*.



**Y. J. MLYAMBINA**  
**JUDGE**  
**12/10/2020**

Ruling delivered and dated 12<sup>th</sup> October, 2020 in the presence of the Plaintiff in person, Counsel Faiza Salah for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Mwasama Elias holding brief of Bernard Shirima for the 3<sup>rd</sup> defendant



**Y. J. MLYAMBINA**

**JUDGE**

**12/10/2020**