

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISC. LAND APPLICATION NO. 86 OF 2020

(Arising from Land Case No. 15 of 2020)

PETROLUX SERVICE STATIONS LIMITED APPLICANT

VERSUS

1. NMB BANK PLC 1ST RESPONDENT

2. ADILI AUCTION MART LIMITED..... 2ND RESPONDENT

RULING

4th and 10th December, 2020

KISANYA, J.

The applicant, Petrolux Service Stations Limited has filed the present application under certificate of urgency. The Chamber Summons thereof seeks for the following orders, *ex-parte* and *inter-parte*:

(a) An order of Temporary injunction restraining the Respondents, their servants, their agents or any person working under their instructions from auctioning, selling or enter into ownership, interfering with the use and/or ownership of:

- i. Landed property with C.T No. 36896, L.O No. 419943 Located on Plot No. 357 & 358 Block 'K' High Density Kitaji Area, Musoma Municipality – Mara registered in the name of Sylvanus Maganya Chacha.*
- ii. Landed property with C.T No. 11034 LR Mwanza, L.O No. 159107 Located on Plot No.*

Block 'C' High Density Kawawa Street, Musoma Municipality, registered in the name of Magori Sylvanus Chacha.

- iii. Landed property (hotel building with No. 11301, Located on Plot No. 67 'C' Karume Street, Musoma Municipality, registered in the name of Silvanus Maganya Chacha;*
- iv. Landed property with C.T. No. 11925, located on plot No. 69 Block 'C' Karume Street, Musoma Municipality, registered in the name of Celestine Sylvanus Magori;*
- v. Landed property with C.T No. 49973, LR Mwanza, LO No. 425389 Located on Plot No. 480 and 481 Block 'S' Nyasurura D, Bunda Urban Area registered in the name of Petrolux Service Stations Limited;*
- vi. Landed property with C.T No.51566 LR Mwanza, LO No 423108 Located on plot No. 22 Block 'C' Ilungu Magu Urban Area registered in the name of Petrolux Service Stations Limited.*
- vii. Landed property with C.T No.55850 LR Mwanza, LO No. 462411 Located on Plot No.1 Block 'B' Kakindo Area Muleba District registered in the name of Petrolux Service Stations Limited;*
- viii. Landed Property with C.T No. 51565 LR Mwanza, LO No. 423106 Located on plot No. 69 'A' Kisesa, Mwanza City Council registered*

in the name of Petrolus Service Stations Limited;

- ix. *Landed property with C.T No. 48802 LR Mwanza, LO No. 420518 Located on Plot No. 677 & 678 Bweri Musoma Municipal, registered in the name of Magori Sylanus Chacha.*

(b) Costs of the Applicant pursuit of this Application;

(c) Any other temporary relief as this Honourable Court deem fit and justice to grant.

The matter was assigned to me on 25/11/2020. I noticed that a similar application (Misc. Land Application No. 59 of 2020) in respect of the foresaid relief sought between the same parties was heard and determined by this Court on 16/11/2020. The said application was dismissed for want of merit as the condition for granting temporary injunction were not met by the applicant. Therefore, I hesitated to entertain the application *ex-parte* and went on to order both parties to appear for hearing inter-parties on 30/11/2020. I also ordered the respondents to file the counter affidavit on or before 30/11/2020.

In compliance with the order of this Court, the respondents filed a counter affidavit on 27.11.2020. Along with, they filed a notice of preliminary objection on point of law that, the applicant's application is *res-judicata*. Upon being served with the counter affidavit and the notice of preliminary objection, the applicant asked for time to research on the issue raised by the respondent. The prayer was granted and the hearing of the preliminary objection adjourned to 4/12/2020.

When this matter was placed before me for hearing, the applicant was represented by Mr. Heri Emanuel, learned advocate while Dr. George

Mwaisondola, and learned advocate appeared for both respondents. In addition to the issue raised by the respondent and for the foresaid reasons, I asked the parties to address me on whether the Court was not *fanctus officio* and hence not seized with jurisdiction to try the matter.

In justifying the point of preliminary objection and the issue raised by the Court, Dr. Mwaisondola argued that the present application is *res judicata* on the account that it was decided by this Court in Misc. Land Application No. 59 of 2020. He went on to submit that, the Court is *fanctus officio* on the reason that the issue of temporary injunction had been decided by the Court. The learned counsel argued that the doctrine of *res judicata* bars adjudication of a matter which has been adjudicated. He referred the Court to the Black's Law Dictionary, 6th Edition, where *res judicata* is defined to mean a matter adjudicate, a thing judicious acted upon or decided.

It was submitted further by Dr. Mwaisondola that the present application and Misc. Application No. 59 of 2020 are similar. He stated both suits arise from Land Case No. 15 of 2020; parties are the same; the question before the Court is the same; and the landed properties subject to the application is the same. He submitted further that, the previous application (Misc. Application No. 59 of 2020) had already been decided. That said, Dr. Mwaisondola was of the firm view that the subsequent application at hand was *res judicata* and the Court *fanctus officio* to hear and determine. He therefore urged the Court to dismiss it with costs.

Mr. Emanuel, learned counsel for the applicant on the other hand disagreed. He submitted so ardently that the present application was not *res judicata* and that the Court was not *fanctus officio* to determine the same. He referred the Court to the case of **Paniel Lotta vs Gabriel Tanak and Others** [2003] TLR 312 where it was held that the principle of *res judicata* aims at barring multiplicity of suit and guaranting finality to litigation. He

went on to submit that, one of five conditions for the res judicata to apply is to the effect that “the matter in issue must have been heard and decided in the former suit”. Mr. Emanuel argued that the previous application did not finally determine the right of the litigants and that it was not final and conclusive with respect of the right of the parties. For that reason, the learned counsel was of the firm view that the applicant was not barred from applying for another temporary injunction in the same matter or the main suit.

Mr. Emanuel fortified the above argument by citing **Mulla the Code of Civil Procedure by Sir Dinshash Fardunji Mulla, 18th Edition** that:

"In needless to point that interlocutory orders are of various kinds, some of like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that parties might not be prejudiced by normal delay which the proceeding before the court usually take... As they do not impinge upon the legal rights of the parties to the litigation the principle of res judicata does not apply the findings on which these orders are based...."

The learned counsel went on to cite second **Law of Injunctions, Second Edition by Vishwas Shriphar Sohoni** where it is stated at page 178 that:

"It is correct that interlocutory order like temporary injunctions are meant only to preserve the status quo during the pendency of the proceedings and not decide the controversy in issue on merits. Such orders therefore, as laid down by the Apex Court, capable of being altered or varied, but only on proof of new facts or new situation which have emerged subsequently. In this case since the second application for issue of temporary injunction... has been filed, there is no bar under the principle for its consideration..."

Mr. Emanuel went on to submit that the reasoning by the above prominent scholar with respect to temporary injunction has been embraced under Order XXXVII, R. 5 of the CPC. That, temporary injunction is not final and conclusive to the extent that, it can be altered, varied, set it aside or discharged. In view thereof, the learned counsel was of the firm view that, the present application is not *res judicata*.

Submitting on the issue of *fanctus officio*, Mr Emanuel argued that the said principle does not apply in the case at hand. His argument was based on the reasons that the present application seeks for an interlocutory order which is not final and conclusive in determination of the rights of the parties. Therefore, the learned counsel moved the Court to overrule the preliminary objection.

When Dr. Mwaisondola rose to rejoin, he reiterated his argument that the principles of *res judicata* and *fanctus officio* apply to an application for interlocutory orders. He cited the case of **Shaku Haji Juma vs Attorney General and Two Others** (2000) TLR 49 to support his argument. The learned counsel went on to submit that the fifth element of *res judicata* was satisfied. He argued that the issue of temporary injunction in respect of the landed properties in the present application was determined and finally determined in Misc. Land Application No. 59 of 2020. Dr. Mwaisondola argued further that the literatures referred to by the learned counsel for the applicant provides that the court would be justified in rejecting subsequent application which is based on the same facts. He also contended that the present application is not for temporary injunction on the account that, it was not brought pending determination of the main case.

I have considered the rival arguments by the learned counsel for both parties with the weight they deserve. It my considered view that the issue which ruling is required to address is whether the Court lacks jurisdiction to

entertain this application on the reasons that it is *res judicata* or the Court being *fantus officio*.

The principle of *res judicata* is governed by section 9 of the CPC. According to this principle, a court is barred from adjudicating a suit or an issue involving the same parties if the said suit or issue was heard, determined and decided to its finality by another court with competent jurisdiction. The rationale behind the principle of *res-judicata* is to ensure that finality of judicial decisions is recognized by the parties and avoid multiplicity of cases. In view of section 9 of the CPC and the decision in **Paniel Lotta vs Gabriel Tanak and Other** (supra), the principle of *res-judicata* applies where the following elements have been established or proved:

1. The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
2. The former suit must have been between the same parties or privies claiming under them;
3. The parties must have litigated under the same title in the former suit;
4. The Court which decided the former suit must have been competent to try the subsequent suit; and
5. The matter in issue must have been heard and finally decided in the former suit.

It is a legal requirement that all of the above elements must be established and proved for the principle of *res judicata* to apply and bar the subsequent suit.

In the instant case, Mr. Emanuel does not dispute existence of the first, second, third and fourth elements or conditions. He only dispute existence of the fifth condition. The learned counsel argued that the matter in the present application was not finally decided in Misc. Land Application No. 59 of 2020. As stated herein, his argument was based on the fact that both suits are based on temporary injunction which does not determine the right of the parties to finality.

I agree with Mr. Emanuel that an order for temporary injunction aims at maintaining the status quo and that, it does not determine the right of the parties. It is also common ground that, an interlocutory order can be varied or set aside depending on the circumstances and facts following issuance of the previous order. That is when the argument that, *res judicata* does not apply to interlocutory orders like temporary injunction comes in. However, if the application for an interlocutory order is dismissed for want of merit, the applicant cannot bring a fresh application basing on the facts existed at the time of filing the previous application. Otherwise, it will be regarded as abuse of court process. This position is also stated in **Mulla the Code of Civil Procedure** (supra) as follows:

"...if the applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of the process of court."

Similar position is stated in **Law of Injunctions by Sohoni** (supra) as follows:

"..but when the same can be considered only when the petitioner shows that such consideration is necessary in view of new facts and new situation and circumstances that have taken place subsequently."

Furthermore, in **Abdul Ghani vs. Mahant Ram Saran**, AIR 1976 J& K 72, the Court of India have the following to say when confronted with the issue whether *res judicata* applies to interlocutory orders:

*"In view of the decision of their Lordship of the Supreme Court reported in AIR 1964 SC 993, I find myself in complete agreement with the observations of the Learned City Judge that, **although the principles of res judicata may not be applicable to the findings contained in interim or interlocutory orders like stay, injunction or receiver which are designed to preserve the status quo pending the litigation and to ensure that the parties may not be prejudiced by the delay which the proceedings before the court usually entails, a second application for obtaining substantially the same order or relief cannot lie when a previous application on identical facts has been refused "** (emphasize added)*

I am persuaded by the position stated in the above literature and decision. Thus, the applicant whose application for interlocutory order is dismissed is not at liberty to file subsequent application for the same order on the ground that, the principle of *res judicata* does not apply to interlocutory. To the contrary, the principle of *res judicata* would apply if the subsequent application is based on facts and circumstances that were in existence at the time when the previous application was dismissed.

In the instant application, no new facts and circumstances pleaded to have happened after the dismissal of Misc. Application No. 59 of 2020. The previous application and orders thereto were not referred to at all by the applicant. In my view, the issue whether or not to grant temporary injunction was finally determined in Misc. Land Application No. 59 of 2020. That issue cannot be determined in this application which is based on the facts which were in existence at the time when the application was dismissed. Indeed, that would amount to abuse of court process.

The second issue is whether the Court is *functus officio* to determine this matter. It is settled law that once a decision has been reached and the parties made aware of it, the adjudicating authority becomes *functus officio*. In *Kamundu vs R* (1973), the erstwhile East African Court held that the court becomes *functus officio* upon disposing of a case by passing or making an order finally disposing the case. Thus, the same court cannot reopen a final decision which has been drawn up and entered.

It is common ground that the application for temporary injunction in respect of the landed properties subject to this application was disposed of by this Court. The ruling dismissing the application was made known to the parties on 16.11.2020. As stated herein, this application is based on the facts and circumstances existing at the time when the said decision was dismissed. For the foresaid, the Court cannot reopen the matter and make another decision. I am of the considered view that the Court is *functus officio* thereby lacking jurisdiction to hear and determine subsequent application.

In the event, I find this application is incompetent before the Court. Consequently, it is struck out with costs.

Dated this 10th day December, 2020



E. S. Kisanya
JUDGE

Court: Ruling delivered this 10th day of December, 2020 in the absence of the parties with leave of the Court. B/C Mariam- RMA present.

E. S. Kisanya
JUDGE
10/12/2020

Order: Parties be notified to collect original copy of ruling. At the same time, copy of ruling be sent to the parties through email address appearing in the pleadings.



E. S. Kisanya
JUDGE
10/12/2020