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

AT MUSOMA

MISC. CIVIL APPLICATION NO. 5 OF 2021

(Arising from the Judgment and Decree of the District Court of Musoma at Musoma in Civil Case No. 3 of 2012)

FINCA TANZANIA ..... APPLICANT

VERSUS

LEONARD ANDREW KOROGO ..... RESPONDENT

RULING

4th and 10th February, 2021

KISANYA, J.:

On 27th November 2020, this Court dismissed the applicant's application for stay of execution of the decree of the District Court of Musoma in Civil Case No. 3 of 2012 pending hearing and determination of the application for extension of time to lodge notice of appeal to the Court of Appeal. To appreciate the discussion at hand, I find it necessary to quote the relevant part of the Court's ruling in Misc. Civil Application No. 52 of 2020 as shown hereunder:

> *"In the upshot, I find this application not meritorious for the reason that, the applicant has failed to furnish security for the due performance of the decree as may ultimately be binding on her as required under O. XXXIX, R. 5 (3) (a) of the CPC.*

Consequently, the application is dismissed. I make no order as to costs because the respondent did (sic) enter appearance."

More than a month later, on 15th January, 2021, the applicant filed the present application. The orders prayed for in this application is similar to the orders sought in Misc. Civil Application No. 52 of 2020 which was dismissed for want of merit.

In that regard, when this matter was called on for hearing on 4th February, 2021, I probed Ms. Anna Tupege Mwambosya, learned advocate who entered appearance for the applicant to address the Court on the competence of this matter. To be specific, the learned counsel was invited to address the Court as whether the application was not res-judicata and the Court *functus officio* to hear and determine it. The hearing proceeded in the absence of the respondent who defaulted to appear without notice. However, he had filed the counter affidavit to contest the application.

Reacting to the issue raised by the Court, Ms. Mwambosya submitted that the Court was not *functus officio* and that the application was not *res judicata*. She argued that the Court becomes *functus officio* after deciding the matter before it. The learned counsel contended that the present application is different from Misc. Civil Application No. 52 of 2020. However, she conceded that both applications were for stay of execution of the decision of the District Court of

Musoma in Civil Case No. 03 of 2012. It was further argued by Ms. Mwombosya that, there are circumstances where application or matter dismissed by the court can be filed afresh. She backed up her argument by citing the case of **Fertilizer Company Limited vs National Insurance Corporation and Another**, HCT Commercial Division, Commercial Case No. 71 of 2004, [2016] TLSLR 55. However, the learned counsel did not state whether the circumstances in the above cited case were similar to this case. In the end, she left it to the Court to decide on the matter.

Having considered the submissions made by the learned counsel for the applicant, I will proceed to address the issue whether this application is competent before the Court. In so doing, I will consider applicability of the doctrine of *re judicata* and *functus officio* in the case at hand.

In terms of section 9 of the Civil Procedure Act [Cap. 33, R.E. 2019), the doctrine of *res judicata* applies upon proving that: The matter directly and substantially in issue in the subsequent suit have been directly and substantially in issue in the former suit; the former suit was between the same parties or parties claiming under them; the parties litigated under the same title in the former suit; the Court which decided the former suit was competent to try the subsequent suit; and that, the matter in issue was heard and finally decided in

the former suit. This doctrine is aimed, among others, at avoiding multiplicity of suits in the court of law and ensuring that that judicial decision come to finality.

I have gone through the Chamber Summons and affidavits in the present application and Misc. Civil Application No. 52 of 2020 (the previous application) and noted the following: **One**, the issue litigated in the previous application was whether or not to grant the order for stay of execution of the decree of the District Court of Musoma in Civil Case No. 3 of 2012 pending hearing and determination of the application for extension of time to lodge notice of appeal to the Court of Appeal. The same issue has to be determined in the present application. **Two,** the parties in the previous application and this application are **Finca Tanzania** on one hand and **Leonard Adrew Korogo** on the other hand. Thus, parties are the same. **Three,** the previous application was heard and determined by this Court which was competent to determine it. **Four**, the previous application was finally decided and dismissed for want of merit. In my opinion, these facts imply that the present application is *res judicata*.

As a general rule, the principle of *res judicata* does not apply to interlocutory orders including stay of execution. This is because an interlocutory order does not finally decide the matter. But, if the previous application is heard on merit and dismissed for want of merit, any subsequent application cannot be determined basing on the facts in existence or ought to have been disclosed at

the time of lodging the previous application. That would amount to abuse of court process. In the case of **Petrolux Services Stations Limited vs NMB Bank Plc and Another**, Misc. Land Application No. 86 of 2020, HTC at Musoma (unreported), this Court cited with approval an Indian case of **Abdul Ghani vs. Mahant Ram Saran**, AIR 1976 J& K 72, where it was held as follows:

> "*In view of the decision of their Lordship of the Supreme Court reported in AIR 1969 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.***"

In this case, the previous application for stay of execution was dismissed for want of security for the due performance of the decree as required by the law. Save for matter related to bank guarantee which has been furnished as security for the costs and decree, no new facts deposed by the applicant. In my view, much as the issue of furnishing security was decided in the previous application, the applicant cannot go back, furnish the same and bring a fresh application for further consideration by the same court. In other words, the issue of security

for due performance of the decree is no longer open for discussion in the subsequent application. Therefore, I am satisfied that the present application is *res judicata.*

This moves us to consider the issue whether the Court is *functus officio*. The law is settled that; a judicial authority becomes *functus officio* upon passing or making an order finally disposing the case. It is in evidence that, the application for stay of execution subject to this case was dismissed by this Court on 27th November, 2020. Parties were made aware of the Court's ruling. For that reason, the Court is *functus officio* to hear and determine the same matter.

In the final analysis, I find the application incompetent before the Court. It is hereby struck out with costs.

Dated this 10th day of February, 2021.

E. S. Kisanya
JUDGE

Court: Ruling delivered this 10th February, 2021 in the absence of the parties but with leave of the Court. B/C Jovian-RMA present.

Notify the parties to collect the copies of ruling.

E. S. Kisanya
JUDGE
10/02/2021