IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 93 OF 2020

(C/F Misc. Civil Application No. 230 of 2020)

HAPPINESS IMMANUEL KOMBE.....1ST APPLICANT

LIGHTNESS IMMANUEL KOMBE..... 2ND APPLICANT

GRACE IMMANUEL KOMBE.....3RD APPLICANT

VERSUS

SHAMMAR MINISTRIES NETWORK.....1ST RESPONDENT

JIBU GROUP COMPANY.....2ND RESPONDENT

IMMANUEL N. KOMBE.....3RD RESPONDENT

ALLAN REUBEN MOLLEL (FIRST WORLD

INVESTMENT COURT BROKER) .....4TH RESPONDENT

RULING

27/07/2021 & 13/08/2021

GWAE, J

The applicants above claiming to be the daughters of the 3rd respondent have brought this application under the provision of Order XXI Rule 57 (1) & 59 and Order XLIII Rule 2 of the Civil Procedure Code Cap 33 R.E 2019 seeking the following orders;

i. That the Hon. Court may be pleased to investigate the applicants' claim/objection to the attachment of a houses situated at Oltulelei Street, Moivo Ward, Arumeru District within Arusha Region and after investigation be pleased to make an order releasing the applicants' houses wholly from attachment.

ii. Costs of this application be provided for.

In support of this application, each applicant filed her sworn affidavit which in common they all claim that the properties attached in the execution of a decree in Misc. Civil Application No. 230 of 2015 originating from an Arbitral Award dated 6th June 2015 where the 2nd 3rd respondent were ordered to pay Tshs. 112, 513, 600/= in favour of the 1st respondent. The 1st respondent filed an application for execution of the award followed by questionable attachment of the properties of said the property allegedly owned by the 3rd respondent, Judgment debtor.

According to the applicants, the property attached was transferred to them and their mother on the 8th October 2013 by the 3rd respondent and therefore they are no longer the properties of the 3rd respondent and thus cannot be subjected to execution.

In reply to the application the 1st respondent filed his counter affidavit which strongly disputed the application, the 1st respondent further averred that the matter is res judicata as the same matter was once instituted by the applicants'

mother in the year 2019 in this court and it was heard and conclusively determined. He therefore stated that this application is a repetition of what has already been decided by this court.

On the other hand, the 2nd & 3rd respondents admitted to the fact that the attached properties are not his properties as he had given them to the applicants as stated in their affidavits.

When the matter came for hearing, the applicants were under the legal representation of the learned counsel known by names of **Mr. Stephano James**, the 1st, 2nd, & 3rd respondents appeared in person unrepresented while the 4th never entered appearance. With leave of the court the application was argued by way of written submissions.

Supporting the application, Mr. Stephano maintained that at the time of attachment of the properties subject to this application, the said properties were jointly owned by the applicants and their mother. To justify their ownership, the applicants submitted that the said properties were transferred to them by the 3rd respondent through a written contract which was attached to their application and marked as annexture H4. It was their further submission that, this court be pleased to compel the 2nd and 3rd respondents to use their personal properties to pay the debt and not to interfere with the applicants' properties.

Supporting their argument, the learned counsel cited the case of **Bototo Mwita Maro vs Mustafa Ebrahim Kassam & Zulfikar Ebrahim Kassam t/a Rustaam & Brothers and others** [2016] TLR 272, with the guide of this decision the applicants' sought for an order which was not pleaded in their application that of postponement of the attachment of the properties pending determination of ownership of the attached properties vide Application No. 74 of 2020 filed in the District Land and Housing Tribunal.

In reply to the applicants' submission, the 3rd respondent submitted that at the time of attachment of the properties in dispute he had no any interest over them as he had already transferred them to the applicants since 8th November 2013. He further submitted that he should not be blamed for the attachment of the said properties as he did not tell the 1st respondent to attach the said properties. He thus urged this court to grant the applicants' application by releasing the attached properties from execution. The 1st respondent did not file his written submission.

Having considered the submissions by the parties and the application in general, before going to the merit of the application, I feel legally constrained to determine firstly, as to whether this matter is res judicata as alleged by the 1st respondent in his counter affidavit.

Paragraphs 3, 6, 9 & 10 of the 1st respondent counter affidavit are such that this matter was once opened in this court by the applicants' mother vide Misc. Civil Application No. 17 of 2019 as an objection proceeding claiming to have interests on the same property (House located Moivo Ward) which is the subject matter of the present Application No. 93 of 2020). The matter was heard and determined in its finality, a copy of the same was attached by the 1st respondent in his counter affidavit.

I am of the considered view that in determination of whether or not a particular matter is a res judicata important factors to be examined are; parties to the suit and issues involved, whether they are the ones and the same and if the issues were finally determined by a competent court. The doctrine of res judicata is provided under section 9 of the Civil Procedure Code Cap 33 Revised Edition, 2019 which reads as follows;

> "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."

From the above provision of the law, the reading of this court entails that, the essence of having this doctrine is to ensure that, there must be an end to

litigation, thus, it provides for an ouster clause (preclusion clause) for multiplicity of suits from being instituted by the same party or parties or privies or proxies who may have a common interest in a suit. In the case of **Peniel Lotta vs Gabriel Tanaki and two others,** Civil Appeal No. 61 of 1999 (unreported- CAT) cited and approved in the decision of **Ester Ignas Luambano vs Adriano Gedam Kipalile,** Civil Appeal No. 91 of 2014 (unreported-CAT) at Zanzibar it was stated that;

> "The scheme of section 9 therefore contemplates five conditions which when co-existent, will bar a subsequent suit. The conditions are: -
>
> i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.
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> ii) The former suit must have been between the same parties or privies claiming under them.
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> iii) The parties must have litigated under the same tittle in the former suit.
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> iv) The court which decided the former suit must have been competent to try the subsequent suit.
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> v) The matter in issue must have heard and finally decided in the former suit".

In our instant application, it is evident from the record that the applicants' mother had once filed an application (Misc. Civil Application No. 17 of 2019) against 1st, 2nd and 3rd respondent seeking an order of the court to release the house situated at Oltulelei street, Moivo Ward, Arumeru District in Arusha Region from the attachment sought by the respondent. The application was brought under the provisions of Order XXI rule 57 (1) and rule 59, Order XLIII rule 2 of the Civil Procedure Code Cap 33 Revised Edition, 2019. In the said application the applicants' mother one **Lanta Awi** stated that, the house which was attached did not belong to the 3rd respondent (Awi's husband) as the same was transferred to her together with her children (applicants) through a written contract which was attached to her application. Therefore, it was her argument that at the time of attachment the said house was legally owned by her the applicants. The 3rd respondent just like in the present case denied to be the owner of the attached properties.

The matter was determined to its finality by the Deputy Registrar of the court where the application was dismissed for want of merit as there was no enough proof to substantiate that, the said property was legally transferred to the applicants and their mother due to lack of necessary transfer documents notably; stamp duty and exchequer receipt leading to his disbelief that the house was transferred to the 2nd -4th applicant and their mother.

From the above brief background of the matter, it is apparent that the issue that was determined in Misc. Civil Application No. 17 of 2019 by Nkwabi- DR as he then was now judge of the court, is the same issue that has been brought up by the applicants in the present application. More so, even the subject matter in Misc. Civil Application No. 17 of 2019 is the same as in the present application vide Application No. 93 of 2020 which is an attached house situated at Oltulelei Street, Moivo Ward within Arumeru District in Arusha Region.

Furthermore, in the former application it was the applicants' mother who instituted the case claiming an interest over the attached house together with her children who are the applicants in the present application while in the present matter the applicants are claiming interest over the attached house which was given to them together with their mother. Neither the applicants disputed the existence or their knowledge of the former application of the same nature in their affidavit filed by their mother and against their father now 3rd respondent. It follows therefore, they were aware of that former Application. This position was judicially stressed in **Umoja Garage vs. NBC Holding Corporation** (2003) TLR 339, it was correctly and authoritatively held;

> "Like the previous case, the subsequent case was based on the alleged breaches of the agreement by the respondent. Since by the time the previous suit was filed the facts giving rise to the cause of action in the subsequent suit were

known to the appellant, the matter raised in the subsequent case are deemed to have been a matter, directly and substantially, in issue in the previous case and principle for res-judicata applies"

In our present application, the applicants are privies to their mother who previously instituted an application for the same prayer, in law, they are therefore precluded from filing a further and similar application, the rationale behind this principle is that there should be finality to litigation (the latin maxim: "debet esse finis litium) (See in **Shengena Ltd vs. Nic and Another**, Civil Appeal No.9 of 2008 (unreported-CAT).

I have also given into consideration of the purported written contract which is said to have bequeathed the attached house to the applicants and their mother, it certainly bears the names of the applicants and their mother as the applicants' assertions. The said written contract has been attached in both applications. I am delighted by Explanation VI of section 9 of the Code reads as follows;

"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 above explanation entails that since the applicants' mother filed an application in Misc. Civil Application No. 17 of 2019 claiming to have interest over

the attached house, the interest which she had in common with her children (the applicants herein). Pursuant to the above explanation the applicants are therefore inevitably deemed to have claimed their right through their mother in the said application and the relief sought by the applicants in this application is deemed also to have already been determined in the former application undisputedly filed by their mother.

If at all the applicants' mother, one Lanta Awi was dissatisfied with the decision of the Dispute Registrar of the court, she could have challenged such decision in this court or Court of Appeal of Tanzania as per the law instead of the applicants filing another application of the same nature.

In the end result, this court is satisfied that, the application at hand is res-judicata, it is accordingly struck out with costs.

It is so ordered.

M. R. GWAE
JUDGE
13/08/2021