

**IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
CIVIL CASE No. 09 OF 2020
CENTRAL PARIS COMPLEX COMPANY LIMITED1ST PLAINTIFF
LILIAN DIDAS MUSHI.....2ND PLAINTIFF
VERSUS
DIAMOND TRUST BANK1ST DEFENDANT
DIDAS PATRICE MUSHI.....2ND DEFENDANT**

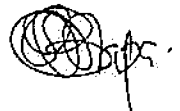
22nd July & 13th August, 2021

RULING

MKAPA, J.

The plaintiffs are suing the 1st defendant for advancing to the 2nd defendant a loan amounting shillings **Three Billion and One Hundred Million**. (Tshs. 3,100,000,000) without the approval of the plaintiffs. It was alleged that the 2nd plaintiff and the 2nd defendant being Co-Directors of the 1st plaintiff, did not pass a Board Resolution approving the loan which later the 2nd defendant defaulted payment.

The plaintiffs instituted **Civil Case No. 9 of 2020** in this Court challenging the acquisition of the loan to the effect that the defendants made misrepresentation in securing the loan without



plaintiffs' consent. Before the suit was heard on merit, the 1st defendant raised of preliminary points objection contending that;

1. The suit is *res judicata* as **Commercial Case No. 47 of 2017** between the 1st defendant and LRM Investment Company Limited, Central Paris Complex Limited, Didas Patricial Mushi, Azila Didas Mushi, Carolina Didas Mushi and Lilian Didas Mushi was heard and finally determined by the High Court of Tanzania, Commercial Division at Dar es Salaam before Hon. **B.M.A. Sahel, J.** (as she then was) on 14th November, 2018.

2. This Court has no jurisdiction to hear and determine this suit.

Hearing of the preliminary objection proceeded by way of filling written submissions. Mr. Engelberth Boniphace learned advocate appeared for and represented the plaintiffs while the 1st defendant was represented by Ms. Jasbir Mankoo, also learned advocate.

Submitting in support of the 1st point of objection Ms. Mankoo submitted that sometime in 2014, the 1st defendant advanced a credit facility of shillings Two Billion One hundred Million (Tshs. 2,100,000,000/=) to the 1st plaintiff and LRM investment Company Ltd (not a party to this suit), hereinafter referred to as the borrowers. That, in August 2016, an additional term loan was



advanced to the borrowers to the tune of shillings one billion (Tshs.1,000,000,000/=). The learned counsel submitted further that, the above loan facilities were secured by personal guarantees from the 2nd plaintiff, 2nd defendant and others not party to this suit named, Azila Didas Mushi and Caroline Didas Mushi.

She went on explaining that, the borrowers' defaulted payment and in 2017 the 1st defendant instituted a **Commercial case No. 47 of 2017** by way of summary suit in the High Court of Tanzania, Commercial Division against the personal borrowers and all personal guarantors. That, in September 2017, all the defendants in **Commercial Case No. 47 of 2017** filed an application to be granted leave to appear and defend the Summary Suit in **Misc. Commercial No. 290 of 2017**. She asserted that in the said application the plaintiffs and 2nd defendant denied to have any contractual relationship nor obtained a loan facility from the 1st defendant. That, on 13th July 2018 Hon. **T. Songoro, J.** (as he then was) dismissed the application for leave to appear and defend a summary suit with costs in favour of the 1st defendant. Meanwhile, the matter in **Commercial Case No. 47 of 2017** was heard ex-parte and Hon. **B.M.A. Sahel, J.** on 14th November, 2018 delivered a judgment in favour of the 1st defendant. Aggrieved by the above decision the plaintiffs and 2nd defendant lodged an appeal to the

Court of Appeal of Tanzania in **Civil Appeal No. 111 of 2019** along with **Civil Application No. 418/16 of 2019** for an *ex-parte* order for stay of execution of the decree arising from the Summary Suit **Commercial Case No. 47 of 2017**. The latter application was granted on 3rd October, 2019 and is still operative pending determination of the appeal filed in the Court of Appeal.

In support of the above submission the learned advocate referred the Court to section 9 of the Civil Procedure Code Cap 33 [R.E. 2019] (the CPC) which provides that;

"No court shall try any suit or issue in which the matter directly or 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 tittle 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."

Furthering her submission he cited the case of **Kamunye V Pioneer Assurance Limited** EA 1971 263 where Court of Appeal of Uganda at Kampala held that;



*"The test whether or not a suit is barred by Res Judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another way and in the form of new cause of action, a transaction which has already been 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 **the subject matter of the subsequent suit must be covered by the previous suit.**" (emphasis added).*

Based on the above authorities Ms. Mankoo argued that the crux of the current suit emanated from denial of the 1st and 2nd plaintiff from even being contractually bound by the 1st defendant through any personal guarantees or credit facilities. More so, the subject matter in this suit has the same bearing with the subject matter in **Commercial Case No. 47 of 2017** and **Misc. Commercial Application No. 290 of 2017** respectively, which had already been adjudicated upon by a court of competent jurisdiction. In the circumstance, it was Ms. Mankoo's view that this suit is *res judicata* that, plaintiffs are

abusing court process by filing multiple suits relating to the same subject matter.

Arguing on the 2nd point of objection that this Court lacks jurisdiction to entertain the suit, Ms. Mankoo referred the Court to section 8 of the CPC which provides;

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, and parties under whom they or any of them claim litigating under the same tittle where such suit is pending in the same or any other Court in Tanzania to grant the relief claimed."

The learned counsel contended the fact that, the matter in issue in the present suit is directly and substantially in issue in **Civil Appeal No. 111 of 2019** which is pending before the Court of Appeal. It was her view that the matter is not only *res subjudice* but also runs a risk of having conflicting decisions on the same subject matter. She averred that, even though some of the parties in **Civil Appeal No. 111 of 2019** are not parties to the present suit namely, LRM Investment Company Ltd, Azila Didas Mushi and Carolina Didas Mushi but the remaining parties are also parties in **Civil Appeal No. 111 of 2019** which is still



pending for determination before the Court of Appeal having jurisdiction to grant the reliefs claimed.

In support of her contention she placed her reliance in the case of **Mark Alexander Gaetje Wiebke Gatje, Hedda Heerdegen V Brigitte Gaetje Peftoor, Civil Appeal No. 15 of 2010** in which the Court of Appeal made the following observation;

*"We subscribe to the above views expressed by the Court in both the **Aero Helicopter and Ntagazwa Cases** to the effect that once a notice of appeal was filed against the decision of Mackanja, J dated 29th January 2009, all subsequent proceedings (particularly those before Sumari J) should have been called off so as to allow the appeal process to proceed. Otherwise all that took place following the Notice of Appeal being lodged, are null and void. We hold so."*

The Learned counsel finally submitted that, this Court lacks jurisdiction to try the present suit due to the pending **Civil Appeal No. 111 of 2019** before the Court of Appeal. She prayed for the court to sustain the preliminary objection raised.

Responding, Mr. Engelberth opposed the 1st preliminary objection to the effect that the same is not purely on point of

law as it would involve examining the defendants' WSD annexures and attachment related to **Commercial Case No. 47 of 2017** and **Misc. Commercial Application No. 290 of 2017**. He referred the case of **Hassan Hiari Pagali V Sokoine Maitei Kotemo, Land Case No. 45 of 2017**, in which the Court at Dar-Es-Salaam identified the following criteria for the doctrine of *res judicata* to apply;

1. *"The matter is directly and substantially in issue in the subsequent suit must have directly and substantially is 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 tittle on the former suit.*
4. *The Court decided the former suit must have been competent to try that suit.*
5. *The matter in issue must have been heard and finally decided in the former suit."*

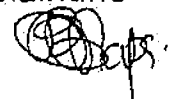
It was his argument that the above criteria have to apply cumulatively. That, in **Commercial Case No. 47 of 2017** the claim involves a loan facility amounting shillings 3,100,000,000/= defaulted by LRM Investment Company, Central Paris Complex Company Ltd, Didas Patrice Mushi, Azalia Didas Mushi, Carolina Didas Mushi and Lilian Didas Mushi.

However, in the current suit **Civil Case No. 09 of 2020** the said loan does not involve the 2nd plaintiff as the Co-Director of the 1st plaintiff in obtaining the loan. That is why the 2nd defendant is sued together with the 1st defendant. In the circumstances, it was Mr. Engelberth view that matters directly and substantially in issue in **Commercial Case No. 47 of 2017** are not directly and substantially in issue in the current suit.

Mr. Engelberth went on submitting that, another requirement for *res judicata* to apply is the fact that the suit must involve the same parties or privies claiming under them. However, the parties in **Commercial Case No. 47 of 2017** are different from the parties in this suit.

Applying the 5th criteria of *res judicata* to the present case that, the matter in issue must have been heard and finally decided in the former suit, Mr. Engelberth submitted that, in **Commercial Case No. 47 of 2017**, the matter was heard *ex-parte*, thus, since the suit was summarily heard *ex-parte* it does not meet the 5th criteria for *res judicata* as one party is still seeking his constitutional right to be heard.

Arguing on the 2nd point of objection to the effect that, this Court lacks jurisdiction, the learned counsel argued that, in the event the 1st objection is overruled by the Court, the 2nd objection will have no legs to stand on. That, in the present suit the plaintiffs'



claim is on the misrepresentation made by the defendants without their consent in securing the claimed amount in **Commercial Case No. 47 of 2017**. Thus, the two cases are not similar and the current suit does not affect the pending appeal before the Court of Appeal hence not *res sub judice*. He finally submitted that this Court has jurisdiction in entertaining the current suit thus, he prayed for the preliminary objection raised be overruled with costs.

In her rejoinder submissions Ms. Mankoo reiterated her stance as she had earlier on submitted in her submission in chief and maintained that the current suit is *res judicata* as there is a pending appeal at the Court of Appeal thus this Court lacks jurisdiction to entertain the same.

I have gone through parties' submission and carefully perused court record and I think the only issue of determination is whether the preliminary points of objection raised are maintainable. To begin with the 1st ground on whether the application is *res judicata*. Section 9 of the CPC defines *res judicata* to the effect that a matter in issue which had already been adjudicated upon by a competent Court then another trial between the same parties in respect of the same shall not be allowed. In **Greenhalgh V Mallard** [1947]2 All ER at page. 255 Lord Somervell had this to say;



“Res judicata for this purpose is not confined to issues which the Court is actually asked to decide but that it covers issues or facts which are so clearly part of the subject matter of litigation and clearly could be raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.”

It is now well settled from numerous case laws the fact that in order for a doctrine of *res judicata* to be established, the following conditions have to be met namely;

- i. there has to be two suits, the former suit and the subsequent suit;
- ii. the former suit must have been between the same litigating parties or between parties under whom they or any of them claim;
- iii. the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;
- iv. the party in the subsequent suit must have litigated under the same title in the former suit;
- v. the matter must have been heard and finally decided;

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vi. that the former suit must have been decided by a court of competent jurisdiction;

The rationale behind the doctrine of *res judicata* as observed in the case of **Umoja Garage V National Bank of Commerce Holding Corporation** [2003] TLR 339 is to ensure finality in litigation and protect the parties from endless litigations. Therefore, it is not allowed under the law to entertain any suit or issue to which the criteria for *res judicata* as outlined above applies. [See; also **George Shambwe V Tanzania Italian Petroleum Company LTD** [1995] TLR 21.

As to the 1st objection that this suit is *res judicata* as it had already been determined by a court of competent jurisdiction, the learned counsel for the plaintiff has argued that the same is not *res judicata* as in the former suit parties did not litigate under the same title and also the subject matter was different. He contended further that in the former suit, the plaintiffs were sued for contractual breach of their obligations as they failed to repay the loan amount due, while in the present suit the plaintiffs are suing the defendants for securing a loan facility without their consent thus should be excluded from any liability arising therefrom. My answer to the 1st objection must be emphatically in the affirmative that the instant matter is *res-judicata*. The reason why I hold so, is that the doctrine of *res judicata* cannot be ousted simply by the Plaintiffs cleverly formulating their claim

by bringing in a new cause of action. All that is required is for the defendant to establish that the matters **could or ought** to have been brought up in the former suit. Explanation IV of section 9 of the CPC is categorical to the effect that;

"Any matter which might or 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 substantially in issue in such suit"

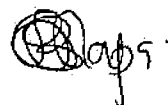
In the instant suit, the fact that the plaintiffs claim to be excluded from repaying the same loan facility which is the subject matter and cause of action in both the former and the current suit on the reason that the Board of Directors did not pass a Resolution to approve the loan, in my view, should have been the defence in the former suit namely, **Commercial Case No. 47 of 2017** instead of filing a new suit. The plaintiff's argument that the matter was determined *ex-parte* hence does not fall within the ambit of *res-judicata* is a misconception since the case had already been decided by the court of competent jurisdiction be it *ex-parte* or otherwise. The fact that the Plaintiffs and 2nd defendant did not defend themselves as to whom the liability should lie upon or otherwise, should not be an excuse for bringing a new cause of action based on a purportedly new cause of action.

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Alternatively, it could have been made a ground of defence in the WSD, but as rightly argued in **Kamunyu's Case** (*supra*), the plaintiffs in the second suit cannot bring before the Court, in his Lordship's words "**... in another way and in the form of a new cause of action**", a transaction which he ought to have brought up in the former suit but did not.

The counsel for the plaintiffs also argued that the parties in the former suit are not the same as in the present suit, yet all parties in the current suit were party to the former suit only that few of them have been dropped out. The former suit was decided against all of them after the trial court was satisfied that they were liable to repay the loan. Assuming that this court proceeds to determine the current suit and come up with a different decision, that will bring a conflicting decision and resulting into a chaos and endless litigation to the parties which what the principle of *res judicata* is against. I am therefore unable to agree with the plaintiffs' argument that there is a new cause of action in the present suit under different parties. Therefore I find the 1st preliminary point of objection has merit and the same is sustained.

Turning to the 2nd preliminary point of objection that this Court has no jurisdiction, since the 1st preliminary objection is sustained, this point of objection also follow suite. I hold so



because none of the parties denied the presence of **Appeal No. 111 of 2019** filed in the Court of Appeal in respect of the same parties to this case and others not parties to this case over the subject matter and the same cause of action which is the same in both the former and the latter (present) suit. In the circumstances, this suit cannot proceed as it was held in the case of **Serenity on the Lake Ltd V Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 CAT Mwanza (Unreported) in which the Court cited the case of **Tanzania Electric Supply Company Limited V Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 where the Court of Appeal stated that;

"It is settled in our jurisprudence, which is not disputed by the counsel for the applicant, that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court, commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter". (Emphasis added)

The Court added that,



*"Similar position was taken by this Court in **Awiniel Mtui and Three Others V Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo)**, Civil Application No. 19 of 2014 (unreported) in which the Court held that:-*

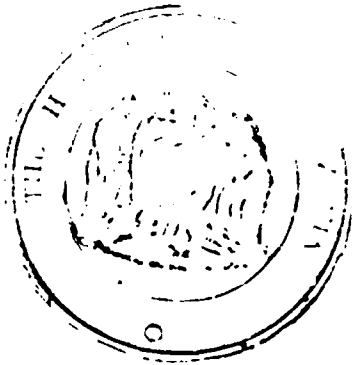
"...once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter"

For the reasons discussed above, I am in agreement with the counsel for the defendants that, this Court is barred from entertaining this suit further as there is a pending appeal lodged by the plaintiff before the Court of Appeal of Tanzania.

In the event, all the preliminary points of objection are sustained and I proceed to dismiss the suit with costs.

It is so ordered.

Dated and Delivered at Moshi this 13th August, 2021.



Handwritten signature of S.B. Mkapa.

S.B. MKAPA

JUDGE

13/08/2021