IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 456 OF 2020

(Arising from Civil Case No. 115 of 2020)

ZEDEM INVESTMENT LIMITED.....1ST APPLICANT

FIRDOS APARTMENT LIMITED.....2ND APPLICANT

MOHAMED IKBAL HAJI.....3RD APPLICANT

VERSUS

EQUITY BANK (TANZANIA) LIMITED.....1ST RESPONDENT

BILO STAR DEBT COLLECTORS CO LTD.....2ND RESPONDENT

OLIVER MARK.....3RD RESPONDENT

MR. DISCOUNT HYPER AND SUPERMARKET LTD.....4TH RESPONDENT

RULING

22th Sept, 2021 & 22nd Oct 2021.

E. E. KAKOLAKI J

By way of chamber summons supported by joint affidavit of **Mohamed Ikbal Haji** and **Hassanat Ikbal Haji**, principal officers of the 1st and 2nd applicants and Mohamed Ikbal Haji on his behalf and under certificate of

urgency, this Court has been moved by the applicants for the following orders:

1. That, this Honourable court be please to issue an order of temporary injunction restraining the 1st and 2nd Respondents or their agents or anybody acting on their behalf from disposing of the suit premises described as Plot No. **2423/208 Kisutu Area, Dar es salaam held under Certificate of Title No. 102095/10** pending hearing and determination of the main suit now pending in the Court.
2. That, this Honourable Court be pleased to issue an order of temporary injunction restraining the 4th Respondent from transferring to his name or the name of any persons the ownership of the property on **Plots No. 41, 43 and 45 Block "G", Magogoni Area within Kigamboni Municipality, Dar es salaam** held under **Certificate of Title No. 53659** or take any other action or omission towards transferring of the ownership of the said property from the name of the 3rd Applicant to his name or the name of any other person pending hearing and final determination of the main suit now pending in this Court.
3. Costs of this Application.
4. Any other reliefs that this Honourable Court may deem fit to grant.

The application which has been preferred under Order XXXVII Rule 1(a) and section 68(c) and (e) of the Civil Procedure Code, [Cap. 33 R.E 2019] is vehemently resisted by the respondents as when served with the chamber summons both filed their respective counter affidavits to that effect. Subsequent to that, the 1st, 2nd and 4th Respondents raised

preliminary points of objections against the applicants' application. It is the 1st and 2nd Respondents' grounds of objection that:

1. In terms of this Court Ruling in the Miscellaneous Civil Application No. 656 of 2018 and Land Application No. 5 of 2020, this Application is res judicata.
2. In terms of this Court's Ruling in Miscellaneous Civil Application No. 656 of 2020 and Miscellaneous Civil Application No. 05 of 2020, this Court is functus officio.
3. In terms of the auction that was conducted on 07th August, 2020, the Application has been overtaken by events.

Similarly the 4th Respondent's grounds of objection are to the effect that:

1. This Honourable Court lacks jurisdiction to grant the reliefs in the chamber Summons against the 4th Respondent.
2. The injunctive order sought against the 4th Respondent in chamber Summons has been overtaken by events, and
3. The injunctive order sought against the 4th Respondent is untenable for failure to join the Registrar of Titles as a necessary party.
4. The application is untenable in law for being in contravention to section 102(1) of the Land Registration Act, [Cap. 334 R.E 2019].
5. The joint affidavit supporting the application is incurably defective for containing arguments, opinions, assumptions ad conclusions under paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21,22,23,24,25,26,27,28,29,30,31,32,33,34 and 35 thereby contravening the provisions of Order XIX Rule 3(1) of the Civil Procedure Code, [Cap. 33 R.E 2019].

Briefly the event that triggered this application is traced way back 2013 when the 1st applicant applied and granted loan facility by the 1st Respondent amounting to USD 1,225,000.00, for completion of construction of its phase 2,3 and 4 of 379 shops on Plot No. 290 situated at Temeke area, the loan which was duly secured under mortgage deed created by the 2nd applicant over its landed property located on the 9th floor, **Plot No. 2423/208 Kisutu Area, Dar es salaam** held under **Certificate of Title No. 102095/10** herein to referred as "Kisutu property". It is alleged the said loan was also secured by a deed of assignment over rental income receivable from the Kisutu Property and was to be repaid in sixty monthly instalments of USD 25,133.00 without single default, exclusive of 6 months grace period. It appears the 1st applicant defaulted repayment of the said loan as a result parties entered into restructuring agreement of the loan payment schedule. Subsequent to that, the 1st applicant obtained a new and extended loan of USD 480,000.00 on the condition that, securities be added to the previously deposited whereby the 3rd applicant under consent of his spouse mortgaged his property held under **C.T. No. 53659** in **Plots No. 41, 43 and 45 Block "G", Magogoni Area,** within **Kigamboni Municipality, Dar es salaam** herein referred to as **Kigamboni Property** as additional security. With time the 1st applicant once again defaulted repayment of the said loan the result of which was for the 1st Respondent to issue a 60 days Notice of default to both 2nd and 3rd applicants as mortgagors requesting them to remedy the default of the said loan that had accrued to USD 883,201.33, plus interest after which the 2nd Respondent was appointed and instructed by the 1st Respondent to auction the mortgaged properties.

In all those transaction 1st Respondent's traded under legal consultation of the 3rd Respondent. It is from that sale instruction by the 1st respondent to the 2nd Respondent, adverts were aired in newspapers to auction the two mortgaged properties on the specified dates. Aggrieved by the recovery measures employed by the 1st respondent and in reaction to the threatened depositions, the applicants unsuccessfully filed in this Court Civil Case No. 190 of 2018 together with Misc. Civil Application No. 656 of 2018 against the 1st and 2nd Respondents for injunctive orders against sale of Magogoni and Kisutu properties, as the application ended up with dismissal on 18/03/2019, Ngwala, J for want of merit and while leaving the main suit withdrawn. Subsequent to that, the 3rd Respondent together with his two spouses filed another case in this Court (Land Division) Land Case No. 02 of 2020 against the 1st Applicant and 1st and 2nd Respondents together with Misc. Land Application No. 05 of 2020, again for injunctive orders against the sale of Magogoni and Kisutu properties, the application which also ended up dismissed on 12/02/2020, Kalunde, J. It appears after refusal of the two attempts to restrain the 1st applicant from realising her due loan over the mortgaged properties, the 2nd Respondent re-advertised sale in newspapers and conducted public auction whereby the 4th Respondent emerged a successful bidder of the Kigamboni property with last hammer of USD 600,000.00, who at the moment is in the process of transferring the said property to her name as the process is pending finalization before the office of Registrar of Titles. It is the applicants' complaints that the 1st loan was secured and mortgage deed of the 2nd applicant's property created without prior authorization of the board of directors of the 1st and 2nd applicants. And further that the alleged mortgage process of the

Kigamboni Property by the 3rd applicant was made without his spouse consents. In short it is alleged both loans transactions were marred with fraud and misrepresentations from the 1st, 2nd and 3rd Respondent as well as the 4th Respondent who came in after the purported sale of Kigamboni property. It is from that background the applicants are before this court praying for the reliefs as enumerated herein above.

As a matter of practice preliminary objections when raised are to be dispose of first. In that regard parties were called upon to address the court and opted to do so by way of written submissions. The applicants hired the services of Mr. Deogratius Lyimo Kirita and Mr. Godwin Musa Mwapongo, learned advocates whereas the 1st and 2nd Respondents enjoyed the services of Godwin Nyaisa, learned advocate and the 4th Respondent appeared represented by Michael T.J Ngalo, learned advocate as the 3rd Respondent did not show interest to file his submissions.

In determining the merits and/or demerits of the preliminary objections raised by the 1st, 2nd and 4th Respondents, I had have an opportunity to travel through the pleadings as well as the submissions by both parties. I am proposing not to narrate the whole submission as reduced by the parties as I will partly make reference to them in the course of determining this matter. Before analysing the submissions as made out by the parties with regard to the grounds of objection raised let me start with the preliminary objection in a way as raised and addressed by the counsels for the applicants. It is their contention that the preliminary objections by the Respondents were filed in court before the amendment of Chamber Application, thus have been overtaken by event as upon amendment being

made nothing done before exists in the record including preliminary objections. This submission is resisted by Mr. Nyaisa for the 1st and 2nd Respondents in his rejoinder submission to the applicants' submission as being misconceived aiming at misleading this court, as this Court on 14/06/2021 when granted orders for amendment of the application, it further ordered that amendment should not prejudice the preliminary objection raised. Further to that he submitted on the 14/07/2021 this court directed the preliminary objections raised be disposed of by way of written submissions and scheduled the filing orders in the presence of counsels for the applicants. However, no concern was raised by them with regard to the preliminary objection being overtaken by event. Thus the objections deserves dismissal, Mr. Nyaisa submitted and prayed. I am at one with Mr. Nyaisa's submission that the existence of the preliminary objections as raised by the respondents has the blessings of this court as they were retained after the issue of orders for amendment of the application on 14/06/2021. I therefore discount it and proceed to hold that the same are properly before this Court. Having so stated and found I now proceed to determine the grounds in seriatim as raised by the 1st, 2nd and 4th respondents.

I will start with the first ground of objection as raised by the 1st and 2nd respondents whereby it contended that; ***in terms of this Court's rulings in Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020, this application is res judicata***. What is discerned after consideration of submissions from both 1st and 2nd respondents and the applicants is that, both are at one with regard to the law applicable to the rule or doctrine of **res judicata**, that once a Court of

Competent jurisdiction to entertain and determine the matter in issue has finally adjudicated on those matters in a certain decision, parties are precluded form re-litigating unless such decision is conclusively reversed in appeal or revision. It is also uncontroverted fact amongst the parties that the doctrine in our law is traced from the provisions of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2019] referred herein to as CPC as the same provides thus:

> *9. 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.*

Further to the above provision parties are also in agreement to the five ingredients subject of proof of the doctrine as reduced from the referred provision of the law and well enumerated by the Court of Appeal a litany of cases to mention a few **Peniel Lotta Vs. Gabriel Tanaki and 2 Others**, Civil Appeal No. 61 of 1999, **Dr. Bhakilana Augustine Mafwere t/a Bakilana Animal Care Vs. Anna Gideon Orio and 3 Others**, Civil Appeal No. 33 of 2016, **Ester Ignus Luambano Vs. Adriano Gedam Kipalile,** Civil Appeal No. 91 of 2014 and **Badugu Ginnng Co. Ltd Vs. CRDB Bank PLC and 2 Others,** Civil Appeal No. 265 of 2019 (all CAT-unreported) In the case of **Peniel Lotta** (supra) as quoted in the case of

Dr. Bhakilana Augustine Mafwere (supra) when discussing on the applicability of the doctrine of ***Res Judicata*** under section 9 of the CPC, the Court of Appeal referred to the conditions as follows:

(i) *The matter directly and substantially in issue in the subsequent suit must have been directly and substantially on issue in the former suit.*

(ii) *The former suit must have been on the same parties or privies claiming under them.*

(iii) *The parties must have litigated under the same title in the former suit.*

(iv) *The Court which decided the former suit must have been competent to try the suit; and*

(v) *The matter in issue must have been heard and finally decided in the former suit.*

It is worth noting at this stage that the rationale behind the said doctrine of **res judicata** is found in two Latin maxims:

(a) ***"interest rei publicae ut sit finis litium"*** *meaning the interest of the public requires that there must be an end to litigation; and*

(b) ***"Nemo debet bis vecali, si constant curie quod sit pro una aedem causa,"*** *meaning no man should be twice used upon one and the same set of facts, if there has been a final decision of a competent court.*

Having expounded on the background of the doctrine of the res judicata and enumerated the five conditions under which it may be proved, let me determine the ground by testing the five conditions as canvassed by both parties since they all have to co-exist for one to prove violation of section 9 of CPC as rightly submitted by Mr. Nyaisa. In his submission he started with the fourth condition as stated in **Peniel Lotta** (supra) that, *The Court which decided the former suit must have been competent to try the suit,* contending that the two ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020***, in which injunctive orders were sought against the 1st and 2nd Respondents and refused by my sister Ngalwa J and brother Kalunde J, respectively, before this subsequent application on the same subject matter were decided by the High Court District Registry and Land Registry respectively which are competent jurisdiction. His submission on this condition was not contested by the counsels for the applicant, therefore I find this condition to have been proved.

Next for determination is the first condition as referred in **Peniel Lotta** (supra), stating that, *The matter directly and substantially in issue in the subsequent suit must have been directly and substantially on issue in the former suit* . In this condition Mr. Nyaisa while citing the decisions in ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020***, argued the reliefs/prayers sought and decisions made in the two cited applications relating to the Kisutu property by Ngwala J and Kigamboni Property by Kalunde J for orders against sale of the two properties respectively are directly and substantially the same to the ones sought in this application, thus proof of this condition. He added one might

argue that, the orders sought in this application are different but that is not the case as the ultimate intention of the Applicant is to prevent the alienation of applicants' title to the 1st respondent for recovery of her outstanding loan as well as to the 4th respondent. He said, by refusing the grant of injunctive orders, the court allowed the transfer of title to the new purchaser including the 4th respondent. Since the transfer of properties subject of this applicant was determined by this court, then applicants' act of bringing the same prayers in the present application is res judicata to the two decisions. He referred the court to the case of **Nelson Mrema and 413 Others Vs. Kilimanjaro Textile Corporation and Another**, Civil Appeal No. 22 of 2002 (HC-unreported) where this court held, the terminal benefits claim in the Inquiry No. 1 of 1992 in the industrial court to have included the claims for costs of repatriation and transport baggage, submitting that in this case since the restraint order for disposition of the two disputed properties included also their transfer, this court is bound to find the first condition is safisfied. In riposte counsels for the applicants argued, the submission is misconceived as the prayers in the present application changed after the 1st and 2nd respondents unlawfully purported to sale one of the suit properties, Kigamboni Property to the 4th respondent who is hell bent to register as its lawful owner for being bonafide purchaser. As such they submitted even the case of **Nelson Mrema and 413 Others** (supra) relied on by the Respondents is inapplicable in this matter as its facts differs to ones in the present matter. They thus prayed the court to find the condition is not satisfied.

It is a condition precedent under this condition that for one to prove the matter is res judicata the matter in the former suit must directly and

substantially in issue to the matter in the subsequent suit. In the case of **Badugu Ginnng Co. Ltd Vs. CRDB Bank PLC and 2 Others,** Civil Appeal No. 265 of 2019 (CAT-unreported) the Court of Appeal when interpreting the phrase 'matter directly and substantially in issue' quoted with approval the book of Mulla **'Code of Civil Procedure'**, 13th Edition, Vol. 1 at page 55 – 56 noted the it on the following words:

> *"The law is accordingly well settled that to invoke the bar of res judicata, it is not necessary that the case of action on the two suits should be identical. It is only required that the matters are directly and substantially in issue should be the same in both suits...* ***Every matter in respect of which relief is claimed in a suit is necessary a matter '"directly and substantially" in issue****." (Emphasis added)*

In this matter there is no dispute that in the two decided applications ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020*** the reliefs/orders sought were intending to restrain the 1st respondent from disposing of the Kisutu and Kigamboni properties respectively. The only issue in controversy as per the applicants' submissions is that, the matter in the present application is not directly and substantially to the ones in the former two applications as the applicants are seeking to restrain the transfer by the 4th respondent. In it evident as regard to the 1st and 2nd respondent in this matter that the applicants are seeking for order to restrain them from disposing the Kisutu property as rightly stated in the amended chamber summons as the prayer reads:

1. *That, this Honourable court be please to issue an order of temporary injunction restraining the 1st and 2nd Respondents or their agents or anybody acting on their behalf* ***from disposing of the suit premises described as Plot No. 2423/208 Kisutu Area, Dar es salaam held under Certificate of Title No. 102095/10*** *pending hearing and determination of the main suit now pending in the Court."* (Emphasis supplied).

As regard to the 4th respondent the relief sought is for an order to restrain her from transferring the Kigamboni property to her name. The prayer reads as follows:

1. *That, this Honourable Court be pleased to issue an order of temporary injunction* ***restraining the 4th Respondent from transferring to his name*** *or the name of any persons the ownership of the property on* ***Plots No. 41, 43 and 45 Block "G", Magogoni Area within Kigamboni Municipality, Dar es salaam*** *held under* ***Certificate of Title No. 53659*** *or take any other action or omission towards transferring of the ownership of the said property from the name of the 3rd Applicant to his name or the name of any other person pending hearing and final determination of the main suit now pending in this Court."* (Emphasis supplied)

The argument by the counsels for the applicants that the relief of ***"restraining of transfer"*** sought in the present application is distinct to **disposition** as sought in the former two applications in my humble view is misconceived as transfer also falls under disposition. The term

"disposition" is defined by Black's Law Dictionary, 8th Edition 2004, at page 1421 to mean:

> *"The act of **transferring something** to another's care or possession, esp. by deed or will; the relinquishing of property" (Emphasis added)*

Applying Mulla's interpretation on what the term *"the matter which is directly and substantially to the issue"* means it is my conviction that since the said prayers in the present application are for restraining the 1st, 2nd and 4th Respondents from disposing and transfer the Kisutu and Kigamboni properties respectively are both falling under the term disposition, I hold the prayers are directly and substantially the same to the ones sought in ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020.*** In other words this court when determining the two above cited application by refusing to grant the prayer for an order restraining the 1st and 2nd Respondents from disposing of the Kisutu and Kigamboni properties, by necessary implication it covered transfer of the said properties as rightly submitted by Mr. Nyaisa, an therefore the applicants are estopped from re-litigating over the same matter under the doctrine of estoppel. Thus the case of **Nelson Mrema and 413 Others** (supra) is relevant and applicable in the circumstances of this matter as in that case like in this matter the Court of Appeal considered the fact that the relief which the appellant had sought in Civil Case No. 6 of 2001 subject of appeal was directly and substantially in the inquiry No. 1 of 1992. In reaching its decision the court held:

> ***"We find that the terminal benefits in Inquiry No. 1 of 1992 in the Industrial Court ought to have included the claims for costs of repatriation and transport of baggage****. As it is, the hearing and final determination of Inquiry of 1 of 1992 renders the present case res judicata." (Emphasis added)*

Applying the principle as cited in the above case to his case where the reliefs sought in the present application are directly and substantially to the ones in the former two application ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020***, it is my finding the condition is fairly met.

On the other conditions Mr. Nyaisa opted to combine two conditions as cited in the case of **Peniel Lotta** (supra) demanding that *"The former suit must have been on the same parties or privies claiming under them" and/or "The parties must have litigated under the same title in the former suit."* It is the counsel's argument that though the law requires parties to be the same, it is not necessary that they should be physically the same as they may be claiming or litigating under the same title. He contended it in Misc. Civil Application No. 656 of 2018 applicants were the same as in this application whereas respondents were only the 1st and 2nd respondents herein. And that, in Misc; Land Application No. 05 of 2020, applicants were 1st applicant together with the 3rd applicant and his spouses and one Roflex Traders Limited and 1st and 2nd respondents but in the present application there is an addition of the 3rd and 4th respondents. He argued the 3rd and 4th respondents were added as a result of execution of the mortgage deed

by way of sale and therefore their addition do not render parties different to the two previous applicants as applicants in all these applications are litigating under the same title. Relying on the cases of **Zuberi Paul Msangi Vs. Mary Machu**, Land Case No. 361 of 2017 (HC-unreported), **Jimmy Brown Mwalugelo Vs. Topm Oil Petroleum Ltd**, Misc. Land Application No. 940 of 2017 (HC-unreported) and **Dr. Bhakilana Augustine Mafwere** (supra), he submitted slight difference of parties to the previous applications does not affect application of the doctrine to the present matter in as far there is a proof that parties were litigating under the same titles which is the case in this application. It is his views therefore the two conditions have been met as well. Retorting to Mr. Nyaisa's submission counsels for applicants contended that the doctrine of res judicata could not apply to this case as the 3rd applicant and other persons who were parties in Misc. Land Application No. 05 of 2020 originating from Land Case No. 02 of 2020 are not parties to the present application which is originating from Civil Case No. 115 of 2020, thus they are different parties under different cases. In his rejoinder submission Mr. Nyaisa reiterated his earlier submission in chief but added that, it is not in dispute that in the two previous decided applications parties were litigating over the suit properties similar to the ones in this application thus proof of the two conditions.

Having paid close look to the fighting arguments by the parties on the two condition, I embrace Mr. Nyaisa's proposition that the mere fact that parties are different in the previous and subsequent applications does not render inapplicable the doctrine of res judicata in as far as there is a proof that parties in all applications were and are litigating over the same titles.

In this matter it is not disputed by the applicants that the properties subject of the two previous applications as well as the present application are owned by the 2nd and 3rd applicants and that parties in all these applications were and are still litigating upon the same titles (properties) though with slight different parties in the present application. The Court of Appeal in the case of **Badugu Ginnng Co. Ltd** (supra) when deliberating on the issue whether the doctrine of res judicata could apply in the situation where parties were added to the subsequent suit on the similar relief to the former suit like the position in this matter had this to say:

> *"...It is our considered opinion that had it been that in the subsequent suit the appellant had sued the 1st respondent alone, for instance, claiming the same reliefs, there could be non-joinder of parties which could lead to impracticability in the enforcement of the decree at the end of the day.* ***By adding the 2nd and 3rd respondents in the subsequent suit does not change the fact that substantially parties in the former suit are the same parties in the subsequent suit. Therefore, we are unable to agree with Mr. Kipeja tha parties are not the same in the former and subsequent suit."*** *(Emphasis supplied)*

Similarly this court in the case of **Zuberi Paul Msangi**, when confronted with more or less similar scenario to the present one where various applications were preferred on the same subject matter but slightly different with parties, in the new application like the present one, my brother Maige, J (as he then was) had the following observation:

"I have considered her submissions in line with the pleadings and copies of the decision attached in the written statement of defence. ***I do not agree with her that for the doctrine to apply the parties in the two proceedings must be the same...in this ruling, my learned brother judge Mohamed dismissed the suit for being res judicata to Civil Case No. 34 of 1991 on account that the defendant therein though not a party to the proceedings before him he was tracing title from the same person.*** *Since in this matter, the plaintiff is claiming the suit property against the same defendant whose title on the suit property is traceable from the said Caroline, this is res judicata. In any event, there being a ruling by my brother Mohamed on the same issue, I would constructively have been functus officio to decide otherwise..." (Emphasis added)*

In another case of **Jimmy Brown Mwalugelo** (supra) this court had an opportunity to examine the situation where the doctrine could apply even in the presence of different parties to the suit is a long as the title in dispute subject of the previous decision is the same where my sister Opiyo J held:

"After all, in law, this application is clear case of res judicata in terms of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2002] as the same was determination had already been concluded in Misc. Land Application No. 940 of 2017. ***In that application the same applicant, Jimmy Brown***

Mwalugelo had already being denied the same prayer against the predecessor in title to the current respondent. Thus, him subsequently making the same application against the successor in title from those he had already lost, is a flawless manifestation of abuse of court process by trying to grab the lost opportunity through backdoor... *" (Emphasis added)*

Basing on principle in the two cited cases in which I subscribe to the positions therein, in this matter since the disputed properties subject of the two previous decided applications and present application are properties of the 2nd and the 3rd applicants whose no suit or application could be preferred over them without involving owners, and since all applicants in the said applications are tracing their interests from the same properties, I can safely conclude and hold that though with slight difference in names parties in the two former application and the present application are legally the same and they are litigating under the same titles which are Kisutu and Kigamboni properties . Thus the two conditions are proved in affirmative as well.

Lastly is the fifth condition where the 1st and 2nd respondents are to prove *the matter in issue was heard and finally decided in the former suit.* It was Mr. Nyaisa's submission on this condition, the rulings in the two previous applications finally determined the prayer for injunction as the same were dismissed with costs for lack of merit, hence final decision. That submission was vehemently resisted by the counsels for the applicants who vied that, the doctrine of res judicata under section 9 of the CPC does not apply to

this matter under the above condition as the determination made by the court in the two previous application was not on the main suit where the issue for determination by the court was on the legality of the loan facility and mortgage deeds between the applicants and the 1st respondent. Thus to them the suit was not heard and finally determined as alleged by Mr. Nyaisa. In other words they were arguing that as the requirement is that the subject matter is dispute must have been heard and finally determined in the **former suit**, this court's determination on the two previous application did not qualify to be final determination of the matter at dispute in the former suit within the meaning of section 9 of CPC as temporary applications for injunctive orders has no effect of determining the matter in dispute between the parties but rather give temporary relief pending determination of the main suits. To reinforce their argument, they stated in the case of **Zuberi Paul Msangi** (supra) this court held the matter was res judicata to the former one because the subject matter at hand had been decided in the former suit. On the case of **Jimmy Brown Mwalugelo** (supra) where the court upheld and confirmed the matter was res judicata to the application before it, apart from terming the decision of the court as obita dictum counsels for the applicant submitted, the decision was arrived at per incurium and in contravention of the Court of Appeal decision which they never mentioned any. They thus prayed the court to find the respondent have failed to prove the ground of objection and therefore proceed to dismiss it and the entire objections with costs. In his rejoinder submission Mr. Nyaisa countered the decision made in the two previous applications were final and that the submission by counsels for the appellants that the doctrine applies to suits only was misconceived and

misleading as the principle of res judicata is applicable to both suit filed by way of plaint as well as the application. Reiterating his earlier submissions he implored the court to find the fifth condition is established in this ground of objection and proceed to uphold it hence dismiss the application with costs.

The conflicting arguments by the parties having been keenly considered, I find it apposite to dissolve the issue whether the term suit covers application as it is the applicants counsels' contention that, it does not while Mr. Nyaisa is of the contrary view that it does. The term "suit" is defined by the **Black's Law Dictionary**, Bryan A. Garner, 8th Edition at page 4499 to mean:

> *"Any proceeding by a party or parties against another in a court of law."*

This court in the case of **MSK Refinary Limited Vs. TIB Development Bank Limited and Another**, Misc. Civil Application No. 307 of 2020, (HC-unreported) had audacity of deliberating on whether the term suit covers application where it had this to say:

> *"Given the definition above cited which I fully subscribe to,* ***defines a suit to cover any proceedings by any party or parties against another or others instituted in the court of law and I would add in any competent tribunal. The application instituted by the applicant being part of the proceedings arising from the main suit Civil Case No. 80 of 2020 in my considered view cannot be excluded from***

> ***the definition of suit under section 6(3) of the Government Proceedings Act,*** *as Mr. Mnyere would want this court to believe. I am at one with Miss Sued's submission that the same intended and covers not only main suits but also all applications emanating from the main suits or made independently..." (Emphasis added)*

In the light of the above authorities I am left without any grain of doubt that the term suit covers also miscellaneous applications emanating from the main suits. In view of the above I hold the submission by the applicants' counsels that the decisions made in the two applications ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020*** do not form part of the decided matters in the former suit within the meaning of section 9 of CPC and fifth condition for proving the doctrine of res judicata, is misconceived and therefore discounted. I further hold that, the submission by the learned legal minds for the applicants that, the doctrine of res judicata is applicable only to suit and therefore there is no decision previously heard and finally determined by this court to make them res judicata to the present application is also misconceived and therefore dismissed as miscellaneous applications are suits within the meaning of the term suit as referred under section 9 of the CPC. Having so found let me move to determine whether the two application finally determined the prayer of disposition or sale of the two properties at Kisutu and Kigamboni.

In its decision Ngwala J handed down on 18/03/2019 in ***Misc. Civil Application No. 656 of 2018,*** the held thus:

"Having said so, the facts of this application do not reavela the tree test or principles discussed above granting injunction. Accordingly, ***it is dismissed*** *in its entirety with costs."*

Similarly in ***Misc. Land Application No. 05 of 2020***, Kalunde J, in his ruling dated 12/02/2020 concluded the matter that:

"... I am assuredly that the above analysis is sufficient to demonstrate the applicants have failed to prove the conditions required for granting temporary injunction as stated in ***Attilio Vs. Mbowe*** *(supra). That said, I decline to exercise my discretion in favour of the applicants.*

In the upshot, I find no merit in the application. The same is hereby dismissed with costs."

In view of the above decision of this court whereby the applicants prayers of injunctive order restraining the respondents from disposing of the two properties in Kisutu and Kigambobi area were heard and finally determined by dismissing the two applications and given the fact that, in this application it is the same applicants who are now seeking for the same orders against the same respondents as found herein above, I am convinced and therefore inclined to hold that the preliminary objection raised by the 1st and 2nd respondents against the applicants has merit and the same is sustained. The two applications in ***Misc. Civil Application No. 656 of 2018*** *and* ***Misc. Land Application No. 05 of 2020*** are therefore res judicata to the present application Misc. Civil Application No. 456 of 2020, as I would be technically functus officio to hold otherwise

since the same matter has been decided by my sister Ngwala J and brother Kalunde, J. I would also want to add that, applications of this nature tantamount to abuse of court process and parties should always be keen and refrain from preferring them. The ground having disposed of the application I see no pressing agenda to compel me consider other grounds of objection for avoidance of academic exercise.

That, said and done I find this application to be incompetent before this court and the same is hereby struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of October, 2021.

E. E. KAKOLAKI

JUDGE

22/10/2021

This Ruling has been delivered at Dar es Salaam today 22nd day of October, 2021 in the presence of the Mr. Levis Lyimo, advocate for the 1st, 2nd and 3rd Applicants, Ms. Kavola Semu, Advocate for the 1st 2nd and 3rd Respondents, Ms. Lulu Mbinga advocate holding brief for advocate Odhiambo Kobas for the 4th Respondent and Ms. **Asha Livanga**, Court clerk.

Right of Appeal explained.

E. E. Kakolaki

JUDGE

22/10/2021