

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND CASE NO. 01 OF 2021

BETWEEN

SIMBONEA GIBSON PLAINTIFF

VERSUS

COMMISSIONER FOR LAND 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

GLADNESS KIMARO 3RD DEFENDANT

SAUL H. AMON 4TH DEFENDANT

**AGGREY KANDOGA (Administrator of the Estate
Of the Late J.A KANDONGA) 5TH DEFENDANT**

MASHANGO INVESTMENT LTD 6TH DEFENDANT

RULING

A. A. MBAGWA, J.

This ruling is in respect of preliminary objections raised by the 3rd, 4th and 5th defendants.

The plaintiff, Simbonea Gibson Kileo instituted the present suit against the defendants praying for the following reliefs:

1. Declaration that Plaintiff is the legal and rightful owner of the disputed property.
2. An order for vacant possession to the 4th Defendant from the disputed land.

3. The Defendants be restrained from interfering with the Plaintiff in the disputed land in any manner whatsoever.
4. That the certificate of title issued to the 4th Defendant (Saul H. Amon) be declared null and void hence revoked.
5. Payment of TZS 60,000,000/= as general damages.
6. Costs for this suit.
7. Any other relief(s) and/or order(s) this Honourable court may deem just and equitable to grant.

Upon service, the 3rd, 4th and 5th defendants filed their respective written statements of defence. The 3rd and 4th defendants filed a joint written statement of defence along with a notice of preliminary objection on the following points of law:

1. That, the suit before this court is bad in law for contravening the principle of ***Res Judicata*** as provided under section 9 of the Civil Procedure Code CAP 33 R.E 2019.
2. That, the suit before this court is bad in law for contravening the doctrine of ***Issue Estoppel*** which is established when an issue between the same parties raised and determined in a previous cause of action is brought again before this court for determination.

3. The suit before this court is bad in law for contravening the doctrine of *Functus Officio*, therefore this Honourable Court lacks jurisdiction to entertain matters that were previously decided by this court.

Similarly, the 5th defendant filed a Written Statement of Defence with a preliminary objection on the following point of law:

1. That the 5th defendant is wrongly impleaded as he was a court broker at the material time acting under the orders of the court as per section 66 (2) of the Magistrates' Courts Act [Cap 11 R.E 2019] and cannot, therefore, be sued.-The 5th defendant will pray that his name be deleted or removed from the list of defendants with costs.

When the matter was called on for hearing of preliminary objections, the plaintiff was represented by Advocates Mwakilima and Beatrice Kessy, on the one hand. On the other hand, the 1st and 2nd defendants had the services of Joseph Tibaijuka, learned State Attorney whilst the 3rd and 4th defendants were represented by Advocates Heri Zuku assisted by Geoffrey Mwakatundu. the 5th defendant, on his part, was represented by Advocate Victor Mkumbe.

The hearing proceeded *ex parte* against the 6th defendant after the Court satisfied that the defendant was duly served but she failed to appear without any justifiable reason.

Arguing in support of the preliminary objection raised by 5th defendant Mr. Mkumbe submitted that the 5th defendant has been wrongly joined because he was acting on the order of the court as court broker. He proceeded that section 66 (2) of the Magistrate Court specifically bars the 5th defendant to be sued. He then prayed the 5th defendant to be removed from this case with costs.

Regarding the preliminary objection raised by 3rd and 4th defendants, Mr. Heri Zuku dropped the 2nd preliminary objection on *issue estoppel*. Submitting in respect of the 1st preliminary objection on *res judicata* Mr. Zuku argued that the instant suit is *res judicata*. He submitted that section 9 of the CPC sets four grounds for which a matter should be held to be *res judicata*. Expounding on the conditions for *res judicata*, Mr. Zuku said that in the 1st ground there must be two suits one conclusively determined and another one pending. He told the court that the decisions in Civil Application No. 24 of 2009 and Civil Appeal No. 5 of 2019 both are pleaded in the WSD of the 3rd and 4th defendants. He submitted that in

both decisions it was held that the property was properly sold under the public auction hence the 4th defendant is a *bcnafide* purchaser.

Mr. Zuku further submitted 2nd ground is that both suits must be before courts of competent jurisdiction. He contended that both Civil Appeal No. 5 of 2019 and Land Case No. 1 of 2021 were both before courts of competent jurisdiction. Mr. Zuku proceeded further that the 3rd ground is that both suits must be between the same parties or parties claiming under the same title. He submitted that Civil Appeal No. 5 of 2019 and Land Case No. 1 of 2021 involve the same parties save for 1st, 2nd and 6th defendants. He further argued that in both cases the main issue is legality of sale of property contained in Plot No. 1103 Block 'S' at Iyela Mbeya with title No. 11443-MBYLR.

Lastly, Mr. Zuku submitted that the matter must directly and substantially be in issue between the parties in the current suit as it was in the previous matter. He contended that paragraphs 8 to 12 and 19 of the plaint reveals similar issues to those that were determined at page 7 of the judgments in Civil Application No. 24 of 2009 and page 3 and 2 of Civil Appeal No. 5 of 2019. To bolster his argument, the counsel referred to the case of **Athnasia T. Massinde vs National Bank of Commerce**, Commerce Case No. 34 of 2016, HC Commercial at Dar es salaam at page 9.

Regarding the issue of *Functus Officio*, Mr. Zuku submitted that this court is *Functus Officio*. Referring to the ruling in Civil Application No. 16 of 2015 at page 9, he contended that this Court has no powers to determine the legality of sale. He finally prayed the Court to dismiss the suit with costs.

In reply, Mr. Mwakilima started with the objection by Mr. Mkumbe on behalf of the 5th defendant. He submitted that the objection is devoid of merits in that the 5th defendant was not executing a lawful order. He said that according to the ruling in Civil Application No. 16 of 2015 at page 17 to 18 the Court nullified the orders which the 5th defendant purportedly executed.

In conclusion, Mwakilima submitted that the 5th defendant's prayer to be removed from the suit is premature for she is the necessary party.

With respect to the preliminary objections raised by the 3rd and 4th defendants, Mr. Mwakilima commenced his response by referring to the case of **Mukiza Biscuits Manufacturers Co. Ltd v. West End Distributors Limited [1969] E.A. 69** and averred that the preliminary objection must be on pure point of law. He said a preliminary objection cannot be raised where any fact has to be ascertained or where what is sought is the exercise of judicial discretion. Nor can it be raised if there is

combination of facts and law. He submitted that it must come from the pleadings.

Mr. Mwakilima submitted that in Civil Appeal No. 5 of 2019 and Civil Application No. 24 of 2009, the issue of legality of sale was not determined. Furthermore, he contended that no other auction was conducted subsequent to the nullification of the auction via Civil Application No. 16 of 2015 (Ngwala, J). He continued to argue that the parties in Civil Appeal No. 5 of 2019 and in the matter at hand are different. In addition, Mwakilima said that even the issues in two cases are different. He was opined that whereas Civil Application No. 24 of 2009 was a matrimonial cause the instant matter is a land case and the prayers in the current plaint are different. Thus, the suit is not *res judicata*, he submitted.

Regarding the issue of *functus officio*, Mr. Mwakilima strongly opposed the objection. He ardently argued that the matter is not *functus officio* on the ground that the plaintiff did not pray to correct the judgment. Citing the case of **Bibi Kisoko Medard vs The Minister for Land** [1993] TLR 250, Mwakilima was of the opinion that *functus officio* is intended to prevent the possibility of judge or magistrate to change his mind after he

had made a decision. He concluded that the preliminary objections are devoid of merits and therefore they should be overruled.

In rejoinder Mr. Mkumbe submitted that the ruling by Hon. Ngwala J was delivered five years after the 5th defendant had executed the order as such, it is not fair to the plaintiff to sue the 5th defendant for action which he had done for five years.

Mr. Zuku reiterated his submission in chief and added that the preliminary objection is premised under section 9 of the CPC and that **Mukisa Biskuit's** case supports the preliminary objection under section 9.

I have dispassionately gone through submissions advanced by counsel for both parties. I also had an occasion to appraise each document annexed to the pleadings.

In the course of disposing the objections raised, I find it apposite to narrate the background obtaining in this matter albeit in brief. Suffice it to say that the present suit has a chequered story. It has come before this Court for more three times through different ways to wit; Consolidated Miscellaneous Civil Appeals No. 1, 2 and 3 of 2013 (Karua J), Civil Application No. 16 of 2015 (Ngwala J.) and Civil Appeal No. 5 of 2019 (Mambi J).

The plaintiff's substantive claim against the defendants is possession of the landed property valued at Tanzanian shillings one billion (Tshs 1,000,000,000/=) comprised in plot No. 1103 Block 5 Iyela Mbeya under certificate of title No. 11443-MBYLR.

The plaintiff, Simbonea Gibson Kileo and the 3rd defendant, Gladness Kimaro were husband and wife. Their marriage was dissolved by Iyunga Primary Court via Matrimonial Cause No. 63 of 2009. Although the primary court granted decree of divorce, it declined to order division of the suit premises i.e. landed property comprised in plot No. 1103 Block 5 Iyela Mbeya under certificate of title No. 11443-MBYLR on the ground that it was a family property.

The 3rd defendant Gladness Kimaro was aggrieved by the decision of the primary court hence she appealed to the District Court of Mbeya through Matrimonial Appeal No. 5 of 2009. The appeal was heard *ex parte* by Hon Salum SDM who allowed the appeal. The appellate magistrate held that the suit premises was a matrimonial asset and proceeded to order division of the same among the plaintiff, 3rd defendant and their three children. After expiry of three months, appointed a court broker one Kandonga herein the 5th defendant to execute a court order. Mr. Kandonga through public auction sold the house (suit premises) to Saul H. Amon herein 4th

defendant at Tanzanian shillings two hundred fifty million (Tshs 250,000,000/=).

Dissatisfied with the sale, the plaintiff filed in the District Court of Mbeya Civil Application No. 24 of 2009 to set aside the *ex parte* judgment in Matrimonial Appeal No. 5 of 2009. It is important to note that this Civil Application No. 24 of 2009 was heard by the District Court three times.

At first it was heard by Hon. Kulita RM who nullified the sale. The 3rd, 4th and 5th defendants were aggrieved by the decision of Hon. Kulita hence they appealed to the High Court. Through Consolidated Miscellaneous Civil Appeals No. 1, 2 and 3 of 2013, Karua J quashed and set aside the decision by Hon. Kulita. Further, Karua J ordered the application to be heard afresh before another magistrate.

Following the decision by Karua J, Civil Application No. 24 of 2009 was reheard before Hon. Mteite SRM. Mteite dismissed the application and proceeded to appoint Mashango Investment LTD, 6th defendant to evict the plaintiff from the suit premises. The plaintiff, being aggrieved by the decision of Mteite SRM, filed in the High Court Revision Application No.16 of 2015 before Ngwala J. Having revised the proceedings conducted by Mteite SRM, the learned Judge nullified them and ordered a fresh hearing of Civil Application No. 24 of 2009.

Consequently, Civil Application No. 24 of 2009 landed in the hands of Chaungu SRM who, on 20th June, 2019, held that the sale was proper. As such, he dismissed the application. The decision by Chaungu SRM did not please the plaintiff hence he appealed to the High Court through Civil Appeal No. 5 of 2019 before Mambi J. Having heard the parties, the learned Judge dismissed the appeal. At page 10 of the judgement, the Judge had the following to say;

'The decision of the District Court is upheld and it is hereby declared as done by the decision of the District Court the property was legally sold under the proper auction and bonafidely bought by the second respondent'

According to the record in this file there was no appeal against the decision of Hon. Mambi J.

Now based on the facts as I have endeavoured to narrate them, the core issue for determination is whether the preliminary objections raised are meritorious.

As rightly argued by Mr. Mwakilima, it is pertinent to state that, in disposing of the preliminary objections, the guidance will be the principle stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs Westy End Distributors Ltd** (1969) EA 698 that, objection should be raised on

pure point of law. Also, a preliminary objection has to be argued on the assumption that all facts deposed by the adverse party in the pleading are correct and that, if argued at the preliminary stage may dispose of the suit.

To start with the first preliminary objection namely, ***res judicata***

Section 9 of the CPC provides for circumstances under which courts are barred from entertaining suits for being ***res judicata***. It reads:

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same 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 issue has been subsequently raised and has been heard and finally decided by such court."

The similar conditions were recapitulated by the Court of Appeal in the case of **Dr. Bhakilana Augustine Mafwere t/a Baklina Animal Care vs Annael Gidion Orio & 3 Others**, Civil Appeal No. 33 of 2016, CAT at Dar es Salaam.

As hinted above, the plaintiff's substantive claim in this case is landed property allegedly valued at Tanzanian shillings one billion (Tshs

1,000,000,000/=) comprised in plot No. 1103 Block 5 Iyela Mbeya under certificate of title No. 11443-MBYLR. Further, the plaintiff prays for, among other reliefs, a declaration that plaintiff is the legal and rightful owner of the disputed property. Mr. Zuku in his submission contended that the issue was conclusively decided in Civil Application No. 24 of 2009 and Civil Appeal No. 5 of 2019 that the disputed property was properly sold under the public auction and the 4th defendant is a **bonafide** purchaser.

Thus, from above narrated facts it is a common ground that the disputed property was a matrimonial property and was legally sold to the 4th respondent. Further, it is clear in the judgment by Hon. Mambi J in Civil Appeal No. 5 of 2019 that the sale of disputed property was not disturbed.

Looking at the whole background as reflected in various cases above, it goes without saying that the central contentious issue was about the ownership of the suit premises. Thus, it is unacceptable for the plaintiff to emerge and bring a suit over ownership of disputed property under the pretext of a land case.

It is worth noting that the objective behind the principle of **res judicata** is to bar multiplicity of suits thereby guaranteeing finality of litigation. See

Dr. Bhakilana Augustine Mafwere t/a Baklina Animal Care vs Annael Gidion Orio & 3 Others (supra).

Furthermore, in the case of **Badugu Ginning Co. Ltd vs CRDB Bank PLC & 2 Others**, Civil Appeal No. 265 of 2019, CAT at Mwanza it was held that;

'In the book by Mulla 'Code of Civil Procedure', 13th Edition, Vol. 1 (hereinafter referred as Mulla), the phrase 'matter directly and substantially in issue' is expressed at pages 55-56 in the following words: 18

*"The law is accordingly well settled that to invoke the bar of **res judicata**, it is not necessary that the cause of action in 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 necessarily a matter "directly and substantially" in issue. [Emphasis added].'*

Now coming to the instant matter, it is common cause that throughout the cases which have been mentioned above, the contentious issue was substantially the same namely, the sale of the suit premises. Finally, in Civil Appeal No. 5 of 2019 Hon. Mambi J ruled that the property was legally

sold to the 4th defendant under the proper auction. As the record would tell it all, there was no appeal against the judgment by Hon. Mambi J. This means that the issue of sale in respect of the disputed property is settled.

In the present matter, the plaintiff has joined two new parties namely, Commissioner for Land and the Attorney General who are 1st and 2nd defendants respectively. However, upon a thorough appraisal of the matter as a whole, I failed to see the importance of joining the two parties. As such, I am inclined to hold that the joining of 1st and 2nd defendants is a mere technicality deliberately designed to defeat the principle of *res judicata*. Indeed, the filing of the instant suit is an abuse of the court process which I am not prepared to condone.

Since the disputed property was held to be a matrimonial asset and sale to the 4th defendant was declared legal by Hon. Mambi J, the plaintiff cannot again move this Court to decide on its ownership.

Alive to the rationale behind the principle of *res judicata*, I am at one with Mr. Zuku, the learned counsel for the 3rd and 4th defendant that the suit at hand is *res judicata* as the matter in issue in the present suit was substantially in issue in the former suits between the parties and the same was conclusively determined by court of competent jurisdiction.

That said and done, it is my considered findings that the matter is **res judicata** and consequently I sustain the first preliminary objection raised by the 3rd and 4th defendants. Since the first preliminary objection is sufficient to dispose of the suit, I see no reasons to delve into other objections.

In the event, I dismiss the suit with costs.

It is so ordered.

Right of appeal is explained.



A. A. Mbagwa

JUDGE

20/04/2022

Court: The ruling has been delivered before E. R. Marley, Ag. Deputy Registrar in the absence of the appellant and respondent this 20th day of April, 2022.



E. R. Marley

AG. DEPUTY REGISTRAR

20/04/2022

