IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL CASE NO. 184 OF 2021

YAHYA ANWAR ABDALLAH ..... 1ST PLAINTIFF

SALUM ABDALLAH HAJI ..... 2ND PLAINTIFF

NAWAF OMARY MASOUD ..... 3RD PLAINTIFF

KAMRAN KAMAL JAFFER ..... 4TH PLAINTIFF

SABREENA KAMAL JAFFER ..... 5TH PLAINTIFF

NAUSHAD NAVINCHANDRA SHARMA ..... 6TH PLAINTIFF

MOHAMED ALAWI ABBAS ..... 7TH PLAINTIFF

ALLY MOHAMED MATAKA ..... 8TH PLAINTIFF

OMARY MOHAMED SAID ..... 9TH PLAINTIFF

SAID MOHAMED KHAMIS ..... 10TH PLAINTIFF

JOHN FERDINAND KIMBORI ..... 11TH PLAINTIFF

MGAYA JUMA CHEDI ..... 12TH PLAINTIFF

ABRAHAMANI ALLY ISSA ..... 13TH PLAINTIFF

HASSAN MOHAMED ABDALLAH ..... 14TH PLAINTIFF

KHAMISI MOHAMED MOHAMED ..... 15TH PLAINTIFF

HAMIS HAMAD SAID ..... 16TH PLAINTIFF

SHEHA HAMIS SHEHA ..... 17TH PLAINTIFF

KHALID SALUM HASSAN ..... 18TH PLAINTIFF

FAISAL HASSAN HAJI ..... 19TH PLAINTIFF

VERSUS

MTEMI NALUYAGA ..... 1ST DEFENDANT
TANGANYIKA AUCTION MART CO. LTD ..... 2ND DEFENDANT

RULING

8th, & 25th July, 2022

ISMAIL, J.

The plaintiffs have founded a claim against the defendants, jointly and severally, for declaration that their acts of demolishing the plaintiffs' properties were unlawful, and that they are liable to compensate the plaintiffs for the loss suffered as a result of the said demolition. There is also a claim of costs of the matter.

The 1st defendant denies any wrong doing as alleged or at all. Besides filing a written statement of defence, he has filed a notice of preliminary objection in which six grounds of objection have been raised. At the hearing, the 1st defendant dropped ground six, maintaining the other five which read as follows:

1. That the suit is *res-judicata;*
2. The suit is doomed as it is caught up by the Court's lack of jurisdiction and therefore *functus officio*;
3. The suit is hopelessly out of time;

4. The suit is bad in law as it does not show when the cause of action arose;
5. The suit is defective as the plaintiffs have no cause of action against the defendants.

When the matter came up for orders, the Court ordered that hearing of the preliminary objections be by way of written submissions, the filing of which conformed to the filing schedule drawn by the Court.

Kicking off the conversation was Mr. Alex Balomi, learned counsel for the 1st defendant. With respect to the first and second grounds of appeal, learned counsel's argument is that the suit offends the provisions of section 9 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). Mr. Balomi took considerable time to lay down the principles governing the doctrine of *res judicata*. He argued that, on 13th June, 2013, a decision was made in respect of Land Application No. 8 of 2006, involving Orestic Ngulumi and the 1st defendant. The subject matter in the said suit, Mr. Balomi contended, was the question of ownership of the same suit property, and that this Court is *functus officio*. In his contention, the decision in Land Application No. 8 of 2006 was final, made by a competent body, and that the same cannot be disturbed without joining Orestic Ngulumi. He contended that leaving him out is tantamount to condemning him unheard. Mr. Balomi further contended

that the 1st defendant was declared a victor and owner of the 62-acre farm located in Tungi, Tuamoyo Kigamboni Municipality, and that the said verdict has not been disturbed, 16 years down the road. He held the view that re-litigating the matter goes against the canon of civil procedure to the effect that litigation must come to an end. The 1st defendant should not be subjected to proceedings twice and on the same set of facts, he remarked.

Fortifying his contention on these grounds, learned counsel argued that the subject matter in both suits is the same; the decision in the former suit was final; and that the parties were litigating under the same title.

On the consequences, Mr. Balomi cited the decision in ***Umoja Garage v. NBC Holding Corporation*** [2003] T.L.R. 339, and urged the Court to dismiss the suit with costs.

Regarding time bar, learned counsel's contention is that limitation of time is a jurisdictional question which must be settled at the earliest. Borrowing the holding of the Court of Appeal in ***Fish Processors Limited v. Christopher Luhangula***, CAT-Civil Application No. 161 of 1994 (unreported), Mr. Balomi argued that limitation is a material point in the speedy administration of justice. He argued that the present suit has been preferred after a lapse of 16 years, making it ineligible for determination.

Invoking section 3 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019, he urged the Court to dismiss the suit.

On the failure to disclose the cause of action against the defendants, Mr. Balomi's take is that the suit does not disclose a cause of action against the defendants, and the consequence thereof is to dismiss it. On what constitutes a cause of action, the learned advocate referred me to the decision in ***John Byombaliwa v. A.M.I*** [1983] T.L.R. 1.

The plaintiffs' rebuttal submission was fielded by Mr. Benitho Mandele, learned counsel. On grounds one and two, his contention is that none of the requirements of *res-judicata* exist in the present matter. This is primarily because none of the parcels of land held by the plaintiffs was involved in Land Application No. 8 of 2016. Mr. Mandele contended that, whereas Land Application No. 8 of 2006 related to the land located at Tungi, Tuamoyo, Kigamboni Municipality, the subject matter in the instant matter is in relation to parcels under Block "E" Chadibwa – Tungi Area, Kigamboni Municipality. Mr. Mandele took the view that the doctrine of *res-judicata* is not applicable in the instant case. He took an exception to his counter-part's contention and argued that, in the absence of evidence that the land in question was involved in the former proceedings, or that the plaintiffs were involved in the former suit, the contention is as baseless as it can get. He argued that, the

fact that evidence would be required to prove involvement of the subject matter or the plaintiffs in the former suit, renders the objection lacking in purity, thereby defying the holding in ***Mukisa Biscuits manufacturing Co. Limited v. West End Distributors Limited*** [1969] 696; and ***COTWU (T) Union & Another v. Hon. Iddi Simba: Minister of Industries and Trade & Another*** [2002] TLR 88.

With regards to the Land Case No. 272 of 2015, the argument by Mr. Mandele is that the same was adjudged incompetent, resulting in the striking out; while with respect to Misc. Civil Application No. 411 of 2018, the same were declared a nullity, giving the parties, including the plaintiffs, the right to seek appropriate redress in appropriate courts. He maintained that none of the plaintiffs was a party to Land Application No. 8 of 2006 that pitted Olestic Ngulimi against the 1st defendant.

On non-inclusion of Olestic Ngulimi, the contention by the plaintiff's advocate is that neither the allocating authority, nor Olestic Ngulimi were involved in re-allocation of land to the 1st defendant as to warrant their inclusion. In any case, Mr. Mandele contended, the alleged non-joinder is not fatal, if Order 1 rule 9 of the CPC is anything to go by.

On the time limit, the contention by Mr. Mandele is that the 1st defendant's contention is flawed as the cause of action in this matter accrued

on 30th September, 2020, when revisional proceedings in Land Revision No. 1 of 2019 were concluded, culminating in the striking out of Misc. Application No. 411 of 2018. He argued that, in terms of section 21 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019, computation of the period of limitation must exclude the period through which the plaintiff was prosecuting proceedings against the 1st defendant. It was learned counsel's argument that reckoning time of limitation from 2013 was erroneous. He urged the Court to find no merit in the objection.

With regards to non-disclosure of cause of action, the view held by Mr. Mandele is that there is no explanation on the anomalies in the plaint as to build the impression that the matter does not disclose a cause of action. He took the view that the plaint discloses a cause of action, and that the ground of objection is devoid of any merit.

As I begin the disposal journey, let me state, at the outset and without any fear of contradiction that, in my view, the objections raised by the 1st applicant are misconceived and untenable. I will explain.

With respect to *res-judicata* and *functus officio*, I would like to start with stating that, the former, a cousin of the latter, is a doctrine derived from a Latin term which means a "thing decided or a matter already judged." It is fondly referred, as well, as claim preclusion, because it precludes re-

litigation of a claim between the same parties. (***John Masiaga Babere v. Musoma Textile Mills (T) Ltd***, HC-Misc. Civil Application No. 140 of 2019 (Mwanza-unreported). It is a doctrine that has been legislated in our laws, and the relevant provision here is section 9 of the CPC. Under the said provision, a preliminary objection premised on this doctrine can only be invoked if the party is able to establish that the following key conditions exist:

> *(i) There must be records to show that the judicial decision was pronounced by a court of competent jurisdiction;*
>
> *(ii) That the subject matter and the issues decided were the same or substantially the same issues in the subsequent suit;*
>
> *(iii) That the judicial decision was final; and*
>
> *(iv) That it was in respect of the same parties litigating under the same title.*

See: Mulla, the Code of Civil Procedure, 16th Edn., Vol. I at p. 173; ***Lotta v. Tanaki & Others*** [2003] EA 556; and ***Badugu Ginning Co. Ltd v. CRDB Bank PLC & Others***, CAT-Civil Appeal No. 265 of 2019 (unreported); and ***Esso Tanzania Limited v. Deusdedit Rwebandiza Kaijage*** [1990] TLR 102 (CA).

Emphasis to the applicability of the doctrine was laid in the case of ***Badugu Ginning Co. Ltd v. CRDB Bank PLC & Others***, CAT-Civil Appeal No. 265 of 2019 (unreported), wherein it was held:

> *"According to explanation to Order IX of the Civil Procedure of 1966, a person does not have to be formerly enjoined in a suit, but will be deemed to claim under the person litigating if he has a common interest in the subject matter of the suit. .... Giving all three a common interest, since the appellant had sued on the subject matter, the appellant could not be disassociated from that litigation but was be deemed to claim under his mother for the purpose of section 9 of the Civil Procedure Code. Accordingly, the appellant's suit was barred by res judicata."*

Added to that is Mulla's Commentary on Explanation IV of the Indian Code of Civil Procedure (p. 114), in which it was opined:

> *"The principle underlying Explanation IV that res judicata is not confined to issues which the court is actually asked to decide but covers issue or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding be started in respect of the them."*

Under this principle, it would not matter if the decision in the former suit was decided *ex-parte*. This was held in ***Tanganyika Motors Ltd v. Trans-Continental Forwarders & Another*** [1997] TLR 158, wherein it was underscored as follows:

> *"It did not matter that the earlier suit had been decided ex-parte: the relief sought was exactly the same as that pleaded by the plaintiff in the present case. The plea had to be upheld."*

Looking at the submissions made by Mr. Balomi, nothing convinces me that the proceedings in Land Application No. 8 of 2006 drew participation of the plaintiffs, or that the issues decided in the former suit were the same or substantially the same issues that are pending in the instant suit. I hold, as well, that nothing suggests that any of the conditions under section 9 of the CPC apply in the proceedings in this Court i.e. Misc. Application No. 411 of 2018 and Land Revision No. 1 of 2019. It is simply that this is not a fit case for invoking the doctrine of *res-judicata*. It would not render this Court *functus officio* either. I choose to subscribe to the reasoning by Mr. Mandele and overrule these two grounds of objection.

Regarding time bar, I am inclined to pronounce myself on this, and my considered view is that this matter is timeous. My position considers that the plaintiffs' right of action accrued when the revisional proceedings terminated.

It is when the parties were given a 'blank cheque' to commence proceedings on the ownership of the disputed land.

It is misleading to contend that the cause of action accrued 16 years ago, while the benchmark for that contention is the proceedings in Land Application No. 8 of 2006 which did not involve the plaintiffs, and there is no evidence that the plaintiffs were aware of the existence of such proceedings. More so, when the subject matter in the said proceedings allegedly touch on different subject matter. Add that to section 21 (1) of Cap. 89 which excludes time during which the parties were actively in court proceedings in respect of the same subject matter.

It is in view thereof, that I hold the view that this objection is also misconceived and I overrule it.

On the cause of action, I share the view held by the plaintiffs' counsel that the 1st defendant's counsel has been extremely economical with facts. He has not stated the premise on which the plaintiffs have failed to disclose the cause of action. In the absence of any absolutes on how the plaintiffs have failed to disclose the cause of action, the contention by Mr. Balomi lacks the basis on which to rely on. I am inclined to reject this objection out of hand on the ground that the 1st defendant has not demonstrated the shortfall

that would validate the contention that the plaint does not disclose the cause of action.

In sum, I find the objections lacking in merit and I overrule them. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of July, 2022.

M.K. ISMAIL

JUDGE

25.07.2022