

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 130 OF 2021**

**OSSY MUGANGA JULIUS KASILO ..... PLAINTIFF**

***VERSUS***

**JAFARI MBEGU ABDALLAH (As legal**

**Representative of the late HUSSEIN MBEGU ABDALLAH) ..... DEFENDANT**

**RULING**

8<sup>th</sup> July & 12<sup>th</sup> August, 2022

**KISANYA, J.:**

This is a ruling in respect of a preliminary objection raised by the defendant, Jafari Mbegu Abdallah (As legal Representative of the late Hussein Mbegu Abdallah) against the suit filed by the plaintiff, Ossy Muganga Julius Kasilo. Notice of the preliminary objection was filed alongside with his Written Statement of Defence. It was to the following effect: -

- 1. That the suit is misconceived and bad in law for being an alternative to appeal.*
- 2. That the prayers and relief sought by the plaintiff cannot be issued by this Court as are subject to another Decree formerly issued by this Honourable Court.*
- 3. That, the matter is Res judicata.*

The preliminary objection was argued by way of written submissions. The defendant was represented by Mr. Herman Lupogo, learned advocate while the plaintiff enjoyed the legal services of Mr. Victor Kikwasi, also learned advocate.

Submitting in support of the preliminary objection, Mr. Lupogo argued altogether the first and second limbs of objection. He contended that this matter was determined in Land Case No. 47 of 2018 in which some of the landed properties claimed by the plaintiff were declared to belong to the defendant. It was his further submission that the plaintiff ought to have appealed or filed an application for revision against the said decision instead of filing the present suit claiming for money used to buy the landed properties that were not proved in Land Case No. 47 of 2018. To cement his argument, the learned counsel cited the case of **Travelport International Limited vs Precise Sytems Limited**, Misc. Commercial Application No. 51 of 2019 (unreported).

Submitting further, Mr. Lupogo contended that the plaintiff is abusing and misusing the court process by bringing the claim which has already been determine on merit and thus, it is *res-judicata*. Referring to the facts deposed in paragraphs 22 and 23 of plaint, he contended that the plaintiff admits his claim to have been determined in Civil Case No. 47 of 2018. On that account,

he urged this Court to pronounce judgment on admission under Order XII, Rule 4 of the CPC.

With regard to the third limb of objection, Mr. Lupogo argued that this suit contravenes section 9 of the CPC on the account that the suit is *res-judicata* to Land Case No. 47 of 2018. Citing the case of **Paniel Lotta vs Gabriel Tanaki and Others** [2003] TLR 312 and **Umoja Garage vs National Bank of Commercial Holding Corporation** (2003) TLR 339, he submitted that the doctrine of *res-judicata* bars multiplicity of suits and guarantee finality to litigation. The learned counsel went on elaborating how each element of *res-judicata* have been met. He then invited this Court to dismiss the suit with costs.

Countering, Mr. Kikwasi submitted at the outset that the preliminary objections have been misconceived. Starting with the first and second limbs of objections, he argued that paragraphs 22 and 23 of the plaint do not suggest that the plaintiff is aggrieved by the judgment and decree in Land Case No. 47 of 2018. He was of the firm view that, following the judgment and decree in Land Case No. 17 of 2018, the recourse available to the plaintiff was to institute the present suit.

Mr. Kikwasi went on arguing that the plaintiff's claim is based on paragraph 25 of the plaint. He contended that the late Hussein Abdallah Mbegu received from the plaintiff a sum of USD 610,187 and that he bought

landed properties worth USD 22,915.36. It was his contention that, the plaintiff is claiming USD 587,272 which was not accounted for. He was of the view that, the claim in Land Case No. 47 of 2018 is distinct from the claim in the instant suit. In conclusion, Mr. Kikwasi argued that the suit is not res-judicata. He, therefore, prayed that the preliminary objections be dismissed with costs.

Re-joining, Mr. Lupogo reiterated his submission in chief and maintained his prayer that the suit be dismissed with costs. He responded further that this suit is a substitute of appeal because in Land Case No. 47 of 2018, the plaintiff failed to prove that there was a contract with the deceased in which the latter agreed to buy the landed properties for the plaintiff. Submitting further, Mr. Lupogo contended that the claim for unaccounted sum of money used to buy the landed properties is res judicata because the court has decided that the said properties belong to the deceased.

Having examined the pleadings and considered the contending submissions, this Court is called upon to consider whether the preliminary objections are meritorious.

It my considered view that the first and second limbs depend on the determination of the third limb of objection. That being the case, I prefer to start with the third issue, whether the suit is *re-judicata*.

As rightly argued by Mr. Lupogo, the doctrine of *res-judicata* is provided in section 9 of the CPC. The said provision reads:-

*"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."*

In the light of the above provision, I also agree with Mr. Lupogo that the ingredients of the doctrine of *res-judicata* are as follows; (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between 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 subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit. It is settled law that all of the above conditions must co-exist before the doctrine of *res-judicata* can be invoked. [See **Yohana Oismas Nyakibari and Another vs Lushoto Tea Company Limited and 2 Others**, Civil Appeal No. 90 of 2008 (unreported)].

In the present case, parties are at one that subsequent to this suit, the plaintiff filed a suit against the defendant in the High Court of Tanzania, Land Division which is prescribed as Land Case No 47 of 2018 (henceforth "the former suit"). Therefore, the second and third conditions or ingredients of res-judicata have been met.

The crucial issue is whether the issue in the present suit was directly and substantially in issue in the former suit. Reading from the judgment of the former suit, the issues framed thereto were:

- 1. Whether the plaintiff has entered into agency agreement with the late Hussein Mbegu Abdallah for the purchase of the suit properties.*
- 2. Whether, pursuant to the said agreement, the late Hussein purchased the suit properties for and on behalf of the plaintiff as alleged or alleged or at all.*
- 3. Whether the relative of Hussein Mbegu Abdallah had ever acknowledged that the plaintiff is the legal owner of the suit premises.*
- 4. To what reliefs are the parties entitled to.*

It is also on record that the plaintiff prayed to be declared as the lawful and beneficial owner of the 12 landed properties.

Now, in its decision, the Court answered the first issue in affirmative. As regards, the second issue, it was partly answered in affirmative in relation to some landed properties. On the other hand, the third issue was answered

negatively while the last issue was determined by declaring the plaintiff as lawful owner of the landed properties proved in issue number 2.

Be as it may, the question is whether the above issues in the former suit will also be determined in the present suit. I am aware that this matter has not reached the stage of final pre-trial and scheduling conference. Therefore, the issues for determination have not been framed. However, looking at the pleading, some of issues be to determined may include: *One*, whether the plaintiff paid the late Hussein Mbegu Abdallah a sum of TZS 587,272 for purposes of implementing the plaintiff's retirement plan in real estate; *two*, whether the plaintiff paid the late Hussein Mbegu Abdallah, a sum of TZS 158,067,000 for purposes of implementing the plaintiff's retirement plan in real estate; *three*, if the 1<sup>st</sup> and 2<sup>nd</sup> issues are answered in affirmative, whether the late Hussein Mbegu Abdallah used the said amount in accordance with his arrangement with plaintiff.

It is vivid that the said issues were not at issue in the former suit and that they were not determined by the High Court Land Division. That being the case, I am of the considered view that the first and fifth conditions of the doctrine of *res-judicata* have been not met. I, therefore, respectfully disagree with Mr. Lupogo who was of the view that this suit is *res-judicata*. Thus, the second ground is dismissed for being devoid of merit.

Reverting to the first and second limb of objection, it is clear that the said objections were premised on the contention that the plaintiff is aggrieved by the decision of the former suit and that the prayers and reliefs were subject to former suit. As hinted earlier, the reliefs sought in the former suit were for the plaintiff to be declared the lawful owner of landed property. In the present suit, the plaintiff prays for the monies paid to late Hussein Mbegu Abdallah. The said claim was not determined in the former suit. Having considered further that, the third limb of objection has been overruled, the first and second limbs of objection lack legs to stand on. Nothing suggest that the plaintiff is appealing against the judgment and decree in the former suit.

In the upshot and for the reasons stated afore, the preliminary objections are hereby overruled and dismissed for want of merit. Costs shall follow the event.

DATED at DAR ES SALAAM this 12<sup>th</sup> day of August, 2022.



S.E. Kisanya  
JUDGE  
12/08/2022