

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

LAND CASE NO. 45 OF 2019

HAMZA BYARUSHENGO PLAINTIFF

VERSUS

MWANGA HAKIKA MICROFINANCE BANK LIMITED DEFENDANT

RULING

29/3/2022 & 28/4/2022

MASABO, J.:-

This ruling is in respect of two sets of preliminary objections. The first set is a notice of preliminary objection raised against the suit and the second set is the preliminary objection raised against the counter claim. For expedition, it was found convenient to hear and determine the two sets of preliminary objections subsequently. Before proceeding to the merit of these preliminary objection, the brief background to the suit as discerned from the pleadings is as follows: The plaintiff and the defendant (then trading under the name of EFC Tanzania) had a banking relationship from which the kernel of this suit derives.

On 26th September, 2013 the plaintiff obtained a loan of Tshs.25,000,000/= from the defendant. In securing the loan, the plaintiff he mortgaged his residential house with residential license (Leseni ya Makazi) No. KND024074 located at Ubungo – Msewe, Dar es Salaam. The loan was repaid in full but the defendant refused to discharge the mortgage. Aggrieved, the plaintiff filed a civil suit (Civil Case No. 133 of 2015) before Kinondoni District Court. The defendant was discontented. He filed a written statement of defence refuting the claims and accompanied it with a counter claim vide which she claimed a sum of Tshs 14,984,657.08 as an outstanding loan.

The counter claim was dismissed for want of prosecution after the defendant defaulted appearance and for similar reasons, the hearing of the suit proceeded *ex parte* him. At the conclusion of the trial on 20th March, 2017, the court declared that the plaintiff has discharged his debt and ordered the defendant to discharge the mortgage and return the residential license No. KNDO24074 to the plaintiff. The defendant has contemptuously not returned the licence in spite of demand from the plaintiff.

Meanwhile, on 24th June, 2019 the plaintiff allegedly executed a 35 years contract for lease/development of the suit premise. The lease would have earned the plaintiff a total sum of Tshs.525,000,000/= derived from a monthly rental fee of Tshs1,250,000/=. Upon the agreement being executed, the lessee one Apronius Mutalemwa paid the plaintiff a sum of 19,500,000/= in advance. The lease contract was prematurely terminated as it has to be rescinded owing to the plaintiff's failure to produce the residential licence which had remained in the hands of the defendant. The plaintiff is aggrieved and has come to this court praying for the following orders:

(a) a declaratory order that the defendant's refusal to releases the plaintiff's residential license No. KND04074 is unlawful;

(b) payment of Tshs.510,000,000/= being an expected rental fee;

(c) payment of Tshs 1,650,500/= being stamp duty and withholding tax paid by the plaintiff in respect of the lease/development agreement;

(d) payment of Tshs 19,500,000/= being the one year rent paid to him by the said Apronius Mutalemwa plus interest at the rate of 30%,

(e) Payment of Tshs 700,000/- being costs of the lessee's property developers demand letter,

(f) interest on (c), (d) and (e) above at the rate of 30% from the date of filing the suit till judgment

(g) general damages for conversion to be assessed by the court

(h) interest on the decretal sum at the court rate from the date of judgment till payment in full

(i) costs of the case be borne by the defendant and

(j) any other relief (s) as the court may deem fit and just to grant.

Upon being served, the defendant filed a written statement of defence accompanied by a notice of preliminary objection that this suit is *res judicata* and a counter claim, claiming from the defendant a total of Tshs 50,000,000 comprising of an outstanding loan balance, interests and penalties. In his written statement of defence, the plaintiff also filed a notice of preliminary objection, that (i) the counter claim offends Order VII rule 1 (e) and (f) of the Civil Procedure Code (ii) the counter claim offends order IX rule 8(1) of the Civil Procedure Code; (iii) the counter claim is *res judicata* to Civil Case No. 133 od 2015 before Kinondoni District Court.

Hearing of the preliminary objections proceeded in writing. The Plaintiff was self-represented whereas the defendant enjoyed the service of Mr.

Cleoplace James, learned Advocate. Starting with the notice of preliminary objection which I will refer as the first set of the preliminary objection, it is premised on only one limb, namely, the suit is incompetent for being *res judicata*. Submitting in support of the preliminary objection, Mr. James argued that this suit is *res judicata* to Civil Case No. 133 of 2015 which was determined by the District Court of Kinondoni at Kinondoni. He argued further that, in that case, much as the court ordered that the license of KND024074 be handed over to the plaintiff as he had discharged his dues, the proper remedy for the plaintiff was to file an execution proceeding instead of instituting a fresh case. By instituting a fresh suit against the same defendant and over a same subject matter, the plaintiff is offending the law.

Mr. James reasoned further that, the general principle is that once the matter has been determined to finality by a court of competent jurisdiction, it cannot be relitigated by the same parties. The plaintiff is, therefore, estopped from suing the defendant over residential license No. KND024074 as the matter was substantially in issue in Civil Case No. 133 of 2015. In fortification, Mr. James reproduced the provision section 9 of the Civil Procedure Code [Cap 33 RE 2019] which sets out the principle of *res judicata* and proceeded to argue that the principle of *res judicata* is

premised on two limbs; *neo debet bis vexari pro una et aedem causa*; that no one is to be tried twice for one and the same cause of action and secondly, that there must be an end of litigation. Buttressing his point, he cited the case of **Paniel Lotta v Gabriel Tanaki & Others**, Civil Appeal No. 61 of 1999, CAT at Arusha (unreported) where it was held that the purpose of *res judicata* is to bar multiplicity of suits and guarantee finality to litigation.

He further cited **Kamunye & Others v The Pioneer General Assurance Society Ltd** [1971] 1 EA 263 (CAK) at page 265; **Tanganyika Motors Limited v Trans- Continental Forwarders & Another** [1997] TLR 158; and **George Shambwe v Tanzania Italian Petroleum Co. Ltd** [1995] TLR 20 which consistently underlines the scope, rationale and criteria used in determining whether a suit is *res judicata*. Based on these cases, he argued that, the principle of *res judicata*, applies where the parties in the present suit are similar to those in the previous case, matter directly and substantially in issue in the contemplated suit is the same as that involved in the former suit between the same parties, and where the formal suit was heard and finally determined by a competent court. Therefore, since the matter involved in the instant suit was determined to finality in Civil Case No, 133 of 2015

by a court clothed with competent jurisdiction the plaintiff is restrained to re-litigate in this court.

In reply, the plaintiff argued that in determining whether or not this suit is res judicata, the court has to look at the plaint and the judgment of the first suit to ascertain if it involves the same parties litigating under the same title, the issue is directly and substantially the same, the first suit was finally heard and determined by a court of competent jurisdiction. He then cited paragraph 975 of **Halsbury's Law of England**, 4th edition, Reissue Volume 16 at page 860 and the **Black's Law Dictionary** (Nineth Edition,2009) by Bryan A Garner at page 1425 in which state that, in determining whether the suit is res judicata, the court has to ascertain whether the plaintiff had an opportunity to recover the claim in the first action but failed because of his own fault.

He then proceeded that, the present case is not res judicata as the cause of action in the present suit is different from the one in the first action because, the cause of action in the present case accrued from 6th July 2019 when the defendant declined/neglected to surrender the residential license even after being required to do so vide the plaintiff's letter dated 06th July 2019. He further argued that, the claims in the present suit could

not have been claimed in the first suit, the cause of action did not exist when the previous action was instituted in 2015.

In rejoinder, Mr. James reiterated his submission in chief that, the suit is res judicata. He added that, this is supported by the plaintiff's failure to show whether he filed an application for execution of the said judgment or not. He further reasoned that the letter dated 6th July, 2019 is not a substitute for execution thus there is no point in insisting that there is a new cause of action.

On the second set of the preliminary objection, the plaintiff who is the defendant in the counter claim argued that, the counter claim offends rule 1(e) and (f) and (i) of the Civil Procedure Code which requires the plaintiff to disclose the cause of action, the court's jurisdiction, and the value of the subject matter. Reinforcing his argument, he argued that pursuant to Order VII rule 9(2) of the Civil Procedure Code, a counter claim is tantamount to a suit thus it is crucial for the counter claim to strictly comply with the formant of the plaint. On the 2nd and 3rd limb of the preliminary objection, he argued that the claim in the counter claim is similar to the claim in the counter claim raised by the defendant in Civil Case No. 133 of 2015. He argued that as the counter claim was dismissed

for want of prosecution, it cannot be re-instituted as the cause of action is similar. By re-instituting the same, the defendant offended the provision of section 9 of the Civil Procedure Code and Order IX rule 8(1) of the Civil Procedure Code.

The defendant did not rebut the merit of the submission. In his reply he merely blamed the plaintiff for raising preliminary objections against the counter claim. He cited the case of **Dar es Salaam Institute of Technology v Deusdedit Mugasha**, Civil Reference No. 11 of 2016 and in **Meet Sing Bachu v Gurmit Sing Bachu**, Civil Application No. 144/02 of 2018 (CAT) in which the Court of Appeal abhorred the tendency of advocates preempting preliminary objections.

Having considered submissions from both parties. The issue for determination with regard to the first set of preliminary objections is whether the present suit is res judicata to Civil Suit No. 133 of 2015. As correctly submitted by the parties herein, res judicata is a bar to multiplicity of suits and a guarantee finality to litigation. It bars parties from re-agitating a matter that has been finally determined. And, as correctly argued by Mr. James, this doctrine is based on the larger public interest and is founded on two legal limbs. The first limb is the

maxim nemo debet bis vexari pro una et eadem causa, which simply means that "No one ought to be tried twice for one and the same cause/ No one should be tried twice in respect to the same matter." As held in **Peniel Lotta vs Gabriel Tanaki and others** Civil Appeal No. 61 of 1999 CAT at Arusha, "it makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit". In our jurisdiction, this principle is found under section 9 of the Civil Procedure Code which provides that;

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 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.

The import of this provision has been extensively litigated in this court and the Court of Appeal and its scope is now very well settled. *In Peniel Lotta vs Gabriel Tanaki and others* (supra) which is one of the landmark authorities on *res judicata*, the Court of Appeal while interrogating the scope of section 9 categorically stated that:

“the scheme of S.9 therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially is 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. [emphasis provided]

Thus, in determining whether the matter is res judicata, the court is basically invited to ascertain if the above conditions exist. If in the end this question is answered in the affirmative, the subsequent suit is inevitably condemned as res judicata. It is in this respect; we proceed to see whether in the present case the question will attract an affirmative answer. Three things are not in dispute, namely: that the parties herein litigated in Civil Case No. 133 of 2015 before the District Court of Kinondoni; that Civil Case No. 133 of 2015 was heard and finally determined by the District Court of Kinondoni which was clothed with

competent jurisdiction to hear and determine the suit. I will thus not exercise my mind on the second, third, fourth and fifth condition. I will reserve my energy for the first condition which is under dispute.

For purposes of res judicata, a matter is understood to be substantially in issue if the whole of the subject matter in both the proceedings is identical and not merely one of the many issues arising for determination (see Fardunji Mulla in **Mulla: The Code of Civil Procedure** (18th Edition, 2011). A matter would not be taken to have been substantially in issue if only one or just some of the issues are common in both suits. As held in **Jeremy Woods & Anor Vs Robert Choudury & Another**, Commercial Case No. 18 of 2007 (unreported) this Court held that:

[It] does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy. It is not enough that one or more issues are in common. The subject matter in the subsequent suit must be covered in the previous suit and not vice versa. [emphasis added]

In the present case, Mr. James has ardently argued that, the matter at issue in the instant case was substantially at issue in former suit, hence, it can not be re-agitated. On the other hand, the plaintiff has argued that

the matter at issue in the instant suit is different from the one substantially in issue in the former suit because, in the former suit, the claim was premised on the repayment of the loan whereas in the present suit, what is at issue is not repayment of the loan but the loss he has suffered as result of an unlawful retention of the residential licence.

Having scrutinized the plaint and the judgment of the court in Civil Case No. 133 of 2015 and having carefully weighted the submissions made by the parties I am of the settled view that, there is a disparity between the two suits. As correctly submitted by the plaintiff, much as there are certain similarities especially on the kernel of both suits, there are seemingly some disparities and the major one is that, the plaintiff's claim in the former suit was premised on repayment of the loan whereas in the present suit he is litigating over the damages he has suffered as result of the defendant's unlawful retention of the residence license.

Mr. James has invited this court to consider the later as a continuation of the cause of action litigated in Civil Case No. 133 of 2015. I will respectfully decline the invitation and reserve the question to be determined after full trial. I say so mindful of the fact that, the question whether the later comprises a new cause of action or a continuation of

the cause of action litigated in Civil Case No. 13 of 2015 cannot be determined at this stage as it would entail navigating through the facts of the suit. The navigation will certainly offend the principle in **Mukisa Biscuits Manufacturing v West End Distributors Ltd [1969] EA 696** which requires that preliminary objections should be on pure point of law. **For this reason,** I overrule the first objection.

Turning to the second set, I will outright reject the argument fronted by Mr. James. The authority that once a preliminary objection is raised must be determined was made out of context because unlike Mr. James's reasoning, the rule does not abhor the right of the plaintiff to file a notice of preliminary objection against the counter claim which in law stands as a separate suit. This is categorically provided for under Order VIII rule 10(2) of the Civil Procedure Code which states that:

(2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint.

This being the case, the defendant in the counter claim/cross suit, just like the defendant in the suit enjoys all rights and this includes the right to file a notice of preliminary objection against the counter claim/cross suit. Since I am not aware of any law that requires the defendant in the counter claim/cross suit to obtain leave of court before raising a preliminary objection or a law that prohibits the court to hear the preliminary objection in the counter claim subsequent to the preliminary objection in the suit, I find no merit in the argument.

Regarding the merit of this set of the preliminary objection, as alluded to earlier on, the notice is premised on three limbs, to wit: the counter claim offends Order VII rule 1 (e) and (f) of the Civil Procedure Code; the counter claim offends order IX rule 8(1) of the Civil Procedure Code; and the counter claim is res judicata to Civil Case No. 133 of 2015 before Kinondoni district court. I prefer to start with the third limb whose jurisprudential foundation I have extensively dealt with in the course of determining the first set of the preliminary objection. For avoidance of repetition, I will go straight to the merit of the objection. As the plaintiff to the counter claim made no attempt to reply to the merit of this limb of the preliminary objection, there is a presumption that he conceded to the submission.

Much as this would suffice to uphold the preliminary objection, for the sake of completeness, I will stretch to the merit. While examined the counter claim filed by the defendant in Civil Case No. 133 of 2015 and the present counter claim, it became very obvious why the defendant opted not to rebut as the previous counter claim which was dismissed for want of prosecution in Civil Case No. 133 of 2015 is substantially similar to the present counter claim.

As correctly submitted by the plaintiff, in both counter claims, the defendant is claiming for an outstanding loan. As the former counter claim was dismissed and there a final judgment which declared the loan to have been fully paid, the counter claim is certainly incompetent for being res judicata to Civil Case No. 133 of 2015. As this finding naturally disposes of the counter claim, I will not proceed to the remaining limbs to which, the defendant has similarly not rebutted in his reply submission. The preliminary objection is found to have merit and is upheld.

In conclusion and based on what I have demonstrated, the preliminary objection to the suit is overruled whereas the preliminary objection to

the counter claim is upheld and the counter claim is dismissed. The defendant shall be responsible for the costs.

DATED at DAR ES SALAAM this 28th April 2022.

4/29/2022

X 

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

