

AT DAR ES SALAAM

(Originating from Civil Case No.12 of 2021 of the Resident magistrate Court of Dar es Salaam at Kisutu)

VERSUS

JUDGMENT ON APPEAL

The appellant was aggrieved by the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu ("The trial court") dated 08/4/2021. In the impugned decision of the trial court was decided in favour of the respondent herein ordering the appellant to pay the appellant a sum of Tshs. 61 million being an outstanding amount for purchase of motor vehicle plus interest. Aggrieved by the said decision, the appellant has lodged this appeal to this court against the whole of the decision of the trial court on the following grounds:-

1. That the Resident Magistrate Court failed to determine the issues raised by the Appellant.
2. That the Resident Magistrate Court erred in law and fact by proceeding with the hearing of the case while the court was functus officio (had no jurisdiction).
3. That the Resident Magistrate Court failed to analyse the fact that the Respondent never adduced any evidence to substantiate as the pleadings were not amended to the effect that PW1 was a legal representative for the Respondent.
4. That the Resident Magistrate Court erred in law and fact for disregarding the fact that the Respondent was in Tanzania at the time the hearing of the case hence PW1 was not competent to testify on behalf of the Respondent.
5. That the Resident Magistrate Court erred in law and fact on failure to find out that the power of Attorney was made in Khartoum Sudan but was signed by the Respondent.

On those grounds, his prayer is that the appeal is allowed by quashing and setting aside the decision of the trial court. Disposal of this appeal was by way of written submissions which were filed accordingly. The Appellant's submissions were drawn and filed by Mr. Nehemiah Geoffrey

Nkoko, learned Advocate while the respondents' submissions were drawn and filed by Mr. Augustine Kusalika, learned advocate.

Before going into the merits of this appeal, brief background of the matter is narrated from the gathered facts. In the year 2017, the Respondent herein filed a Civil Case No. 167 of 2017 against the Appellant herein ("the previous suit"). The case was dismissed for want of prosecution and subsequent to the dismissal; the Respondent herein filed a Misc. civil Application No. 132 of 2019 seeking to set aside the dismissal order. The application was dismissed for want of sufficient grounds. Still dissatisfied and eager to pursue his right, the Respondent herein filed Revision Application No. 26 of 2020 which was also dismissed for lack of merits.

Eventually, having lost all the battles above, the Respondent herein decided to file another fresh suit in the same court, Kisumu Resident Magistrate's Court, the suit was admitted as Civil Case No. 12 of 2021 ("the subsequent suit"). In due course of the pendency of the subsequent suit, the appellant attempted to raise an objection that the suit was not maintainable for being res judicata to the previous suit. In its ruling dated 05th day of July, 2021, the trial court overruled the objection and proceed with the trial of the subsequent suit. The matter ended in favour of the respondent herein. Aggrieved by both the ruling

and judgment of the trial court in the subsequent suit, the applicant has lodged the current appeal on the aforementioned grounds.

I have considered the submissions of both sides which I see no need to reproduce them in general aspect. Instead, I will use them in due course of determination of this appeal. In my determination I will start with the 2nd ground of appeal which touches the jurisdiction of the court to determine the subsequent suit. If the ground will not suffice to dispose the appeal, then I will proceed with the remaining grounds of appeal.

The second ground of appeal is that the trial court erred in law and fact by proceeding with the hearing of the case while the court was functus officio (had no jurisdiction). In his submissions to support this ground, Mr. Nkoko submitted that the trial court had no jurisdiction to entertain the subsequent suit as the court was functus officio vide the previous suit between the Appellant and Respondent. He argued that after the previous suit was dismissed, there were subsequent matters including Misc. Civil Application No. 132 of 2019 and Revision No. 26 of 2020 and that all these cases were filed by the Respondent. That the cases were conclusively determined by the same court.

Mr. Nkoko then pointed out that the Respondent's prayers in Civil Case No. 167 of 2017 and Civil Case No. 12 of 2021 are the same and that since Civil Case No. 167 of 2017 (previous suit) was dismissed and its

subsequent applications also dismissed, it was wrong for the same court to proceed with the Civil Case No. 12 of 2021 (the subsequent suit). He then argued that the respondent was not supposed to file a fresh suit because the court was functus officio and the case was res judicata. He supported his arguments by citing the case of **Kigoma Ujiji Municipal Council Vs. Nyakirang'ani Construction Limited, Commercial Case No. 239/2015** (unreported) in which case the Court was guided by the decision of the Court of Appeal in the case of **Mohamed Enterprises (T) Limited Vs. Masoud Mohamed, Civil Application No. 33 of 2012** and held that:

"in which the court of appeal reminded judges not to trample upon orders of the same court because the court becomes functus officio upon making such order, I cannot disturb the equilibrium as already created by this court through the said application and subsequent order. I will let the bygone be bygone since, in my considered view, no harm was done to justice, as it was left dry and clean by the circumstances. Suffice here to note that the former petition having been struck out, and there being no order as to adoption and declaration of an award as a decree of this Court, and further in the light of section 21 of the Law of Limitation Act, the present petition was properly instituted and well within time."

On that ground, his prayer was that the appeal is allowed by nullifying the proceedings and setting aside the judgment and decree issued against the appellant.

In reply, Mr. Kusalika submitted that this issue of res judicata was not raised by the appellant or his advocate at the trial court. That in the matter which was dismissed, the claim was Tshs. 70,000,000/= while in Civil Case No. 12 of 2021 the claim made was Tshs. 61,000,000/= hence the court was not functus officio.

Having gone through the records of this appeal, I am in agreement with Mr. Nkoko's submission that the case is res judicata, for reasons that will soon be apparent. As far as the records are, in the year 2017, the Respondent herein the previous suit suing the appellant herein on the same subject matter and the same cause of action. The matter was dismissed for non-appearance. The records show that on the 31/10/2017 the defendant (appellant herein) was represented by Mr. Mkwizu and the plaintiff (respondent herein) was absent and the trial court dismissed the suit for non-appearance of the plaintiff pursuant to the provisions of Order IX Rule 8 of the then Civil Procedure Code, Cap. 33 R.E 2002. Rule 9(1) of the same Order IX of the CPC then provided that:

*"Where a suit is wholly or partly dismissed under rule 8, the plaintiff **shall be precluded from bringing a fresh suit in***

respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

In line with the cited provision, the respondent herein filed a Misc. civil Application No. 132 of 2019 seeking to set aside the dismissal order, an application which was dismissed for want of sufficient grounds. The Respondent subsequently filed Revision Application No. 26 of 2020 which was also dismissed for lack of merits. Therefore so far as the respondent's rights to sue the appellant herein were concerned, the respondent had exhausted his available remedies and was precluded from initiating an action against the appellant herein over the same cause of action. The net question is whether the subsequent suit was between the same parties and the same cause of action to make it res judicata of the previous suit.

As correctly pointed out by Mr. Nkoko, the subsequent suit was against the same parties and on the same cause of action. However, what I have noted also is that although the Respondent filed a fresh suit with the same parties, he just changed the amount of claim from 70,000,000/=

to Tshs. 61,000,000/= and it is basing on this difference that Mr. Kusalika wishes to convince the court that the subject of claim has changed. It is important to analyse what the term *res judicata* means for the purpose of determination of the controversy before me. The term has been defined in many decisions including the case of **Peniel Lotta Vs. Gabriel Tanaki and Others Civil Appeal No. 61 of 1999 (2003)**

TLR 314 where the court held:

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

Applying the above authority to the case at hand, what was referred to the trial court before was between the same parties and on the same cause of action, purchase of motor vehicles. It is pertinent to

note that although the amount claimed changed, but the subject matter of the suit and the issue in controversy was a contract for sale of motor vehicle and whether the said contract was breached. Change of the amount claimed does not change the subject matter of breach of the same contract for the same motor vehicle as a subject matter. The matter was finally determined as explained above hence the mere change in the figures that was claimed by the then plaintiff did not defeat the fact that the particular cause of action was barred from being refiled. What the respondent did was an abuse of court process by trying to play with words and changing figures at the expense of the appellant's and the courts precious time.

From those findings, it is my conclusive finding that the Civil Case No. 12 of 2021 at the trial court was res judicata of Civil Case No. 167 of 2017 as the matter had already been determined by the same court, on the same cause of action and between the same parties. The effect of dismissal of the previous suit for want of prosecution and a further refusal to restore the dismissed suit barred a party to lodge a fresh suit on the same subject matter between the same parties.

That being the case, this appeal is hereby allowed on the second ground only which affects the jurisdiction of the trying court. Having allowed the appeal I proceed to nullify the proceedings of the trial

court and set aside the subsequent judgment and decree therefrom.

The appellant shall have his costs for this appeal.

Dated at Dar es Salaam this 13th day of March, 2023



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke, positioned above a dotted line.

S.M. MAGHIMBI

JUDGE