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. 83 OF 2022

SAMBARU MINING GROUP CO. LTD ..... PLAINTIFF

VERSUS

WANG SENG LIM ..... 1ST DEFENDANT
CHIN CHI KIT ..... 2ND DEFENDANT
CAI ZHEN HUA ..... 3RD DEFENDANT
MEGA COPPER COMPANY LIMITED ..... 4TH DEFENDANT

RULING

5th May & 9th June, 2023

KISANYA, J.:

Sambaru Mining Group Co. Ltd (the plaintiff), a body corporate registered under the law of Tanzania instituted this suit praying for judgment and decree against the above named defendants jointly and severally as follows:

(i) *Payment of outstanding debts of USD 170,000/= to the Plaintiff.*

(ii) *Declaration that the defendants shall hand over the equipment to the Plaintiff in good condition.*

(iii) *General damages to be assessed by the Court.*

(iv) *Costs of the Suit.*

(v) *Any other reliefs that the Honourable Court may deem fit and just to grant.*

In bid to dispute the plaintiff's claim, the 1st defendant filed a written statement of defence, while the 2nd, 3rd and 4th defendants filed a joint written statement of defence. Each written statement of defence was prefaced by a notice of preliminary objection. The 1st defendant's notice of preliminary objection was founded on the points of law to the effect that; *one,* the suit is defective for want of Board resolution; *two,* the suit is time barred; and *three*, this Court has no jurisdiction to entertain the matter at first instance. On the other hand, the 2nd, 3rd and 4th defendants raised one point of preliminary objection as follows:

> "*That the suit before this honourable court is Res Judicata as per section 9 of Civil Procedure Code [Cap. 33, R.E.* 2019]."

At the hearing of the preliminary objection, the plaintiff was represented by Mr. Stephen Ally Mwakibolwa, learned advocate, the 1st defendant was represented by Mr. Anwaar Katakweba, learned advocate, while Mr. Peter Mshikiwa appeared for the 2nd, 3rd and 4th defendants. The hearing proceeded by way of written submissions. Both parties filed their respective written submissions in accordance with the Court's schedule.

Having gone through the written submissions, I prefer to start with the preliminary objection by the 2nd, 3rd and 4th defendants, that, the suit is *res-judicata*.

Submitting in support of this limb of objection, Mr. Mshikilwa argued that the matter subject to this case was filed before this Court as Civil Case No. 247 of 2017 and was dismissed for want of prosecution on 3rd November, 2020. He further contended that, the plaintiff's application for setting aside the dismissal order was dismissed by this Court through Misc. Civil Application No. 186 of 2021. In that respect, the learned counsel argued that this matter is *res judicata* under section 9 of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). He was of the view that, if this suit is allowed to proceed to its finality, there will be no end to litigation and that the time spent to adjudicate the former suit would be wasted. To bolster his argument, he cited the case of **Ally Khalfan Mleh vs Attorney General,** Civil Application No. 40 of 2012 (unreported). In conclusion, the learned counsel prayed for this Court to dismiss the suit with costs.

In response, Mr. Mwakibolwa argued that the principle of *res-judicata* set out under section 9 of the CPC applies where the suit has been determined to its finality and heard on merit. He went on to contend that Civil Case No. 247

of 2017 was dismissed under Order XIX Rule 2 of the CPC. Relying on Order XIX Rule 3 of the CPC, the learned counsel argued that a suit dismissed under the said provision can be filed afresh subject to the law of limitation.

I have considered the arguments for and against the preliminary objection under consideration. The principle of *res judicata* pleaded by the 2nd, 3rd and 4th defendants finds its basis on the provision section 9 of the CPC which provides:

> *"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."*

The above cited provision has been interpreted in a number of cases to the mean that, the principle of *res judicata* should be invoked upon establishing the following elements;

1. the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;

2. the former suit must have been between the same parties or privies claiming under them;
3. the parties must have litigated under the same title in the former suit;
4. the court which decided the former suit must have been competent to try the subsequent suit; and
5. the matter in issue must have been heard and finally decided in the former suit.

I am fortified, among others, by the case of **Yohana Oismas Nyakibari and Another vs Lushoto Tea Company Limited and 2 Others**, Civil Appeal No. 90 of 2008 (unreported) where it was also underlined that the said elements or conditions must co-exist for the principle of *res judicata* to be invoked.

From the contending submissions of the parties, the plaintiff does not dispute that the matter subject to this case was initially filed as Civil Case No. 247 of 2017. Further to this, the plaintiff does not dispute that Civil Case No. 247 of 2017 was dismissed for want of prosecution and that her application for setting aside the dismissal order was dismissed for want of merit. It follows therefore, that, parties are not at issue that the first, second, third and fourth conditions for invoking the principle have been met.

The bone of contention of the preliminary objection is whether Civil Case No. 247 of 2017 was heard and determined on merit. The answer to this question lies on the decision of this Court in the ruling dated 3rd November, 2020 as reproduced hereunder:

> *"On the 31/08/2020, the plaintiff failed to enter appearance in court without assigning any reasons as a result the matter was adjourned to 06/10/2020, where once again defaulted appearance before it was scheduled to proceed today.*
>
> *To the court's dismay the Plaintiff once again has defaulted appearance apparently without any notice or reason assigned the fact that prompted Mr. Mshikiwa, counsel for the Defendants to pray for dismissal of the suit.*
>
> *After taking note of the dates in which the Plaintiff defaulted appearance in court and having considered the prayer by the counsel for the defendants, I am satisfied that the Plaintiff has lost interest in prosecuting her case. The only remedy for this cause is to dismiss the suit. All said, I proceed to dismiss the suit for want of prosecution with costs*."

As it can be glanced from the above paragraphs from the ruling, it is clear that Civil Case No. 247 of 2017 was dismissed for want of prosecution. In that regard, the question whether the plaintiff's claim was heard and finally determined arises. In the case of **Athnas T Massinde t/a Abeti Primary**

School vs National Bank of Commerce, Commercial Case No. 34 of 2016, HCT Commercial Division at DSM (unreported) this Court (Songoro, J, as he then was) had this to say on the issue under consideration:

> *"…hearing envisaged in section 9 of the Civil Procedure Code, Cap. 33 [R.E. 2002] is any hearing which may enable the court to make a final decision on a suit or issue."*

I associate myself with the above position of law. In view of the ruling of this Court in Civil Case No. 247 of 2017, the plaintiff was accorded with the right to appear in order the suit to proceed. It was dismissed due to the plaintiff's failure to appear without notice. That being the case, I hold that the former suit was heard and finally determined within the meaning of section 9 of the CPC. I am supported by the decision of the Court of Appeal in the case of **Ally Khalfan Mleh** (supra), where it was held that:

> "*From the above discussion it will be accepted without further elaboration that the dismissal of the petition on 28th March, 2012 was a decision on merits. The applicant cannot institute another petition claiming the same reliefs unless and until the dismissal order has been quashed or vacated either on appeal by this Court or review of the High Court. It goes without saying, therefore, the dismissal order dated 28th March, 2012 amounted to a decree in terms of section 3 of the CPC*."

I have further considered that the plaintiff did not dispute that his application for setting aside was dismissed for want of merit. This implies that this Court was satisfied the plaintiff did not assign reasons for failing to appear when the former suit (Civil Case No. 247 of 2017) was called on before it for final pre-trial conference. In the circumstances, the plaintiff ought to have appealed against the order rejecting to set aside the dismissal of the suit.

Mr. Mwakibolwa sought refuge in Order XIX, Rule 3 of the CPC which provides that the plaintiff to whom suit is dismissed under rule 2 of Order XIX of the CPC may file a fresh suit or apply to set aside the dismissal order. However, the provision of Order XIX rule 2 of the CPC empowers the court to dismiss a suit where neither party appears when the suit is called on for hearing in the court. Now, it is deduced from the ruling quoted herein that the counsel for the defendants was present when Civil Case No. 247 of 2017 was dismissed. This implies that the suit was not dismissed under Order XIX, rule 2 of the CPC. In that regard, I hold the view that the fresh suit could not be brought under rule 3 of Order XIX of the CPC.

Even if I was to consider that the former suit was dismissed under Order XIX rule 2 of the CPC, the plaintiff has not disputed to have applied to set aside the dismissal order in lieu of the remedy of filing a fresh suit. According to

section 12 of the Interpretation of Laws Act, Cap. 1 R.E. 2019, where the word "or" is used in the statute it must be construed disjunctively and not as implying similarity. Since the plaintiff opted to apply to set aside the dismissal order, she was barred from employing the second option after dismissal of the said application for want of merit.

For the foresaid reasons, I agree with Mr. Mshikiwa for the 2nd, 3rd and 4th defendants that there will be no end of litigation if this matter is heard on merit. I accordingly, uphold the preliminary objection pleaded by the 2nd, 3rd, and 4th defendants by holding that this matter is *res judicata*. In that respect, I find no need of considering the rival arguments on other limbs of objections. This is when it is considered that this suit was not required to be lodged in this Court.

In the upshot of the above, this suit is hereby struck out with costs for being *res-judicata.*

Dated at DAR ES SALAAM this 9th day of June, 2023.

S.E. KISANYA
JUDGE