IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 126 OF 2022

SWAHILI TRAVEL SERVICES LIMITED @ SWAHILI TRAVELLERS SERVICE LIMITED ..... 1st APPELLANT

WILLIUM MUYAGA MUTAKI ..... 2nd APPELLANT

LETICIA MICHAEL MUTAKI ..... 3rd APPELLANT

HARRY KAMOGA MUTAKI ..... 4th APPELLANT

VERSUS

PETER THOMAS ASSENGA ..... RESPONDENT

(Appeal from the ruling and drawn order of the Resident Magistrate Court of Dar-es-Salaam at Kisutu)
(R. E. Kabate, PRM)
Dated 29th day of August 2022
In
(Civil Case No. 119 of 2022)

JUDGMENT

Date: 10/07 & 09/08/2023

NKWABI, J.:

The appellants fought the suit in the trial court. The suit arose over a contract of sale of a motor vehicle make ZHONG TONG with registration No. T.552 CQE whereas its body type is bus in which the respondent allegedly paid for its purchase T.shs 57,000,000/= and surrendered a title deed No. 4446 for plot No. 22, 23 and 24 Block D Mtwara region. With a preliminary objection, the suit filed by the respondent in the trial court, got struck out with leave to refile based on the preliminary objection over the legal objection that the

2nd defendant therein was wrongly joined. The appellants were aggrieved as they were convinced that with their raised preliminary objection which had six branches, the suit of the respondent would have been dismissed by the trial court.

As a matter of fact, the respondent had sued the appellants for the underneath remedies:

a. Declaration that the defendants are guilty of fraudulent misrepresentation.
b. Order restoration of the plaintiff's belongings before intended agreement to wit T.shs 57,000,000/- and a title deed No. 4446, plot No. 22, 23 and 24, Block D, Mtwara.
c. Order for payment of general damages as will be assessed by the court.
d. Interests on the decreed sum at the commercial rate from the date of judgment until the date of final satisfaction of the decree.
e. Order for costs of the suit.
f. Any other relief this court may deem fit and just to grant.

Unhappy with the ruling and the drawn order of the trial court, the appellants have filed a memorandum of appeal comprising 9 grounds of appeal about to be specified:

1. That, the learned magistrate erred in law by striking out the suit without taking account that the trial court lacked prerequisite jurisdiction to entertain the suit.
2. That, the learned magistrate erred in law for disregarding and vacating to determine on merits four preliminary objections that were raised by the appellants on points of law without assigning any legal justification thereto.
3. That, the learned magistrate erred in law and fact for failure to hold that the plea of res judicata was untenable.
4. That, the learned magistrate erred in law for failure to sustain all the preliminary points of objection on point of law raised by the appellants, which depicted that the suit not be maintainable.
5. That, the learned magistrate erred in law for ruling that the 2nd, 3rd, 4th appellants were necessary parties to suit, thus it was justifiable for them to be joined.

6. That, the learned magistrate erred in law, for failure to hold that the trial court was functus officio in Civil Case No. 119/2022 after ascertaining that civil case No. 307 of 2017 was dismissed for want of prosecution.
7. That, the learned magistrate erred in law and fact for failure to hold that the respondent had intentionally omitted and relinquished his claims in civil case No. 307/2017 for suing the appellants for fraud, misrepresentation and restoration of monies and title deed; hence, he was legally barred to sue the appellants in civil case No. 119 of 2022 in respect of the same portion so omitted and relinquished.
8. That, the learned magistrate erred in law and fact for failing to spot and hold that the former suit and subsequent suit, were all premised on the subject matter and cause of action, such that sale agreement dated 18th September 2017. Henceforth, the subsequent suit was an attempt of the respondent to circumvent the bar of lack of jurisdiction and of bringing a fresh suit on the subject matter and cause of action, by the clever drafting of the plaint.
9. That the learned magistrate erred in law for striking out the suit without awarding costs thereto.

The hearing of this appeal proceeded by way of written submissions. Mr. Nafikile Mwamboma, learned counsel drew and filed the written submission in chief and also filed a rejoinder submission for the appellants. Mr. Harry Mwakalasya, also learned counsel, drew and filed the reply submission. I am thankful to both counsel for their submissions. I will address the grounds of appeal in the manner they were submitted upon.

The 1st, 2nd, 3rd and 4th grounds of appeal were argued together by the counsel for the appellants in submission in chief. It is contended that had the learned magistrate determined the four preliminary objection, the court would have dismissed the suit for want of jurisdiction instead of striking it out with leave to refile. It is stated that Civil Case No. 119 of 2022 was a replica of the dismissed Civil Case No. 307 of 2017, thus, it lacked jurisdiction contrary to section 9 of the Civil Procedure Code, Cap. 33 R.E. 2019 because the former suit was dismissed for want of prosecution, thus, determined. I was referred to **MM Worldwide Trading Company Limited & Others v. National Bank of Commerce Limited,** Civil Appeal No. 258 of 2017, CAT (unreported).

It is also maintained by the counsel for the appellants that civil case No. 119 of 2022 is res judicata of Civil Case No. 307 of 2017 which was dismissed.

That is owing to the subsequent suit originating from the same subject matter i.e. sale agreement dated 18th September, 2017 and both suits revolved the same parties, only that in the subsequent suit, the respondent added the 2nd and 3rd appellants in order to circumvent the bar of lack of jurisdiction. It is urged that the suit ought to have been dismissed instead of being struck out. He exemplified **Clara Mathias Kwilasa v. Efs Tanzania Microfinance Bank Ltd & Others,** Land Case No. 143 of 2020, HC (unreported). It is added that the plaintiff cannot circumvent lack of jurisdiction by bringing a fresh suit on the subject matter and cause of action by clever drafting the plaint. He backed his view by the case of **Tanzania Revenue Authority v. New Musoma Textile Limited,** Civil Appeal No. 93 of 2009 CAT, (unreported) among other cases, it was held that:

> *"The second answer provided by Mr. Magongo to the issue, is that there was no reference to any tax dispute in the body of the plaint or prayers. The answer to that is provided by this Court in* ***KOTRA's*** *case. Where the decision of the Indian case of* ***RAM SINGH vs. GRANPANCHAYAT*** *(1986) 4 sac 364 AIR, 1986) SC. 2197 was approved. In the latter case it was held that where the civil Court's jurisdiction*

is excluded, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint."

It is also beefed up that the court lacked jurisdiction to entertain the matter because the respondent had intentionally omitted and relinquished his claims about fraud, misrepresentation and restoration of monies and title deed in civil case No 307 of 2017 thus he is barred to sue them in civil case no. 119 of 2022 as per Order II Rule, 2 (1), (2) and (3) of the Civil Procedure Code.

The counsel for the respondent was unmoved. In reply submission, he professed his view that in Civil Case No. 307 of 2017 the parties were **Peter Thomas Assenga v Swahili Travellers Services Limited & Harry K. Mutaki** while in this case civil case no. 119 of 2022 parties are **Peter Thomas Assenga v. Swahili Travel Services Limited, Willium Munyaga Mutaki, Letisia Michael Mutaki and Harry Kamoga Mutaki**. It is pointed out that Swahili Travellers Service Limited is not Swahili Travel Services Limited since the latter is a legal entity registered by BRELA while the other is a fictious name. It is further added that Swahili Travellers Service Limited was strongly denied to be capable for the suit as stated in the written statement of defence and complaint letter dated 30th January 2018 drawn by the 1st appellant both are in the record of Civil Case No. 307 of 2017 (may

your Court be pleased to revisit records for clarity). It is stated that those records stated that the 1st defendant did not own the subject matter of the suit, hence incapable to be sued and the subject matter belongs to the 1st appellant who is the 1st defendant in Civil case No. 119 0f 2022. The counsel for the respondent referred me to the case of **Ilela Village Council v. Ansaar Muslim Youth Centre,** Civil Appeal No. 317 of 2019 CAT (unreported) where it was held that:

> *"It follows then that, in law, Ansaar Muslim Youth Centre does not legally exist. As such, any order and/or decree issued in the name of Ansaar Muslim Youth Centre will not be executable because the properties of the Registered Trustees of Ansaar Muslim Youth Centre are not vested in the 1st respondent. Furthermore, the 1st respondent does not have powers to transact any business or invest or manage the properties of the Registered Trustees of Ansaar Muslim Youth Centre."*

He also cited the **Registered Trustees of Chama Cha Mapinduzi v. Mohamed Ibrahim Versi and Sons & Another,** Civil Appeal No. 16 of 2008, CAT, (unreported) where it was stated that:

"Incorporation Act, renders it a body corporate by that name with the power to sue and be sued in that corporate name (see section 8(1) and (6). Therefore, in law, the Registered Trustees of C.C.M. is a separate person with its own legal identity distinct from Naibu Katibu Mkuu C.C.M."

Furthermore, the respondent contended that the 2nd and 3rd defendants are other parties who are directors and shareholders of the 1st appellant, they have joined in the suit for reasons stated in the plaint related to fraudulent misrepresentation, and the 4th respondent (sic) being the signatory of the said Swahili Travellers Services Limited bogus agreement, and based on Order 1 Rule 7 and 9 it is immaterial to state the respondent has trickily joined the other respondent sic. while the records and annexures are clear in support to the allegations attached to the plaint yet to be produced for evidence.

It is elaborated that in the first suit the claim was for the motor vehicle, (surrender of the car) damages and permanent injunction but in the latter suit the suit is for claim of T.shs 57,000,000/=, return of the money, and title deed as were paid through fraud, declaration that the appellants are guilty of fraudulent misrepresentation.

Another ground for this case to be ruled not res judicata by the trial court is that between the present suit and the prior suit the cause of action is not the same. In the previous suit it was breach of contract while in the present suit, it is fraudulent misrepresentation. He fortified his view with the case of the **Registered Trustees of Chama Cha Mapinduzi** (supra) where it was stated that:

> *"the test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceeding."*

Another matter that does not make the suit res judicata is, according to the counsel for the respondent, that the title of the party in the subsequent suit must have litigated under the same title in the former suit; the sale agreement of the motor vehicle may have taken a part as a title, with respect to his learned friend, retorted that, the short answer to that is that not the same rights were claimed in the two suits. It is expounded that the right to own the motor vehicle in the former suit is not the same as the right to reimbursement/restoration of the respondent's belongings in the later suit. Nevertheless, with two distinct legal identity of the 1st respondent, the title

also is not the same. It is reinforced that the detected fraudulent misconduct alleged in the later suit changed nature of the suit and nature of claim and parties to suit. On that stance of the respondent, I was referred to the case of the **Registered Trustees of Chama Cha Mapinduzi's** case (supra) where it was stated that:

> *"The right to ownership of property claimed in the subsequent suit is different to the right to vacant possession prayed for in the former suit. Moreover, as we had stated earlier, the appellant in the subsequent or instant suit with a distinct legal identity did not litigate in the same title or legal capacity as the defendant in the former suit."*

The counsel for the respondent further stated that the provision of Order II Rule 2(1) (2) and (3) of the Civil Procedure Code is not relevant in this nature of cases, the reliefs claimed in two suits civil case No. 307 of 2017 and civil case No. 119 of 2022 cannot link together, nature of cause of action also cannot tie. It is also argued that the respondent neither omitted nor relinquished his claims in civil case No. 307 of 2017, on the ground that unless there could be a valid and executable contract between the parties.

He cited the written statement of defence under the preliminary objection in civil case No. 307 of 2017.

In concluding remarks, the counsel for the respondent argued that the appeal is devoid of merits, civil case no. 119 of 2022 does not meet and or confer to any condition or requirement of the law under section 9 of the CPC to be declared res judicata. It is pointed out that the matter is not directly and substantially in issue with the former suit as alleged and parties, subject matter and cause of action are also not the same. Therefore, he prayed the appeal be dismissed with costs.

He also reminded this Court to uphold the overriding objective principle where cases should be determined on merits. I was referred to the decision of the Court of Appeal in **Dar-Express Co. Ltd v. Mathew Paulo Mbaruku,** Civil Appeal No. 132 of 2021 (unreported) where it was stated that:

> *"In addition, courts should be more inclined to have case heard and finalized on merits when the law permits such a course, in line with the overriding objective or oxygen principle. Even before the coming into being of the principle*

this Court discourage over reliance on technicalities at the expense of substantive justice."

The counsel for the appellant reiterated his submission in chief in the rejoinder submission.

I have carefully considered the submissions of both counsel. I am of the view that the appeal has to succeed. I agree with the counsel for the appellant in the submission in rejoinder that the cited cases of **Ilela Village Council** and the **Registered Trustees of Chama Cha Mapinduzi** are distinguishable in the circumstances of this case because the there the adverse party did not claim the successful party had relinquished part of his claim. The respondent seems to try to circumvent the preliminary objection that was raised in the former suit by bringing a fresh suit, because he knows that once a preliminary objection is raised a party cannot be allowed to amend the pleading. See **Standard Chartered Bank & Another v. VIP Engineering & Marketing Ltd & Others,** Civil Application No. 222 of 2016, CAT (unreported)

"Having so found, we now proceed to determine ground (b) of the preliminary objection. It is trite principle that where a party has raised a preliminary objection in a case, the other

party cannot be allowed to rectify the defect complained of by the other party who raised the objection. This is because, to do so would amount to pre-empting that preliminary objection."

This suit arose on the same subject matter (the contract). In that regard, Order II Rule 2(1) (2) and (3) of the Civil Procedure Code applies to this suit as opposed to the suggestion of the counsel for the respondent that it is not applicable. He could not hide behind adding new defendants because that could have been addressed in the former case by amendment of the plaint before the preliminary objection was raised. The same applies to the name of the 1st defendant. Once a preliminary objection is raised, a plaintiff is precluded from amending the plaint or withdraw the suit prior to determination of the preliminary objection because that would amount to pre-empting the preliminary objection.

Besides, if the 1st defendant in that name was not the one intended to be sued, why was she served with the summons by the plaintiff in that case in the first place? Faced with such preliminary object, why did the plaintiff therein, the respondent in this appeal fail to concede and pray to for refiling a fresh suit instead of leaving it to be dismissed? Why then the plaintiff

therein was sued? Why Harry too was sued. It points that the respondent screwed. He cannot flip the anomaly to the appellants. It is the plaintiff who has to know her defendant. He did not say he served a wrong person when the objection was raised, he intended that party to that case to be the 1st defendant, she incurred costs to defend it albeit in preliminary stage. So, it is an afterthought. If he sought injunction or attachment before judgment, whose property was he doing so, was he doing it so believing he is doing it to a total stranger and still wanted the court to issue such order? That is a gross abuse of the court process.

Had, the trial magistrate determined the preliminary objection that the suit was incurably defective for want of cause of action against the 2nd 3rd and 4th defendants, he would have found that the parties were the same for the simple reason that the company has distinct legal personalities to the directors and shareholders so the 2nd, 2rd and 4th defendants therein were incapable of being sued, see **Solomon v. Solomon & Co. Ltd.** (1897) A.C. 22:

> *"The company is at law a different person altogether from the subscribers, and, though it may be that after incorporation the business is precisely the same as it was*

before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees of them. Nor are subscribers, as members liable, in any shape "or form, except to the extent and in the manner provided by the Act."

and for one to sue them it is desirable that one first lifts the corporate veil. A court of law is not a common market which a person can bring any persons without proper procedure or without the sanction of the law.

It should be kept in mind that, in the former suit, the trial court gave a final order which was dismissal of the suit for want of prosecution when the respondent failed to appear in court and give evidence under Order IX Rule 8 of the Civil Procedure Code. Nevertheless, the suit ought to have been dismissed in terms of **Diamond Trust Bank Ltd v. Puma Energy Tanzania Ltd,** Civil Application No. 40 of 2016 CAT (unreported) where it was ruled that:

"Going by the principle in the above cases, we think, it is well established that an order of the court made under Order XVII Rule 3 of the CPC is one on the merits of the case and

thus appealable as of right under the provisions of section 5 (10 (a) of the AJA."

With due respect to counsel for the respondent, in the circumstances therefore, I am of the considered opinion that Civil Case No. 119 of 2022 which was res judicata in Civil Case No. 307 of 2017 which was dismissed for want of prosecution in the very court. Thus, I accept the contention of the counsel for the appellants that the trial court had no jurisdiction to entertain civil case No. 119 of 2022 so it ought to have dismissed the suit for want of jurisdiction instead of striking it out with leave to refile. The rule as to res judicata is in the same vein as the law that litigation has to come to an end and cannot be open ended which was stated in **Stephen Masato Wasira v. Joseph Sinde Warioba and the Attorney General** [1999] TLR 334.

For avoidance of doubt, the claim that the agreement was bogus or that the 1st appellant has a fictitious name cannot be determined at preliminary stages, as the case which is the basis of this appeal was decided at a preliminary stage, while the former suit was dismissed for want of prosecution where witness(es) had not been heard.

In what it appears to me to be an attempt to save his ever-sinking boat, the counsel for the respondent urged this Court, in his reply submissions to revisit the record of the record of Civil Case No. 307 of 2017 for clarity and also had attempted to cite the written statement of defence therein. Those records, be it the file of civil case No. 307 of 2017 or the written statement of defence therein are not annexures in the pleadings in civil case No. 119 of 2022, so, as civil case No. 119 of 2022 was decided on preliminary stage, I cannot have any avenue to determine what was determined in Civil Case No. 307 of 2017 at a preliminary stage. If Civil Case No. 119 of 2022 were determined on merit, maybe the respondent would have tendered necessary documents that are found in Civil Case No. 307 of 2017. The plea therefore is rejected.

Further, the counsel for the respondent asked this court to invoke the overriding objective principle to determine the matter on merits citing **Dar-Express Co. Ltd's** case (supra), but that plea should be rejected by this Court in accordance with the decision of the Court of Appeal in **Mondorosi Village & 2 Others v. Tanzania Breweries Ltd & 4 Others,** Civil Appeal No. 66 of 2017 CAT (unreported) where it was stated that:

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provision of the procedural law which go to the very foundation of the case."

One can also be tempted to think that the respondent was in a forum shopping expedition which is not accepted. I fortify my view with the decision in **East African Development Bank v. Blueline Enterprises Limited,** Civil Appeal No. 101 of 2009 at page 15 where it was observed that:

"After the dismissal the appellant went back to the same court (Sheikh, J.) and filed an application for extension of time similar to the one which was earlier marked withdrawn! Surely, by the above sequence of events the appellant exhibited what we may safely term as "forum shopping." This was no doubt, an abuse of court process."

The counsel for the appellants, elsewhere, criticized the trial court for having determined only one preliminary objection. I do not see any wrong with that approach, but the approach should be used for finally determining the matter justly. The approach was used in **Fatma Fatehali Nazarali Jinah v.**

Mohamed Alibhaai Kassam, [2016] 1 T.L.R. 262, CAT where it was stated that:

> *"... we think that for reasons we intend to assign in the course, the third ground of appeal is sufficient to dispose of the appeal. ..."*

All the above said and done, the appeal is allowed. I reverse the ruling of the trial court and set aside the order that the suit is struck out with leave to refile and substitute thereof the order that the suit is dismissed for being res judicata and thus the trial court had no jurisdiction to entertain the suit. The respondent has to bear the costs of the appellants in this Court and the court below.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 9th day of August, 2023.

J. F. NKWABI

JUDGE