

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

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**LAND CASE NO. 29 OF 2023**

**BETWEEN**

**MAHESH B. AGGARWAL.....1<sup>ST</sup> PLAINTIFF**

**NSK OIL AND GAS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK TANZANIA LIMITED..... DEFENDANT**

**RULING**

09/08/2023 & 28/08/2023

**MWASEBA, J.**

This is the ruling in respect of the preliminary objection raised by the counsel for the defendant to wit:

a) *To the extent that the Plaintiffs' claim is based on the claims arising from Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha and to the extent that the Parties to this suit were also parties in the said suit and the extent that the averments in paragraphs 8, 9, 10 and 11 of the plaint were finally and conclusively determined by this Court in Commercial Case No. 10 of 2020 in this*



*Court's Commercial Division at Arusha on 17<sup>th</sup> December 2021, this suit is res judicata.*

*b) To the extent that the Plaintiffs' claim is based on the claims arising from Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha and to the extent that the Parties to this suit were also parties in the said suit and the extent that the averments in paragraphs 8, 9, 10 and 11 of the plaint were finally and conclusively determined by this Court in Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha on 17<sup>th</sup> December, 2021, and to the extent that the judgment and decree in Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha are still valid, this Court is functus officio.*

*c) To the extent that the Plaintiffs' claim is based on the claims arising from Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha and to the extent that the Parties to this suit were also parties in the said suit and the extent that the averments in paragraphs 8, 9, 10 and 11 of the plaint were finally and conclusively determined by this Court in Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha on 17<sup>th</sup> December, 2021, and to*



*the extent that the judgment and decree in Commercial Case No. 10 of 2020 in this Court's Commercial Division at Arusha are still valid, and to the extent that the Plaintiffs filed notice of appeal against the said judgment and decree on 28<sup>th</sup> December, 2022 in the Court of Appeal of Tanzania, which notice has not been withdrawn, this Court lacks jurisdiction to hear and determine this suit.*

During the hearing of the raised points of preliminary objection, which was done by way of written submissions, Mr. Mworio Denis, learned counsel represented the defendant whilst Mr. Andrew C. Akyoo and Stephen Mushi, both learned counsels represented the plaintiffs.

Submitting in support of the 1<sup>st</sup> and 2<sup>nd</sup> point of preliminary objection, Mr. Mworio argued that this matter is *res judicata*. He submitted so based on the facts that this claim is arising from Commercial case No. 10 of 2020 which was already decided on 17/12/2021. He argued further that, in Commercial case No. 10 of 2020 the plaintiffs were found to be in breach of an overdraft facility advanced to them and the court ordered them to pay the outstanding amount. Further to that, paragraphs 8,9, 10 and 11 of the plaint were already determined by the court in Commercial Case No. 10 of 2020. The plaintiffs were ordered



to pay Tshs. 16, 590,213, 465.34/= of which they failed to pay and decided to file the current suit. Thus, this court is *functus officio* to determine this case. He supported his argument with several cases including the case of **Scolastica Benedict v. Martin Benedict** [1993] TLR 2 and **Bibi Medard v. Minister for Lands, Housing and Urban Development and Another** [1983] TLR 250.

On the 3<sup>rd</sup> point of objection, Mr. Mworio submitted what had already been submitted in the previous points and added that the decree issued in Commercial case No. 10 of 2020 is still valid and the plaintiff filed a notice of intention to appeal to the Court of Appeal against the said decision on 28/12/2022 which has not yet been withdrawn. Thus, this court lacks jurisdiction to entertain the matter. His argument was supported with the case of **Exaud Gabriel Mmari (As Legal and Personal Representative of the Estate of the Late Gabriel Barnabas Mmari) v. Yona Seti Akyo & 9 others**, Civil Appeal No. 91 of 2019. Hence, he prayed for all points of objection to be sustained and the suit be dismissed with costs.

Opposing the raised points of preliminary objection, on the 1<sup>st</sup> point Mr. Mushi submitted that the point of *res judicata* does not apply equally



into this matter based on the following reasons: - The two conditions of *res judicata* as provided in **Section 9 of the Civil Procedure Code**, Cap 33 R.E 2019 were not co-existed. Firstly, the matter in issue is not directly and substantially in issue as in the Commercial Case No. 10 of 2020. In this case the cause of action is on declaration that the certificate of Title No. 16257 Plot No. 311/24 has been unlawfully detained by the defendant as pleaded under paragraph 4 of the plaint. While in Commercial Case No. 10 of 2020 the issue was on breach of the overdraft facility.

Secondly, the matter in issue in this case was never determined in Commercial Case No. 10 of 2020 and it was not even framed thus, a principle of *res judicata* cannot be raised at this stage. The averments under paragraphs 8,9,10 and 11 was not meant to be adjudicated but it was just supporting the issues of the certificate being unlawfully detained. He supported his argument with the case of **Gerard Chuchuba v. Ractor, ITAGA Seminary** [2002] TLR 213.

Coming to the 2<sup>nd</sup> point of preliminary objection, counsel for the plaintiffs submitted that, the matter is not *functus officio* as the issue, in this case, was never adjudicated in Commercial Case No. 10 of 2020 as



submitted on the 1<sup>st</sup> point of preliminary objection. He submitted further that as the property unlawfully detained by the defendant was not party to the mortgage, the plaintiff was correct to file a new suit. Therefore **Section 38 (1) of the CPC** is not applicable.

On the last point of preliminary objection, counsel for the plaintiffs submitted that he is aware that once a notice of appeal has been filed, the High Court seizes to have jurisdiction to entertain the matter. However, the same does not mean parties are bound not to institute a matter before the High Court over a different matter. As the issue in this case was not determined in Commercial Case No. 10 of 2020, the plaintiffs have a chance to file a separate suit. In the end, he submitted that this court has jurisdiction to entertain this matter.

In his brief rejoinder, Mr. Mworira submitted that the plaintiffs did not dispute that the parties herein litigated under the same names in Commercial Case No. 10 of 2020. And the issue of the captured case related to a breach of facility advanced to the plaintiffs and the same was secured by mortgage properties including the suit property of the personal guarantee of the 1<sup>st</sup> plaintiff. He added further that, the act of the plaintiffs to explain away the import of paragraphs 8, 9, and 10 and



11 of the plaint is an abuse of the court process if allowed as they are bound by what they have pleaded. For the issue raised by the plaintiffs that the certificate of title was unlawfully detained, the court has to examine how the title reached the defendant. The same will be reopening again Commercial case No. 10 of 2020 which has already been determined. So, he maintained his prayer for the points of objection to be sustained and the suit to be dismissed with costs.

Having heard the rival submission in support and against the raised points of preliminary objection, the issue for determination is whether the preliminary objection has merit or not.

Based on the raised Points of objection, Mr. Mworira submitted on the 1<sup>st</sup> point that this matter is *res judicata* as the same has already been determined by the Commercial Court in Commercial Case No. 10 of 2020. Regarding the principle of *Res Judicata* **Section 9 of the Civil Procedure Code** [Cap 33 RE 2019] stipulates 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 or between parties under whom they or any of them claim litigating under the same title in 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 said provision tried to put some clarification in respect of the circumstances under which the doctrine can be applied. All in all, the concept is that the matter which has already been determined by the court of competent jurisdiction should not be retried by that court, or any other court even if it has jurisdiction to try that said matter. The logic behind that procedural law is to avoid endless of litigations. The doctrine prohibits the losers to go back to the same court or any other court with competent jurisdiction to file the same matter which has already been determined.

As for the matter at hand the Plaintiff's Counsel conceded that the issues under paragraph 8, 9, and 10 and 11 had already been determined by the court in Commercial Case No. 10 of 2020 and added that they don't want this court to adjudicate them. He submitted further that, in this case they only want to challenge the act of the defendant to unlawfully confiscate title No. 16 257 Plot No. 311/24. However, as well submitted by the counsel for the defendant that by determining the raised issue, the court will be required to determine why the defendant retained the





said certificate of title which will be the same as re-opening Commercial Case No. 10 of 2020 which had already been decided since 17/12/2021.

It is also not in dispute that the same parties appeared in Commercial Case No. 10 of 2020 where it was determined on merit and the plaintiffs lost the case. As it was held in the case of **George Shambwe v.**

**Tanzania Petroleum Company Ltd** [1995] TLR 21 that:

*"For res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court."*

See also the case of **Zaruki Mbokomize v. Swaibu Omari and Another** [1988] TLR 60.

Therefore, once a matter has been heard and determined by a court of competent jurisdiction, the parties to that case are estopped to file a similar suit in respect of the same dispute.

Finally, I find the parties and cause of action in Commercial Case No. 10 of 2020 is the same as in the suit at hand. As long as Commercial Case No. 10 of 2020 was determined on merit and the court had its final

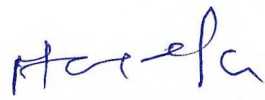


verdict, therefore, I concur with Mr. Mworira that this suit *res judicata*. This point suffices to dispose of the matter. Thus, I will not determine the remaining points of objection. For those reasons, the preliminary objection is sustained for being meritorious and the Land case No. 29 of 2023 is hereby dismissed with costs.

Order accordingly.

**DATED** at **ARUSHA** this date 29<sup>th</sup> day of August 2023.



  
**N.R. MWASEBA**  
**JUDGE**