

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB REGISTRY
AT MBEYA
LAND CASE NO. 21 OF 2023**

HENRY JALISON MWAMLIMAPLAINTIFF

VERSUS

CRDB BANK LIMITED1ST DEFENDANT

DIMUTA SOLUTION COMPANY LIMITED2ND DEFENDANT

RULING

Date of hearing: 6/9/2023

Date of ruling: 11/10/2023

NONGWA, J.

The plaintiff has sued the defendants in respect of the land described as plot 4 Block "C" Tunduma Urban area comprised in Certificate of Title No. 10188 MBYLR (suit property) which is about to be sold to recover a loan advanced to him.

From the pleadings, facts leading to this suit is that the 1st defendant advanced a loan to the plaintiff at the tune of Tsh. 380,000,000/= which was secured by the suit property as a security. In 2014 a dispute arose among the family member of the plaintiff regarding the suit property which is alleged affected the ability of the plaintiff to service the loan, in 2016 the loan stood at Tsh. 635,379,646.50. The discussion was held

between the plaintiff, family members and the 1st defendant and resolved that a family bank account be created in which the 1st defendant was to be collecting monthly instalments. As a surprise to the plaintiff, in June 2023 the 1st defendant stopped taking money in the account created but instructed the 2nd defendant to auction the suit property. This prompted the plaintiff to file the current suit praying for **one;** the court to announce that the action of defendant is in breach of the contract, **two;** this court to compel the defendant to honour the agreement which was entered between the plaintiff and defendant, **three;** the acquisition of the land in dispute by the defendant is null and void, **four;** the defendants to be condemned to costs, **five;** general damages and **six;** any other relief the court could deem fit to grant.

Upon being served with the plaint, the defendants filed joint written statement of defence (WSD) in which they disputed every allegation contained in the plaint. The defendants further pleaded that in 2017 the plaintiff filed Land Case No. 12 of 2017 which was between the 1st defendant and one Mem Auctioneers and General Brokers Ltd in respect of the same suit property which was resolved through amicable settlement in a deed of settlement filed in court on 11th March 2019 and the court issued a decree thereof. It was further alleged that consent order entered

in Land Case No. 12 of 2017 empowered the 1st defendant to sell the mortgaged property in case of default by the plaintiff.

In addition to transversing the allegation in the plaint, in accordance with Order VIII rule 2 of the CPC the defendant accompanied their Written Statement Defence with a notice of preliminary objection on point of law that;

1. This court has no jurisdiction over the suit for being *res judicata* vides (sic) Land Case No. 12 of 2017 which was finally and conclusively ended by consent judgement. The same claim is precluded to be re-opened before this court.

Given the raised a preliminary objection and because, according to the rule of practice, determination of a preliminary point of law has to precede hearing of a main case. I proceeded to hear the learned counsel for the parties on the point of law raised by the defendants.

At the hearing of the objection the plaintiff was represented by Kelvin Kuboja Gamba whereas the defendants enjoyed the service of Mr. Baraka Mbwilo, both learned advocates. Hearing was conducted orally.

Mr. Baraka being the objector was the first to take the ball rolling, he submitted that the suit was *res judicata* vide Land Case No. 12 of 2017 which was finally concluded by this court through a consent judgment and decree. He submitted that the plaintiff is the same so as the subject

matter, adding that the plaintiff cannot sue again over the same matter as he is bound by the decision. He cited the case of **Badugu Ginning Co. Ltd vs CRDB Bank Plc & Others**, Civil Appeal 65 of 2019, CAT at Mwanza (Unreported) in which section 9 of the Civil Procedure Code [Cap 33 R: E 2019] "the CPC" was interpreted and the circumstances was the same to the case at hand. From this submission he prayed the suit to be dismissed with costs.

Replying to the above, Mr. Gamba submitted that the matter was not *res judicata* as some of the elements under section 9 of the CPC was missing for the doctrine to apply. He said the condition to be met are (1) the matter should emanate from the same cause of action (2) same parties (3) litigating under same titles (4) the court which tried the suit be competent and (5) the matter in former suit should have been tried and determined to its finality. He cited the case of **George Shambwe vs Tanzania Italian Petroleum Co. Ltd** [1995] TLR 20 and **Gerard Chuchuba vs Rector Itaga Seminary** [2002] TLR 212 to support the argument.

Explaining Mr. Gamba said the first and fourth elements have been met. He added that in Land Case No. 12 of 2017 the plaintiff was Henry Jalison Mwamlima and defendants were CRDB and MEM Auctioneers and General Brokers Ltd whereas in the current suit are Henry Jalison

Mwamlima and defendants are CRDB and DIMUTA SOLUTION COMPANY LIMITED and which makes the parties different.

Mr. Gamba went on to state that cause of action is different as in the present case the cause of action is breach of consent judgment entered between the plaintiff and 1st defendant in Land Case No. 12 of 2017. According to the counsel the current matter was not *res judicata* as per section 9 of the CPC and the cited cases. Thus, prayed the objection to be overruled.

During rejoinder, Mr. Baraka submitted that the second and fourth conditions have also been met because of existence of consent judgment and deed of settlement in Land Case No. 12 of 2017. He added that the cause of action is the same because in both cases the plaintiff is challenging sale of the suit property. That parties are the same although the 2nd defendant is deferent but is litigating under the same status as they are agents of the 1st defendant. He recited the case of **Badugu Ginning Co. Ltd** (*supra*) and repeated the prayer for the suit to be dismissed for being *res judicata*.

Having considered pleadings and the rival submissions of the parties, the only issue for determination is whether preliminary objection has merits. The starting point is section 9 of the CPC which provides;

'No court shall try any suit or issue in which the matter 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 issue has been subsequently raised and has been heard and finally decided by such court.'

In terms of section 9 of the CPC, to make the suit *res judicata*, following conditions must be established;

- (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) *(ii) The former suit must have been between the same parties or privies claiming under them.*
- (iii) *(iii) The parties have litigated under the same title in the former suit*
- (iv) *(iv) The court which decided the former suit been competent to try the subsequent suit.*
- (v) *(v) The matter in issue must have been heard and finally decided in the former suit."*

[See; **Badugu Ginning Co. Ltd vs CRDB Bank Plc & Others** Civil Appeal 65 of 2019 [2021] TZCA 158 (www.tanzlii.org.tz; 3 May 2021) cited also by the defendants.]

From the submission of the parties, it is agreed that only the first and fourth conditions are applicable to the case at hand. As rightly submitted by the parties there is no dispute that in Land case No 12 of 2012 the suit

property was Plot 4 Block C Tunduma area, the same as in this case, the first condition is fulfilled. On the fourth condition that it must have been decided by a competent jurisdiction, it is agreed that the high court had jurisdiction to adjudicate Land Case No. 12 of 2017.

The second and third conditions will be addressed together that is parties must be the same and litigating under the same status, here Mr. Gamba submitted that parties are not the same because the 2nd defendant was not party to Land Case No. 12 of 2017. On his part Mr. Baraka submitted 2nd defendant in the former suit was litigating under the same status and is the agent of the 1st defendant.

I entirely agree with parties that the 2nd defendant was not a party in Land Case No 12 of 2017 however, it does not make any difference for the doctrine of *res judicata* to apply. This is because in Land Case No. 12 of 2017 the 2nd defendant Mem Auctioneers and General Brokers Ltd were agents of the 1st respondent instructed to sell the suit property, he had no any interest in the suit property save only to conduct sale of it. So is in this case, the 2nd defendant Dimuta Solution Company Limited is the broker who has been instructed to action the suit property, she does not acquire any propriety interest in it. The role of the 2nd defendant is only to sell the suit property on behalf of the 1st defendant. Therefore, I am unable to agree with Mr. Gamba that parties are not the same.

In the last condition that the matter in issue must have been heard and finally decided in the former suit. Parties did not specifically submit on this condition. Mr. Gamba submitted that the cause of action is different in the current case as cause of action is breach of consent judgment between the plaintiff and 1st defendant which is not the case in Land Case No. 12 of 2017. Mr. Baraka did not comment on this point.

I have considered the pleadings together with its annexure. At the outset I decline the argument of Mr. Gamba that cause of action is different. Going by pleading Land Case No. 12 of 2017 has not been pleaded in the plaint and nowhere consent judgment is mention. The issue of *res judicata* is raised through paragraph 13 and 15 of the WSD together with reply to WSD filed on 28th August 2023 by the plaintiff in which under paragraph 12 admits existence of consent judgment. From the pleadings aforementioned and as submitted by parties it is now clear that there was Land Case No. 12 of 2017 in this court between the plaintiff and 1st defendant which was compromised by filling deed of settlement under Order XXIII Rule 3 of the CPC which resulted the court to issue an order dated 11/3/2019. Terms and conditions contained in the deed of settlement is part of the decree of the court. When the parties signed deed of settlement and the court issue a decree, it conclusively marked the determination of Land Case No. 12 of 2017 and the dispute involving

the plaintiff and 1st defendant in respect of Plot 4 Block "C" Tunduma Town area.

There is argument by Mr. Gamba that the 1st defendant had breached conditions of deed of settlement by instructing 2nd defendant to auction the suit property. I have given thorough thought to the argument and come to the conclusion that it is the matter pertaining to the execution of the decree in Land Case No. 12 of 2017 and not filing a fresh and separate suit with the same subject matter and parties. If the plaintiff is aggrieved by the performance of the conditions in the decree in Land Case No. 12 of 2017, he was supposed to invoke remedy under section 38(1) of the CPC, which provides;

'38(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.'

The decree of the court in Land Case No. 12 of 2017 where terms and conditions of the deed of settlement is incorporated, in item 6 make it clear that in default of payment of any instalment the 1st defendant would embark on recovery measures including sale of the mortgaged property. In view that the 1st defendant was executing the decree of the court, if the plaintiff was not satisfied with measures undertaken by the

1st defendant, he was supposed to invoke section 38(1) to his aid. On this I find support in the case of **Badugu Ginning Co. Ltd** (supra) in which the court stated;

'In the light of the above provision, the avenue which the appellant ought to have taken if she found that her interests were affected was to apply to the High Court to set aside that sale. We agree with Mr. Msuya that the law provides that all questions relating to the execution of the decree shall be determined by the court executing the decree and not determined as a separate suit (see section 38 (1) of the CPC).'

Applying the principle to the case at hand, I am unable to agree with Mr. Gamba that cause of action is different, late alone it has not been pleaded. Even if I was to assume so, still the matter could not have been adjudicated through a separate suit save if it was challenging how consent judgment was obtained.

In the light of the above, I sustain the objection and hold that land Case No. 21 of 2023 is *res judicata*. It is hereby dismissed with costs. It is so ordered.




V.M. NONGWA
JUDGE

DATED and DELIVERED at MBEYA this 11th October, 2023, in presence of Mr. Kelvin Kuboja Gamba for the applicant and Mr. Ipyana Mwantoto for the Respondents together with Mr. Kelvin Director of the 2nd Respondent.




V.M. NONGWA
JUDGE