

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM.

CIVIL CASE NO 56 OF 2023

MOHAMED R. LEMA.....PETITIONER

VERSUS

ATHUMAN J. ADEN.....RESPONDENT

JUDGMENT

POMO, J

This is a Ruling on the preliminary objection raised by the Respondent against the herein Civil Cause No. 56 of 2023. In this case the petitioner sued the respondent for defamation and claiming for the following orders: -

- (i) A declaratory order that the respondent defamed the petitioner*
- (ii) A court order for unconditional apology and retraction of the false and malicious publication complained of*

with bold and large print in the same manner that was used by the respondent

- (iii) The sum of Tzs.380,000,000/= being compensation for defamation*
- (iv) Permanent injunction restraining the respondent, their agent and or workmen from publishing defamatory statements against the petitioner herein*
- (v) General damages for slander as shall be assessed by this court*
- (vi) Aggravated damages for slander*
- (vii) Interest at court's rate of 12% per annum from the date of judgment to the date of full and final payment*
- (viii) Costs of this suit and any other relief(s) this court may deem just to grant*

The respondent raised a preliminary objection (the P/O) against the suit, the notice of which being filed on 30th May, 2023, to the effect that the case is ***res-judicata*** the same being re-opened by the same party against the same person with the same cause of action.

It is a settled principle that in a trial whenever a part raised a preliminary objection on point of law it has to be resolved first before proceeding on merit.

On 30th May, 2023 a day set for hearing of the objection, both sides were present unrepresented. I ordered hearing of the objection against the suit be argued by way of written submissions. Parties complied the order by filing their respective submissions within the scheduled dates

Submitting in support of the objection, the respondent argued that, before Kariakoo Primary Court, the petitioner sued him vide Civil Case No. 100 of 2017 on defamation and it was decided that the respondent have to pay the petitioner Tshs.30,000,000/= as compensation. That, aggrieved, the respondent lodged Civil Appeal No. 162 of 2018 before the District Court of Ilala at Kinyerezi which ended up being dismissed for want of prosecution.

Following the above, Criminal Case No. 304 of 2022 was initiated against the respondent on what is regarded disobeying the lawful court order of Kariakoo Primary Court in the said Civil Case No. 100 of 2017. On 17th June, 2022 the district Court convicted and sentenced the respondent

herein to serve twelve months jail sentence. Aggrieved, the Respondent filed Misc. Criminal Application No. 50 of 2023 for extension of time within which to lodge Notice of Appeal against the decision of the district court which convicted and sentenced him, that is to say, Criminal Case No. 304 of 2022.

In the end, the respondent prayed the objection be sustained and the petitioner's suit be struck out.

In reply, the petitioner submitted that section 9 of the Civil Procedure Code, [Cap 33 R:E 2019] prohibit re-filing of the case twice (Res-Judicata). That, for a case to fall under Res- Judicata it has to pass through the test as analyzed in **Jansa Mwakipesile (Administrator of the estate of the late Jafari M. Mwakatobe) vs Benedictor Mwambwila**, Land Appeal No. 52 of 2021 High Court at Mbeya (unreported) which listed the ingredients of res-judicata, and argued that, in the instant case, the listed elements of Res-Judicata do not exist. He further argued that he had a new cause of action against the respondent because he had a series of repetition of publishing and circulating defamatory statements soon after his conviction by Kariakoo Primary court.

In a further submission, the petitioner argued that the raised objection is not maintainable because it is not pure point of law. In support, he cited **Shose Sinare versus Stanbic Bank Tanzania Limited and Another**, Civil Appeal No. 89 of 2020 CAT at Dar es Salaam; **Mohamed Enterprises(T) Limited vs Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 CAT at Dar es Salaam (both unreported) and **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Limited** [1969] EA 696. In the end, he prayed the objection be overruled and the suit be allowed to proceed

In his short rejoinder, the respondent submitted that his preliminary objection is totally based on the point of law that is section 9 of the Civil Procedure Code, [Cap 33 R:E 2019]. That, the nature and quality of the two cases, Civil Case No.100 of 2017 of Kariakoo Primary Court and this Civil Case No.56 of 2023 are the same hence *res-judicata*. He prayed his objection be sustained

Having considered the court`s records and rival submissions by the parties, the issue for determination is whether the petitioner`s herein Civil Case No.56 of 2023 is *Res-Judicata*

The doctrine of *res-judicata* prohibits a court to entertain a matter refiled which already was filed heard and decided by a competent court between the same parties on the same subject matter. This is per section 9 of the Civil Procedure Code, [Cap 33 R.E 2022] (the CPC). See **Ngoni Matengo Corporation Marketing Union Ltd vs Ali Mohamed Osman** [1956] EA 577, **Ester Ignas Luambano vs Adriano Gedumu Kipalile**, Civil Application No. 91 of 2014 CAT at Zanzibar and **Jansa Mwakipesile** case (**supra**).

Section 9 of the CPC and the cases cited above, insist that for *res-judicata* to exist the following conditions must co-exist between the former case and a subsequent suit. The same are: -

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

5. The matter in issue must have been heard and finally decided in the former suit.

It is evident that parties in Civil Case No. 100 of 2017 before Kariakoo Primary Court are the same in this Civil Case No. 56 of 2023. In the former suit the claim was for defamation so is in the instant suit. The former suit was finally determined against the respondent by awarding the petitioner be paid by the respondent herein Tshs. 30,000,000/= as compensation and to make apology and retraction of the false and malicious publication complained of in the same manner that was used by the respondent to publish. It seems the petitioner is yet to realize the fruit of the court decree the facts which culminated into commencing Criminal Case No. 304 of 2022 at Ilala District Court and subsequently the pending Misc. Criminal Application No. 50 of 203 in this court seeking extension of time to lodge notice of appeal against the district court decision. The petition is clear as pleaded under paragraphs 5 and 6 of it, the Respondent is alleged to have published new defamatory statements against the

petitioner immediately after being released from the jail. In my considered views, this is a new cause of action which can not bar the petitioner from commencing the suit.

Following the above, I hold that the suit herein is not res-judicata on the ground that it is founded on new defamation allegedly uttered by the respondent after completing serving jail sentence.

In the upshot, I hereby overrule the objection. I order the matter to proceed from where it ended.

It is so ordered

DATED at Dar es salaam this 30th Day of November, 2023



MUSA K. POMO

JUDGE

30/11/2023

