

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 127 OF 2013

NATIONAL BANK OF COMMERCE LIMITED PLAINTIFF

VERSUS

<p>BASIC ELEMENT LIMITED ROBERT SIMON KISENA FLORENCIAN ROBERT MASHAURI ROBESIKA AGRO-PRODUCTS LTD SIMON GROUP LIMITED LEONARD DOMINIC RUBUYE</p>	<p style="font-size:4em;">}</p>	<p>..... DEFENDANTS</p>
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21st April & 9th May, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a joint preliminary objection raised by the defendants – Basic Element Limited, Robert Simon Kisenka, Florenciana Robert Mashauri, Robesika Agro-Products Ltd, Simon Group Limited and Leonard Dominic Rubuye – to the effect that the suit filed by the

National Bank of Commerce Limited; the plaintiff, is *res judicata*. Notice of the preliminary objection was filed on 12.08.2014 alongside with their joint Written Statement of Statement. The notice filed was to the following effect:

"NOTICE IS HEREBY GIVEN THAT on the first day of hearing of this suit, or on any other day appointed by the Honourable Court, the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants above named, in response to the claims and averment made by the Plaintiff in the Plaint filed in the Honourable Court on 17th September, 2014, (the "Plaint") shall raise a preliminary objection on point of law that the suit filed by the Plaintiff is ***Res Judicata***."

The preliminary objection was argued before me on 21.04.2015 during which Ms. Linda Bosco, learned advocate appeared for the plaintiff and Mr. Mtani, learned advocate appeared for the defendants. The oral hearing was preceded by the parties filing skeleton arguments in conformity with rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules"). At the hearing, the advocates for the parties did no more than adopt their skeleton arguments earlier filed.

It may not be out of place to recount that that the preliminary objection was to be heard on 16.12.2014 but the defendants' counsel did not enter appearance. Ms. Bosco who appeared for the plaintiff on that date snatched the opportunity to pray for dismissal of the PO for want of prosecution. This court, in its ruling dated 03.02.2015, refused Ms. Bosco's prayer and ordered that the date of hearing of the PO would be fixed. On 24.02.2015 hearing of the PO was slated for 17.03.2015 but the same could not take off on that date until 21.04.2015 before me.

As already alluded to above, the counsel for both parties opted to adopt their skeleton arguments earlier filed without any elucidations. The defendants, in a nine-page skeleton written arguments filed on 13.03.2015 submit that the PO is based on Civil Case No. 72 of 2012 between Basic Element Limited (plaintiff) and National Bank of Commerce (1st defendant) and Silvanus Benedict Mlola t/a Kisarika, Malimi & Mlola (Advocates) (2nd defendant) and Seni Songwe Malimi t/a Kisarika, Malimi & Mlola (Advocates) (3rd defendant) which was filed in and determined by this court; the High Court of Tanzania at Dar es Salaam. The plaintiff in that case, who is the first defendant in the present suit, claimed for Tshs. 3,500,000,000/= being a loss incurred from fraudulent misrepresentation and declaration that there was fraudulent cheating in the process of purchase of the mill plant under CT No. 32516, Mikocheni Light Industrial Area within the City of Dar es Salaam once owned by Ben Es Haq Limited which was under receivership.

The defendants' counsel argues further that the present suit is founded on a credit facilities offer of the letter of 15.01.2010 which this court ruled in Civil Case No. 72 of 2012 that it was part and parcel of the Sale Agreement of the Mill Plant and that there was fraud committed. On this premise, the counsel argues that fraud vitiates everything including the plaintiff's claim arising from the credit facilities offer letter of 15.01.2010. The learned counsel submits therefore that this suit is *res judicata*.

The plaintiff, through their advocates; IMMMA Advocates, filed their skeleton arguments on 04.11.2014, submits that the suit is not *res judicata* in that the subject matter of Civil Case No. 72 of 2012 filed in and decided by the High Court at Dar es Salaam was the alleged fraudulent misrepresentation committed by the defendants in the sale of a mill plant under CT No. 32516; the property of Ben Es Haq Limited while the subject matter of the present suit is payment of amount due and outstanding on account of Credit Facility Agreement advanced by the plaintiff to the first defendant and guaranteed by the second, third, fourth, fifth and sixth defendants. The two suits, it is submitted, are different and therefore the conditions precedent for the doctrine of *res judicata* to apply, as set out in ***Gerald Chuchuba Vs Rector, Itaga Seminary*** [2002] TLR 213, were not met.

It is also submitted for the plaintiff that the parties were not litigating under the same title. The plaintiff in the former suit was Basic Element and the defendants were National Bank of Commerce, Silvanus Benedict Mlola t/a Kisarika, Malimi and Mlola (Advocates) and Seni Songwe Malimi t/a Kisarika, Malimi and Mlola (Advocates) while the plaintiff in the present suit is National Bank of Commerce and the defendants are Basic Element Ltd, Robert Simon Kisenia, Florenciana Robert Mashauri, Bobesika Agro-products Limited, Simon Group Limited and Leonard Dominic Rubuye.

The doctrine of *res judicata* is embodied in Section 9 of the CPC. The Section reads:

"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 essentials of the doctrine were the subject of discussion in ***Yohana Dismas Nyakibari and Another Vs Lushoto Tea Company Limited and 2 Others***, Civil Appeal No. 90 of 2008 (unreported) in which the Court of Appeal held:

“There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These are (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) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

Likewise, this court had an opportunity to deal with the doctrine at hand in the ***Gerard Chuchuba*** case (supra), a case cited to me by the plaintiff’s counsel. In that case, I quote from the first headnote, it was held:

“Before the doctrine of *res udicata* is applied the following essential elements must be shown to exist: that the judicial decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, that the judicial decision was final, and that it was in respect of the same parties litigating under same title”.

In the matter at hand, the parties to the suit in Civil Case No. 72 of 2012 were Basic Element Limited who was the plaintiff and National Bank of Commerce Limited, Silvanus Benedict Mlola t/a Kisarika, Malimi & Mlola (Advocates) and Seni Songwe Malimi t/a Kisarika, Malimi & Mlola (Advocates) who were the first, second and third defendants respectively. In the case at hand, the National Bank of Commerce, who was the second defendant in Civil Case No. 72 of 2012, is the plaintiff. Basic Element Limited, who was the plaintiff in the former case, is the first defendant while Robert Simon Kisenia, Florenciana Robert Mashauri, Robesika Agro-Products Ltd, Simon Group Limited and Leonard Dominic Rubuye are the second, third, fourth, fifth and sixth defendants respectively. Except for the plaintiff and first defendant in the present case, the rest of the parties to the present suit were not parties in Civil Case No. 72 of 2012. In the premises, the issue whether in Civil Case

No. 72 of 2012 and the present suit the parties are the same is answered in the negative; the parties are different and were not litigating under the same title.

The foregoing suffices to dispose of the PO. In the premises, I do not find it necessary to belabour into some other grounds enumerated under section 9 of the CPC and the cases cited above. The PO is therefore overruled. It is overruled with costs to the Plaintiff.

Order accordingly.

DATED at DAR ES SALAAM this 9th day of June, 2015.

J. C. M. MWAMBEGELE

JUDGE