

IN THE HIGH COURT OF TANZANIA
COMMERCIAL COURT
AT DAR ES SALAAM

COMMERCIAL CASE NO 34 OF 2016
BETWEEN

ATHNASIA T MASSINDE
T/A ABETI PRIMARY SCHOOL -----PLAINTIFF
VERSUS

NATIONAL BANK OF COMMERCE-----DEFENDANT

RULING

Date: 8/6/2016 & 30/6/2016

SONGORO, J

This is a Ruling, on the Preliminary objection on point of law raised by the National Bank of Commerce, the Defendant that, the Commercial Case No 34 of 2016 instituted by Athanasia Masinde who is trading as Abeti Primary School, the Plaintiff, is Res Judicata therefore ought to be dismissed.

In the objection, the Defendant argues that, the Commercial Case No 34 of 2016, in which Plaintiff is claiming from the Defendant a sum of shs 122,606,380 for failure to remit insurance premiums as a result was not indemnified when her school dining hall and a dormitory was unroofed by whirlwind was heard and determine in Commercial Case No 30 of 2014 and dismissed on the 24th February, 2016.

The Defendant therefore object that, pursuant to Section 9 of the Civil Procedure Code Cap 33 [R.E.2002] the Plaintiff is barred from instituting another suit involving the same parties and cause of action, and wants the Commercial Case No 34 of 2016 be dismissed because it is a Res Judicata.

In view of the Objection raised by Defendant, the Court invited the Parties to pursue the preliminary objection, and Ms Linda Bosco, Learned Advocate, appeared for the Defendant and pursued the objection where as Mr. Jamal Learned Advocate appeared for the Plaintiff and opposed the Objection raised.

In pursuing the objection, Ms. Linda Bosco first explained to the Court that, in the Commercial Case No 34 of 2014 the Plaintiff was claiming from the Defendant a sum of shs 122,606,380 for failure to remit insurance premiums and as result of that, the Plaintiff was not indemnified when her school dining hall and a dormitory were unroofed by whirlwind. The Plaintiff claim the properties were still under the mortgage and it is the Defendant who was supposed to pay for insurance premium but did not and was not indemnified when her school was damage.

The Defendant's Counsel then argued that, since there is Commercial Case No 34 of 2016 containing the same cause of action of breach of contract and the same parties which was determined, in Commercial

Case No 30 of 2014 and the previous suit was dismissed for "want of prosecution", it is obvious that, the previous claim was conclusively determined by this court on the 24/2/2016.

In view of the above, the Defendant's Counsel submitted that the Plaintiff is precluded from instituting Commercial Case No 34 of 2016 which involves the same matter against the same Defendant. The Counsel submitted that, the instant suit is Res Judicata and ought to be dismissed.

To support her assertions that the suit is Res Judicata, the Defendant's Counsel drew the attention of the Court to the decisions in cases of Salim A.H. Zaidi versus Faud Hussein Humaida [1960] EA 92 and Kotak versus Kuverji 1969 EA 295 in which they decided that, a judgment entered for failure to produce evidence is a judgment on merit, and operates as "Res Judicata", and the case of Kotak cited above decided even that where a decision of the Court dismiss the suit on point of law, the doctrine of Res Judicata applies.

The Defendant's Counsel then explained that, the only way available to the Plaintiff to pursue her claim is to challenge decision in the Ruling of Commercial Case No 30 of 2014 which dismissed the suit by filing an appeal to the Court of Appeal.

Finally, Ms. Linda Bosco prayed to the court for the dismissal of the suit on the ground that, the suit is *Res -Judicata*.

On the other hand, Mr. Jamal Learned Advocate for the Plaintiff firmly opposed the Defendant preliminary objection on point of law and argued that, Commercial Case No 34 of 2016 filed by the Plaintiff is not Res Judicata and he advanced several reasons to support his stance.

First, and foremost the Plaintiff's Learned Counsel informed the Court that, it is true that, Commercial Case No 30 of 2014 involved the Defendant was filed by the Plaintiff. He also agreed that, it was dismissed by this Court.

Further, the Learned Counsel informed the court even the present Commercial Case No 34 of 2016 was filed by the Plaintiff and involves the Defendant.

The Learned Counsel further challenged the Defendant's objection by explaining that, Section 9 of the Civil Procedure Code Cap 33 R.E 2012 which sets conditions under which the doctrine of Res Judicata may apply, and the Section set several criteria's which has to be established before a suit is declared as Res Judicata.

On established criteria `s under the above-mention section 9 of Cap 33, the Counsel insisted there must be proof from the Pleadings of previous suit that, the parties and issues in the previous suit are the same, like the parties and issues in the present suit. He also insisted that, there must be a proof from the Pleadings that, the previous suit was heard and determined on merit by a court of competent jurisdiction.

Mr. Jamal went further and explained to the court that, in his views the key issue need to be exploring in the Defendant objection is whether or not the dismissal of Commercial Case No 30 of 2014 amounted to hearing and final disposition of the case. While on this point the Plaintiff Counsel elaborated that, there are two type of dismissal.

He then explained that, in the first type of dismissal is where a suit is dismissed at the moment when issues in disputes for determination has not been identified and determined by the court. Such dismissal is not dismissal on merit, and it can not be said the parties have been heard and the suit determined. Such dismissal includes dismissal on the ground that, the suit is "time barred" or is "incompetent. The Counsel then explained that, in such dismissal, a party may be allowed to rectify the identified defects and sue again. The second type of dismissal is where issues have been agreed upon,

and the case is heard and disposal off on merit. Such dismissal is on merit.

He then enlightens the court that, dismissal, of Commercial Case No 30 of 2014 was not a decision on merit and did not disposal of the suit. Therefore, it may not be argued that, the suit was heard and finally determined t on merit for a doctrine of Res Judicata to apply.

To support his assertion, the Plaintiff Counsel drew the attention of the Court to the decision in Commercial Case No 2 of 2009 between Zanzibar Telecommunication Ltd Versus Haidery Rashid Narasisa Enterprises (Unreported) in which at page 10 of typed Judgment, Hon Justice Bukuku J found and decided that, for a plea of Res-*Judicata* to stand and bar s suit there must be a decision on merit.

Mr. Jamal then submitted that, the Commercial Case No 30 of 2014 which was dismissed was not decided on merit. Finally, Mr. Jamal prayed to the court to dismiss the Plaintiff`s objection Res Judicata for lack of merit and allow the suit to proceed into full hearing.

The court has carefully considered Defendant's preliminary objection that, the Commercial Case No 34 of 2016 is Res Judicata, and the Plaintiff arguments that, is not "Res Judicata" and finds the bone of contention in the objection raised is whether or not Commercial Case No 30 of 2014 was heard and determined on merit.

However before going into the merit of the objection it is important to state that doctrine of Res Judicata pleaded by the Defendant is entrenched under Section 9 of the Civil Procedure Act Cap 33 [R.E.2002]. And Section states as follows;

"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."

So going by the wording of Section 9 of the Civil Procedure Act Cap 33 [R.E 2002] cited above, I easily noted the above mentioned provision "bars" the court to try a "suit" or "an issue" involving the same parties, which matters are directly and substantially the same like the ones which were tried in the former suit.

Also, what the court gathered from Section 9 of the Civil Procedure Act, Cap 33 [R.E.2002] is that, the provision also sets pre-conditions that, for the "suit" or issues to be barred from being tried twice "the suit" or "issue" must have "been heard" and "finally decided" in the previous suit by a court of competent jurisdiction.

It is important to note that, Section 9 of the Civil Procedure Code Cap 33 did not fix a standard time frame of hearing the suit, or an "issue" under which a suit or "an issue" may be heard. It only requires that, "a suit" or an "issue" in the previous suit be heard and finally determined.

The Court further noted that, Courts in various decisions and occasions, have pronounced themselves on the scope and applicability of the doctrine of Res-Judicata.

As pointed out by Mr Jamal the Court in Commercial Appeal No 2 of 2009 between Zanzibar Telecom Co Ltd Versus Haidary Y Rashid t/a Narasisa Enterprises (Unreported) Hon Justice Bukuku J quoting a decision of Honourable Das Gupta J in the case of **Satyadhyan Ghosal Versus Deorjin Debi AIR 1960 SC941** explained the intent and scope of doctrine by saying that;

The principle of "Res- Judicata" is based on the need of giving finality to judicial decisions. What it says is that, once a re is Judicata, it shall not be adjudged again.

Also on the scope and rationale of the doctrine of Res Judicata the Court in the said case of Commercial Appeal No 2 of 2009 between Zanzibar Telecom Co Ltd versus Haidary Y Rashid t/a Narasisa Enterprises cited above further stated that;

Primarily it applies as between past litigation and future litigation. when a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceedings , and the decision is final , either because no appeal was taken to a higher court or because the appeal was dismissed or no appeal lies neither party will be allowed in a future suit or proceedings between the same parties to canvass the matter again.

Thus from the wording of Section 9 of the Civil Procedure Code, Cap 33 [R.E 2002], and the doctrine of Res-Judicata as explained in decision in cases of Zanzibar Telecom Co Ltd Versus Haidary Y Rashid t/a Narasisa Enterprises (Unreported) and Satyadhyan Ghosal

Versus Deorjin Debi AIR 1960 SC941 referred above, I also find the doctrines applies on a "suit" or "issues" between the past litigation, which has been finally decided upon, and litigation which is being investigated by the Court. It seems to me for better determination of whether or not particular suit is Res Judicata one needs to examine parties and issues involved, in two cases and decided if are one and same, and if were finally decided.

With that, legal position in mind, I reverted back to the Defendant's objection and perused a ruling in decision of Commercial Case No 30 of 2014 together the Plaintiff of Commercial Case No 34 of 2016.

While perusing the two suits I find in both two suits the Plaintiff is Athanasia Masinde trading as Abeti Primary School whereas Defendant in the two cases is National Bank of Commerce. Therefore from the two suits I find and decide that, parties in two suits meaning the Plaintiff and Defendant are the same.

Next stage I examined what were the issues in the two suits with the aim of ascertaining whether or not what was litigated it is the same "subject matter" or "issue" are the same or directly and substantially the same.

In finding what was the subject matter or issues in the two suits, I revisited the Ruling in decision of Commercial Case No 30 of 2014

and find Plaintiff was claiming from the Defendant for payment of shs 122, 606 380 as compensation after her school which was unroofed by whirlwind (cyclone) while there was an agreement of maintaining of insurance cover arising from the loan advanced by Defendant's bank loan.

Also, further perusal of the Plaintiff of Commercial Case No 34 of 2016, the Court find the Plaintiff is also is claiming from the Defendant for payment of shs 122, 606 380 as insurance compensation after her school was unroofed by whirlwind (cyclone) while there was agreement between the two to maintain insurance cover arising from the loan advanced by the Defendant's bank loan.

Thus upon close examination of the two suit and issues as explained above, I honestly find and decide that, issues and subject matter in the two suits are directly and substantially the same in the sense that, on each suit the claim is for payment of shs 122, 606 380 as compensation after her school was unroofed by whirlwind (cyclone) while was under insurance cover arising from the loan advanced by the Defendant's bank loan.

The next and last huddle on the Defendant's plea of Res Judicata and that is where there is a tug of war between the parties is whether or not the Commercial Case No 30 of 2014 and issues involved was heard and finally determined on merit. While on this point Mr. Jamal

submitted at length that, Commercial Case No 34 of 2014 was not heard and determined on merit. So the objection that, the suit is Res Judicata may not stand. Without repeating too much what Mr Jamal said on this point, but it was views and submission that, issues in the dismissed suit were not framed and agreed upon. He was of the view that if that is proper position, therefore issues in the present case Commercial Case No 34 of 2016 were not heard and finally determined, in Commercial Case No 30 of 2014.

To substantiate his point Mr. Jamal elaborated that, even the issues for determination in the previous were yet to be framed.

I have examined the point raised by Mr Jamal and find what Section 9 of the Civil Procedure Act bars is "tried suit" or "tried issue" in which the matter directly and substantially in issue has been directly and substantially the same like in the previous issue in a former suit. This mean an objection on Res Judicata may be on "a suit" or on "specific issue" or both. As it can be noted from the presented arguments, the Defendant objection is on the "suit" and "issue involved.

Now turning to point whether or not Commercial case No 30 of 2014 was heard and finally determined I find the answer lies on what was decided by this Court in its Ruling of 24th February 2016.

So in the cause of addressing if the Plaintiff suit and issue in Commercial Case No 30 of 2014 was heard and finally determined I opted to reproduce the last two paragraph of the relevant Ruling which reads as follows;

Reverting to the present suit, I find no evidence in chief from Ms. Athanasia Masinde was filed 7 days after mediation session. Since she is the sole witness, her failure to file Witness Statement amounts to failure to prosecute her suit and contravention of provisions of Rule 49 (1) and (2) of the High Court (Commercial Division) Procedure GN 250 of 2012.

Further, the last Paragraph dismissing the suit stated as follows;

Consequently, for reasons explained above, I hereby dismiss the Plaintiff suit with costs in favour of the Defendant for The right of appeal is fully explained to the parties.

Having considered the cited paragraph, from the Ruling of the Commercial Case No 30 of 2014 which dismissed the Plaintiff suit, which decided that there was a failure to prosecute the suit and the suit was dismissed, the legitimate question to be asked by any reasonable man is whether on the Plaintiff claim was heard investigated and finally determined. Honestly I have revisited the Ruling more than twice and find the Plaintiff claim was heard, investigated and determined to the finality in the sense that, the court revisited the Plaintiff claim and find there was i no "Plaintiff Witness Statement" which was filed in court by the Plaintiff as Examination In Chief to support her claim against the Defendant, and that was a failure to prosecute the said suit and the suit was dismissed.

In my view derived from the Ruling of Commercial Case No 30 of 2014, the hearing was accorded to Plaintiff and her Counsel in court, on the point if they have file a Witness Statement, which under the High Court Commercial Division Procedure Rules No 250 of 2012 is the Examination In Chief of a Witness.

Then it turn out that, the "plaintiff witness statement" who was the sole witness, was not filed, as required by Rule. Subsequently, the Plaintiff suit was dismissed, and nothing from the suit was spared by the Court Ruling.

It appears to me that, hearing envisaged in Section 9 of the Civil Procedure Code; Cap 33 [R.E 2002] is an any hearing which may enable the court to make a final decision on a suit or issue.

Therefore the close perusal of Ruling in Commercial Case No 30 of 2014, I find the Plaintiff was heard on her claim however slightly the hearing" was, on availability of her Witness Statement and thereafter decision was made and the suit was dismissed. So, in is my view the Plaintiff claim was finally determined. Nothing from the claim was spared.

Further, the court noted that the Ruling dismissing the Commercial Case No 30 of 2014 was not challenged by way of appeal or set aside and it stands and binds the parties even today. From the Ruling the Plaintiff` s insurance claim of shs 150,000,000 against the Defendant

was also dismissed. Quite frankly I find the same dismissed suit and claim is being revived in Commercial Case No 34 of 2016 between the same parties.

A risk which the court is facing if to proceed with the hearing and determination of Commercial Case No 34 of 2016 while the Ruling of Commercial Case No 30 of 2014 is still in enforce and binding between the Plaintiff and Defendant on the decided claim, is that, the court will ultimately find itself it has two decisions on the same subject matter and between same parties.

In other words the same "Plaintiff`s claim of breach of contract " and same cause of action would have been re- litigated twice by the same parties. The first litigation will be on the cause of action undertaken in the Commercial Case No 30 of 2014 and the second litigation will be undertaken in Commercial Case No 30 of 2016.

Re-litigating previous cause of action which has been decided by a court of competent jurisdiction is discouraged and there are several court decisions on this point. To point just one, is in the case North West Water Ltd Versus Bannier Patmer ALL ER [1990] Vol 3 at Page 547 Kerr LJ said and I quote that,

It is clear that, an attempt to re-litigate in another cause of action which has been fully investigated and decided in former action may constitute an abuse of the process.

It is in this respect I agree with Ms Linda Bosco, the Learned Advocate of the Defendant's bank that, Section 9 of the Civil Procedure Code Cap 33 [R.E.2002] bars this court from hearing and determine Commercial Case No 30 of 2016 because that, will amount to re-litigate one subject matter between the same parties twice.

Also to allow the hearing and determination of Commercial Case 30 of 2016 to continue it means the National Bank of Commerce, the Defendant shall be vexed twice in the same cause of action by the same Plaintiff.

On the foregoing reason, I find and decide that, Commercial Case No 30 of 2016 is Res Judicata I uphold the objection raised by the Defendant and dismiss the Plaintiff suit. On the costs, I order the Plaintiff to pay half of the costs incurred by Defendant in pursuing the suit. The right of appeal is fully explained to the parties.

Dated at Dar es Salaam this 30th day of June, 2016


H.T.SONGORO
JUDGE



Delivered at Dar es Salaam this 30th day of June, 2016


H.T.SONGORO
JUDGE



The Ruling was delivered in the presence of Mr Jamal, Learned Advocate for the Plaintiff and Mr. Gasper Nyika, Learned Advocate for the Defendant.