

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 34 OF 2022**

**SIMPLY FRESH (TANZANIA) LIMITED ..... PLAINTIFF**

**VERSUS**

**KEVIN STANDER ..... 1<sup>ST</sup> DEFENDANT**

**YASMINE HAJI ..... 2<sup>ND</sup> DEFENDANT**

**SHANTA RETAIL HOLDING LTD ..... 3<sup>RD</sup> DEFENDANT**

**Date of Last Order: 05/07/2022**

**Date of Ruling: 29/07/2022**

**RULING**

**MAGOIGA, J.**

This ruling is on preliminary objection on point of law raised and argued by the learned advocate for the 2<sup>nd</sup> defendant that the instant suit is Res judicata and/or res subjudice with Commercial Case no 76 of 2020 and abuse of the court process.

The facts of this suit are simple and straightforward. That plaintiff when set up was financially sound but later encountered financial challenges necessitating to draw various financial credit and services on loan from various institutions and individuals to the tune of USD.8,371,243.00 with the full knowledge of the shareholders and directors.

Further facts went on that on 20<sup>th</sup> January, 2020 the plaintiff's shareholders resolved that the said liabilities be shared by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as shareholders of the plaintiff and the 2<sup>nd</sup> defendant liability was pegged at USD.2,097,810.67 to be paid within two years commencing January 2020 to December, 2021. The defendants did not pay the money and it was resolved that, the instant suit be instituted against all defendants. Upon being served, the 1<sup>st</sup> and 3<sup>rd</sup> defendants settled the suit with the plaintiff and the claims against the 2<sup>nd</sup> defendants are now subject if this suit.

Upon being served, the 2<sup>nd</sup> defendant filed written statement of defence and simultaneously raised preliminary objection on point of law to the effect that the instant suit is ***res judicata*** and/or ***res subjudice*** with Commercial Case No 76 of 2020 and an abuse of the court process and prayed for dismissal or stay of these proceedings, hence, this ruling after hearing learned advocates for parties.

The plaintiff is enjoying the legal services of Mr. Joseph Kipeche, learned advocate and the 2<sup>nd</sup> defendant is enjoying the legal services of Mr. Jovinson Kagilwa, learned advocate.

Mr. Kagilwa told the court that their two limbs of objections will be argued jointly and are pegged on section 9 of the Civil Procedure Code, [Cap 33.R.E.2019]. According to Mr. Kagilwa, the instant suit is barred by doctrine of res judicata with Commercial Case No 76 of 2020 which is direct and substantially to the instant suit. Citing the famous author Mulla On Civil Procedure Code 16<sup>th</sup> edition at page 163 where the learned author observed that the doctrine of res judicata is a mixed question of law and fact to be specifically pleaded to enable the court to find so.

The learned advocate for the 2<sup>nd</sup> defendant argued that in Commercial Case No. 76 of 2020 decided on 13/11/2020, the plaintiff was the 1<sup>st</sup> plaintiff (with others not in this suit) and the 2<sup>nd</sup> defendant was the sole defendant, the claim was for derogation of contractual obligations issued by Bank M and was before competent court to try it. On the above factors, Mr. Kagilwa argued that the subject matter that suit is directly and substantially in this suit. When orally probed by the court the subject of financial obligations, Mr. Kagilwa was candid enough to say the former suit the obligation arose from guarantor ship of the 2<sup>nd</sup> defendant while in this suit was for other derogation of financial obligation in the name of the

plaintiff. According to Mr. Kagilwa, much as Commercial Case No. 76 of 2020 was finally determined then is res judicata to the present suit.

In support of his arguments, Mr. Kagilwa cited the case of ATHANASIA T. MASINDE t/a ABETI PRIMARY SCHOOL vs. NBC, COMMERCIAL CASE NO.34 OF 2016 in which it was held that suit dismissed for want of prosecution is a suit determined on merits. On that same note, Mr. Kagilwa urged this court to find out that the previous suit was dismissed for want of prosecution as such finally determined and hence res judicata to the present suit.

Mr. Kagilwa pointed out that the essence of the doctrine of res judicata is two folds, one is for protection of parties from being faced on multiplicity of suits arising from same parties and cause of action, and two is for public interest that litigation comes to an end.

On that totality of the above submissions, the learned advocate for the 2<sup>nd</sup> defendant strongly urged this court to find and hold that the instant suit is res judicata, hence, purely abuse of the court process. Citing the case of JV TANGERM CONSTRUCTION CO. LTD AND TECHNOCOMBINE CONSTRUCTION LTD vs. TPA AND AG, COMMERCIAL CASE NO. 117 OF 2015 which defined what amounts to abuse of the court process.

Guided by the above decision, argued that since the decision in Commercial Case No. 76 of 2020 is challenged by way of appeal, then, instituting the present suit against the defendant is an abuse of the court process and on that basis prayed and strongly urged this court to uphold the preliminary objection and dismiss the suit with costs.

Mr. Kipeche was not moved by the submissions by Mr. Kagilwa which he equated as misleading and misconceived and that the instant suit is not an abuse of the court process. Mr. Kipeche, cited the case of YOHANA DISMAS NYAKIBARI vs. LUSHOTO TEA COMPANY LIMITED, CIVIL APPEAL NO. 90 OF 2008 by Court of Appeal in which it was held that for the principle of res judicata to apply five cumulative conditions must exist. These are:

- i. The matter must be direct and substantially the same in both cases;
- ii. The matter must be between the same parties;
- iii. Parties must have litigated under the same title;
- iv. The matter must be before a competent court
- v. The matter must have been heard and finally determined.

According to Mr. Kipeche, if the above conditions are subjected to the instant suit, it is clear do not all fit in the present suit. In this he pointed out that, in both cases parties are different, subject matter or cause of action is not the same (in the former suit the cause of action was from guarantor ship and this suit is director's obligation), the amount is different, the plaintiff is not suing under same title and lastly that court's jurisdiction and issue of finality is not contested and as such concluded the matter is not res judicata.

Further Mr. Kipeche argued that the suit is, thus, not an abuse of the court process as argued by Mr. Kagilwa. The learned advocate for the defendant distinguished the cases cited by Mr. Kagilwa on reasons that parties are not the same and cause of action is not the same.

On the totality of the above reasons, the learned advocate for the defendant strongly urged this court to overrule the objection with costs.

In rejoinder, Mr. Kagilwa argued that parties are the same. Mr. Kagilwa when orally probed by the court if the 5 conditions as enumerated in the case of NYAKIBARI cited by Mr. Kipeche for the application of the principle of res judicata to apply must co-existed readily conceded to that effect.

Further submissions in rejoining are that the law do not say similarities of the cause of action but directly and substantially and reiterated his earlier prayers.

This marked the end of hearing of the preliminary objection. The noble task of this court now is to determine the merits or otherwise of the preliminary objection.

After hearing parties' learned advocates rivaling arguments, I noted that guided by the holding in the case of NYAKIBARI by the Court of Appeal of Tanzania, the learned advocates for parties join hands that for the principle of res judicata to apply the five ingredients as provided for under section 9 and interpreted by the Court of Appeal must co-exist. Further, I agree with Mr. Kagilwa that the principle of res judicata was legislated in our laws with a purposes to serve; one, to avoid multiple suits arising from the same cause of action between same parties, and two, it is public interest that litigation should come to an end. The above purposes of the principle were well articulated in the case of PANIEL LOTHAN vs. TANAKI AND OTHERS [2003] TLR 312.

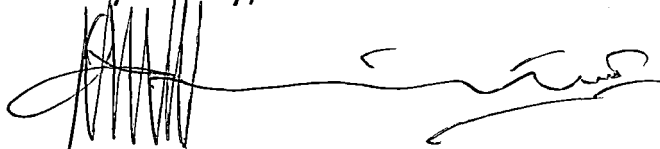
However, the only issue for determination after hearing the rivaling arguments of the legal trained minds for parties' is whether the instant suit is res judicata to the Commercial Case No. 76 of 2020? Having dispassionately considered the pleadings, the arguments and the case law cited in support of their respective stances, I am with due respect to Mr. Kagilwa found that his arguments in support of the objection are far from convincing me to associate with him. I will explain. One, much as both counsel and this court agrees that for the principle of res judicata to apply as legislated under section 9 of the CPC and which has been subject of several interpretations by both the high court and Court of Appeal in several decisions, the NYAKIBARI case (supra) inclusive by the Court of Appeal, it is a trite law that five ingredients must co-exists. However, in this case, as rightly argued by Mr. Kipeche, the cause of action in this suit is different because in the former suit the 2<sup>nd</sup> defendant was sued under guarantor ship with loan from Bank M while in this suit she is being sued for her directorship obligations. These are, in my view, two different causes of actions. Two, Parties are not suing under the same title as such not directly and substantially with the former suit as Mr. Kagilwa wanted this court to believe.



With the above two reasons, I find the preliminary objection devoid of any useful merits in the circumstances of this suit and unhesitatingly proceed to overrule the objection with cost in the cause.

It is so ordered.

Dated at Dar es Salaam this 29<sup>th</sup> day of July, 2022.



**S.M.MAGOIGA**

**JUDGE**

**29/07/2022**

