

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 449 OF 2016

RADVAN SHERCALI.....PLAINTIFF

VERSUS

LILIAN JOSEPH OGUTU.....1ST DEFENDANT
CRB BANK PLC.....2ND DEFENDANT
KCB BANK LIMITED.....3RD DEFENDANT

Date of Last Order: 21.02.2019
Date of Judgment: 09.03.2020

RULING

V.L. MAKANI, J

In the course of hearing of this suit the Counsel for the 1st Defendant Mr. Charles Alex raised preliminary points of objection as to the viability of the matter before the court. Since an objection on a point of law can be raised at any time the court granted leave to Counsel to address on the said objections.

Mr. Alex for the 1st defendant informed the court he had two points of objections. As for the first point he stated that the present suit, Land Case No. 449 of 2016 is *res judicata* and it contravenes section 9 of the Civil Procedure Code CAP 33 RE 2002 (the **CPC**). He said the matter becomes *res judicata* because the subject matter in Land Case No. 449 of 2016 is one house with CT 79487 Block 21 Kariakoo, Ilala Municipality Dar es Salaam (the **suit property**). He said the dispute regarding the said subject matter was determined in the Consent

Judgment at Kisutu Resident Magistrates Court at Dar es Salaam (**Kisutu Court**) in Matrimonial Cause No. 6 of 2017. He said the parties in the Matrimonial Cause No. 6 of 2017 and Land Case No. 449 of 2016 are the same, namely, the plaintiff and the 1st defendant herein. He further said the gist in the Matrimonial Cause was ownership and division of assets, of which the plaintiff was claiming for share in the suit property. He said the case at Kisutu Court was settled amicably between the parties and a Settlement Agreement and a Settlement Decree dated 16/05/2018 was extracted. According to the Settlement Decree, which was adopted as a Consent Judgment, the suit house was given to the 1st defendant and the plaintiff was given another house with CT No. 3023 located in Mikocheni Area, Kinondoni, Dar es Salaam.

According to Mr. Charles Alex the Consent Judgment has not been challenged. He said according to section 9 of the CPC the matter has been determined and other courts have no jurisdiction to re-open the matter. He emphasized that this court is basically dealing with the suit house whose ownership has already been determined by Kisutu Court and the plaintiff has no right to re-open the matter in respect of the suit property. He said the 2nd and 3rd defendants are proper parties and their absence in the Matrimonial Cause No. 6 of 2017 does not affect the principle of *res judicata* as far as the rights and obligations of the plaintiff and 1st defendant in respect of the suit property are concerned.

As for jurisdiction of this court, Mr. Alex submitted, that this suit is not viable for determination by this court or any other court simply because the parties in the Settlement Agreement went a step ahead to state that upon signing the agreement all disputes between the plaintiff and 1st defendant in any court of law initiated by either party should be withdrawn (Paragraph 9 of the Settlement Agreement). He said the present case was filed by the plaintiff before the Matrimonial Cause No. 6 of 2017 but the plaintiff and 1st defendant are bound by the Settlement Agreement hence this matter in this court ought to be withdrawn, but this obligation has not been discharged by the plaintiff. He said once there is a Settlement Agreement and it is adopted by the court it overrides any other view or legal position. He said since the plaintiff is not intending to withdraw the suit it is the duty of the court to strike it out in line with section 9 of the CPC. Mr. Alex also prayed for costs.

Ms. Leah Andrew, Advocate for the 2nd defendant supported the preliminary objections raised by the 1st defendant.

Responding to the objections raised, Mr. Balomi for the plaintiff submitted that there are three issues whether the objection is properly before the court. He said the objections offends Order VIIIA of the CPC because there is already a scheduling order and it prohibits departure. Secondly, he said this court has to invoke the overriding objective as under section 3A of the CPC. Thirdly, he said the objections do not meet the test of preliminary objections as provided in the case of **Mukisa Biscuits vs. West End Distributors [1969]**

1 EA 696 as the facts in the Matrimonial Cause No. 6 of 2017 and the Land Case No. 449 of 2016 herein are different.

As regards the principle of on *res judicata*, Mr. Balomi submitted that he has a problem with the subject matter because while the case at Kisumu Court is purely a matrimonial matter the suit before this court is a land matter. The parties are not the same so the doctrine cannot apply. He said in the present case the core point is the mortgage deed affecting the suit house which was created by the 1st defendant. He said the case at Kisumu Court is matrimonial cause which is divorce and division of matrimonial assets, so it does not have direct or similar issues to be decided upon. He said in *res judicata* the conditions have to be cumulative and one cannot pick one or two conditions. He said Counsel has shown only two conditions so *res judicata* cannot be invoked.

As for jurisdiction of this court Mr. Balomi submitted that it is statutory, and it cannot be ousted easily. He said in the Settlement Agreement, Land Case No. 449 of 2016 is not expressly mentioned. He said the Settlement Agreement is challenged by Application No. 206 of 2019 and so the Settlement Agreement cannot bar this court from proceedings with the matter. He added that a decision of the lower court cannot bind the higher court. He said the Settlement Agreement has not been satisfied to date and it cannot be binding if there is discovery that it was improperly procured. He concluded by stating that the objections are misconceived, and they ought to be dismissed so that the parties proceed with the case herein as appropriate.

In rejoinder Mr. Alex said the objections are properly before the court after leave was granted on 18/11/2019. He said the subject matter in all the cases is based on share/interest of the plaintiff and the 1st defendant in the suit property. The mortgage in the Land Case herein is in respect of share/interest of the plaintiff and the 1st defendant and the suit house in both the cases is referred as the matrimonial property.

Mr. Alex further stated that the jurisdiction of the court has been ousted by section 9 of the CPC on the basis that the case has been determined by a court of competent jurisdiction. He prayed for the court to take judicial notice of the Settlement Agreement of Kisumu Court as a judgment. He said the argument that the decision of a lower court is not binding is a misconception as what he wanted was for the court to take judicial notice that there is a judgment in another court regarding the suit property. He further contended that paragraph 9 of the Settlement Agreement does not expressly state the present land case but says "any other case" which the parties were supposed to withdraw including this case. He went on stating that the Consent judgment has not been challenged because the 1st defendant has not been served with any papers and there is nothing before this court proving as such. An application for extension of time to challenge the Consent Judgment has no legal force. He said the Matrimonial Cause at Kisumu Court has not been challenged to date, so the Consent Judgment is still in force. He further said that the argument that the execution of the matrimonial cause is not valid in

respect of the doctrine of res-judicata as execution is not one of them and more so, it was the plaintiff who ought to have filed the execution proceedings. He reiterated that *res judicata* has been properly raised and the 2nd and 3rd defendants remain to be proper parties as far as the main issues are concerned which issues remain between the plaintiff and the 1st defendant. He reiterated his prayers that the suit be struck out for being *res judicata*.

I have listened to the rival submissions by learned Counsel. I would wish to point out on the outset that, the preliminary objection raised by the 1st defendant was with leave of the court, and it was on the issue of jurisdiction I so it is pure point of law and it falls squarely under the elements provided for in the case of **Mukisa Biscuits** (supra).

In considering the objections it is without dispute that there is a Consent Judgment between the parties that emanated from Matrimonial Cause No. 6 of 2017 of Kisumu Court. It is also not disputed that the said Consent Judgment is still in force as there is nothing before this court to prove otherwise. The only issue is whether the Consent Judgment is res judicata of the present suit and binding to the current proceedings of this court.

Section 9 of the Civil Procedure Code CAP 33 RE 2002 under which the principle of res judicata arises provides:

"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 on which such issue has been subsequently raised and has been heard and finally decided by such court."

It is well settled law and leading authorities are at one, that in order for the plea of res judicata to successfully operate, the following conditions must be proved, namely:

- (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim;*
- (ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;*
- (iii) the party in the subsequent suit must have litigated under the same title in the former suit;*
- (iv) the matter must have been heard and finally decided;*
- (v) that the former suit must have been decided by a court of competent jurisdiction.*

The rationale behind the doctrine of res judicata is to ensure finality in litigation – **Umoja Garage v. National Bank of Commerce Holding Corporation, Civil Appeal No. 3 of 2001 (CA)** (unreported). It is also meant to protect an individual from multiplicity of litigation. According to Mr. Balomi he does not have a problem with all the elements save for the second one which is on the subject

matter which must be substantially the same between the previous and the present suit. In this regard, the issue to look upon is the cause of action and reliefs in the previous and subsequent suit. In Matrimonial Cause No. 6 of 2017 the matter was division of matrimonial assets which included ownership of the suit property CT 79487 Block 21 Kariakoo, Ilala Municipality Dar es Salaam and the claim in the present suit is also on ownership of the same suit property. In that respect, though the case at Kisutu Court was of the nature of a matrimonial cause but the issue of ownership of the suit property was also among the main matters which were agreed upon by the parties; and which essentially is the same subject matter in this court. In other words, the foundation of the claim in this present case is ownership of the suit property which is also amid the main things agreed upon in the suit at Kisutu Court (see the case of **The Registered Trustees of Chama Cha Mapinduzi Appellant vs. Mohamed Ibrahim Versi & Sons & Ali Mohamed Versi, Civil Appeal No. 16 Of 2008, (CAT-Zanzibar)** (unreported) which quoted with approval the case **Jarwart Singh and Another v. The Custodian of Evacuee Property, New Delhi, 1985 AIR 1096** the Supreme Court of India, where it was stated:

"The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceeding."

For the foregoing reasons, I find that the subsequent suit has been hit by section 9 of the CPC and it is accordingly res judicata. The preliminary objection therefore has merit and it is upheld.

Irrespective of the finding above, it is my considered view that the Consent Judgment at Kisumu court has a binding nature over the present suit. It should be observed that such judgments have contractual effect on the parties. In the Kenyan case of **Edward Acholla v. Sogea Satom Kenya Branch & 2 others, Cause No. 1518 of 2013; [2014] eKLR**, which is highly persuasive, the Industrial Court held:

"Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain".

The Order of Kisumu Court of 22/03/2018 in respect of the Settlement Agreement in Matrimonial Cause No. 6/2017 states:

- 1. The matter is hereby marked settled. The Memorandum of Settlement filed in court on 11th March, 2018 is adopted and pronounced as the judgment of the court.*
- 2. Each party to bear its own costs.*

It is apparent that the Settlement Agreement which was signed by the plaintiff and the 1st defendant was duly adopted by Kisumu Court as a judgment of the court. The advocates also signed as witnesses to what has been agreed upon. There is no proof that the Consent Judgment has been challenged save what was stated by Mr. Balomi at the bar without presentation of any documents whatsoever. The said Settlement Agreement therefore has a contractual effect and is binding on the parties who signed it.

In another Kenyan case of **Samuel Mbugua Ikumbu v. Barclays Bank of Kenya limited, Civil Appl. No 1 of 2015; [2015] eKLR**, it was submitted that a consent order is binding on the parties and cannot be set aside or varied unless it is proved that it was obtained by fraud or is contrary to the policy of the court, or that it was obtained without sufficient material facts.

Paragraph 9 of the said Settlement Agreement which was adopted as Consent Judgment on 22/03/2018 states:

"That upon signing of this Deed the parties shall immediately withdraw all the pending proceedings in the RM's Court of Dar es Salaam at Kistutu that is to say: Matrimonial Cause No. 6/2017, Misc. Civil Application No. 97/2017, Misc. Civil Application No 95/2017, Misc. Land Application No. 417/2017-Contempt, Land Case No. 449/2016 and Misc Land Application No. 1088/2016 in the High Court of Tanzania Land Division at Dar es Salaam and any other dispute in any court, Immigration departments in any Tribunal whatsoever initiated by the parties under this Deed of Settlement including this pending Petition."

It is clear that the said Settlement Agreement gives obligation to the parties to withdraw all the cases instituted by them in various courts including this present suit. The claim by Mr. Balomi that the present Land Case No. 449 of 2016 was not expressly mentioned is without merit because as seen from paragraph 9 of the Settlement Deed quoted above, the said case was duly mentioned as among those obligated for withdrawal. Even if the said case would not have been

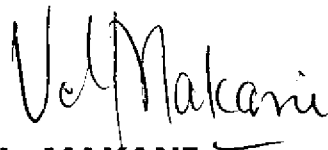
expressly mentioned in the said Paragraph 9 but the said case would have been caught in the web of "*...withdrawal of all pending proceedings and any other dispute in any court*" reflected in the said paragraph.

Now what is the consequence of the contractual obligations of the parties and the adoption of the Settlement Deed as a Consent Judgment? The principal effect is that the court is rendered *functus officio* unless the parties' default in their obligations. The rationale behind a Consent Judgment was stated in the Nigerian case of **Star Paper Mill Ltd & Another vs. Bashiru Adetunji & Others, Suit No. SC 292/2002** that it is intended to put a stop to litigation effectively rendering the court *functus officio*. In a similar vein, since there was a Consent Judgment with terms by parties to withdraw this present suit, this court cannot have the mandate to proceed with what the parties had agreed to withdraw. The jurisdiction of this court has been ousted by the Consent Judgment.

Mr. Balomi argued that this court cannot be bound by a judgment of the lower court, but I would wish to state that Consent Judgment is not guided by the principle of precedent it is a judgment based on terms agreed by the parties and hence contractual. And if I may state in passing it was the duty of the parties as was prompted by the 1st defendant herein to inform the court of the said Consent Judgment. The silence on the part of the plaintiff who was supposed to withdraw the present suit creates adverse inference as to his intentions. In the upshot, since the Consent Judgment is still valid and has not been

varied and or challenged in any way, then this court has no jurisdiction to entertain the suit herein.

For the reasons I have explained hereinabove, the preliminary objections raised by the 1st defendant have merit and are upheld and the suit is hereby struck out with costs.



V.L. MAKANI

JUDGE

09/03/2020