

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

**LAND CASE NO. 143 OF 2020**

**CLARA MATHIAS KWILASA.....PLAINTIFF**

**VERSUS**

**EFC TANZANIA MICROFINANCE  
BANK LIMITED.....1<sup>ST</sup> RESPONDENT  
NUTMEG AUCTIONEERES  
COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT  
SALU ALLY SALUM.....3<sup>RD</sup> RESPONDENT**

Date of Order: 14.04.2021  
Date of Ruling: 24.05.2021

**RULING**

**V.L. MAKANI, J**

Simultaneously, with filing their Written Statement of Defence with filing their Written Statement Defence, the 1<sup>st</sup> and 3<sup>rd</sup> defendants in this suit raised preliminary objections as follows:

**By the 1<sup>st</sup> defendant:**

*That this suit is res judicata*

**By the 3<sup>rd</sup> defendant:**

*That this court has no jurisdiction to entertain this suit because previously the plaintiff instituted in this court Land Case No. 12 of 2018 which was dismissed on the*

*22<sup>nd</sup> May, 2019; and an application (Application No. 566 of 2019) to set aside the dismissal order which was also dismissed on the 07/08/2020*

The objections above are all discussing one thing and that the suit is *res judicata*.

Mr. Cleophance James, Advocate on behalf of the 1<sup>st</sup> respondent stated that way back in 2018 the plaintiff filed Land Case No. 12 of 2018 against the same parties herein and the said case was dismissed on 22/05/2019 by Hon. Maige, J (as he then was) for non-appearance of the plaintiff under Order IX Rule 5 of the **Civil Procedure Code, CAP 33 RE 2019**. He said instead of the plaintiff filing an application for setting aside the dismissal order, the plaintiff has decided to knock the door of this honourable court with a fresh suit against the same defendants under the same cause of action. Mr. James said section 9 of the **Civil Procedure Code CAP 33 RE 2021** bars the court to entertain the suit which has already been determined by the court of competent jurisdiction between the same parties and the same cause of action. He said Land Case No. 18 of 2018 was determined on merits on 22/05/2019 after being dismissed for want of prosecution; the court is therefore *functus officio*. He said the object of the doctrine of

res judicata is to bar the multiplicity of suits and guarantee finality to litigation. He relied on the cases of **Paniel Lotha vs. Tanaki & Others [2003] TLR 312** and **Maria Mkama vs. Mr. F. Mchuruza & 5 Others, Misc. Land application No. 192 of 2019 (HC-Mwanza)** (unreported). He further stated that **Maria s/o Matiku vs. Wankyo Sanawa [1987] TLR 41**, **Gerard Chuchuba vs. Rector Itaga Seminari [2002] TLR 213** and **Karsha vs. Uganda Transport Company (1967) EA 774** which cases stressed the point that dismissal amounts to *res judicata*. Mr. James prayed for the suit to be dismissed with costs.

Mr. Makubikunju Makubi, Advocate on behalf of the 3<sup>rd</sup> defendant had the same views as Mr. James and he further relied on the case of **Hector Sequiraa vs. Serengeti Breweries Limited, Civil Application No. 395/18 of 2019 (CAT-DSM)**(unreported) and **Dr. Bakilana Augustine Mafwere t/a Bakilana animal Care vs. Annael Gideon Orio & Others, Civil Appel No. 33 of 2016** (unreported). He prayed for the suit to be dismissed with costs.

In response Mr. Kusalika on behalf of the respondent said that the suit was dismissed under Order IX Rule 5(2) of the Civil Procedure

Code CAP 33 RE 2002 which provided that the plaintiff herein may file a fresh suit subject to the law of limitation). He said the suit was not res judicata because it was not litigated on merit as the dismissal was made following failure by the applicant to serve the respondents. He reiterated his prayers for the preliminary objections to be dismissed and the suit to proceed on merit.

I have gone through the proceedings of the court and the written submissions by the parties herein. The main issue for consideration is whether the suit before this court is res judicata.

In arguing against the preliminary objection by the defendants, Mr. Kusalika in his submissions on behalf of the plaintiff stated the matter was not res judicata because it was not litigated on merit as it was dismissed for non-service of summons to the defendants under Order IX Rule 5(2) of the Civil Procedure Code CAP 33 RE 2002. This means Mr. Kusalika based his arguments on the old law that is Civil Procedure Code CAP 33 RE 2002 whereas according to the amendment vide Government Gazette No. 381 published on 10/05/2019, Order IX Rule 5(2) of the Civil Procedure Code CAP 33 RE 2002 no longer existed.

According to the proceedings of the court, the suit by the plaintiff in Land Case No. 12 of 2018 was dismissed for both non-service of the summons to the defendants and for non-appearance of the plaintiffs on the date set by the court. The order of the court was as follows that:

*"Since the plaintiff is absent and he has not served the defendants despite being ordered so to do, the suit is hereby dismissed under Order 9 Rule 5 of the Civil Procedure Code (CPC)."*

*Sgd I. Maige  
Judge  
22/05/2019*

The order above does not state that the suit was dismissed under Order IX Rule 5(2) of the Civil Procedure Code CAP 33 RE 2002. Understandably, it is because on 22/05/2019 when the said order was delivered, as said hereinabove, the **Civil Procedure Code CAP 33 RE 2019** had already come into operation by virtue of the amendment in Government Notice No. 381 published on 10/5/2019; and Order IX Rule 5(2) of the Civil Procedure Code, CAP 33 2002 no longer existed. In that respect the only existing law, and which in my

view properly dismissed Land Case No. 12 of 2018, was Order IX Rule 5 of the **Civil Procedure Code CAP 33 2019** and it states:

*Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.*

It is apparent that the above provision does not give an option for filing a fresh suit.

Indeed, Order IX Rule 5(2) of the Civil Procedure Code CAP 33 RE 2002 (the old law) states:

*5.-(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of twenty-one days from the date of the return made to the court by the officer ordinarily certifying to the court returns made by the serving officers, to apply for the issue of a fresh summons the court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the court that:*

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served;*
- (b) such defendant is avoiding service of process; or*

*(c) there is any other sufficient cause for extending the time, in which case the court may extend the time for making such application for such period as it thinks fit.*

*(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.*

The provision above gives an opportunity for a plaintiff to file a fresh suit if the defendant was not served with a summons on reasons enlisted in the said provision. But unfortunately there is no longer in existence that part in the provision which deals with the non-service of summons in Order IX Rule 5 of the **Civil Procedure Code CAP 33 RE 2019** which according to the record was the foundation of the dismissal order of the court in Land Case No. 12 of 2018.

Now, considering Order IX Rule 5 **Civil Procedure Code CAP 33 RE 2019** does not give an option for filing a fresh suit, and further that the suit was dismissed not only for failure by the plaintiffs to serve the plaint to the defendants but also for failure to appear on the date set for appearance in court. The remedy was for the plaintiff to apply to set aside the dismissal order which remedy the plaintiff dutifully adhered to vide Misc. Land Application No. 566 of 2019 but the said application was dismissed for want of sufficient reasons. It

should be noted that the Honourable Judge in Misc. Land Application No. 566 of 2019 confined himself to dismissal for non-service of summons to the defendants under Order IX Rule 5(2) of the Civil Procedure Code CAP 33 RE 2002 which is no longer in existence. He did not touch on the dismissal for want of appearance. With Order IX Rule 5 of the **Civil Procedure Code CAP 33 RE 2019** in existence and following that the plaintiff's failure to set aside the dismissal order in Land Case No. 12 of 2018, then this court cannot embark to hear and determine a fresh suit on the same parties and same subject matter. I agree that not all dismissals entail *res judicata*, but with the in terms of Order IX Rule 5 of the **Civil Procedure Code CAP 33 RE 2019**, the court's hands are tied. In that regard the suit is *res judicata* and renders the court to be functus officio as the dismissal is not open for further determination of a fresh suit of the same parties and subject matter by this court, without an order setting aside the dismissal order in Land Case No. 12 of 2018. This was stated in the case of **FINCA Tanzania vs. Leonard Andrew Korogo** (*supra*) that a judicial authority becomes functus officio upon passing or making an order finally disposing the case.



For the reasons, I have endeavoured to address, I find the preliminary objections raised by the defendants to have merit and the suit is hereby dismissed with costs.



*V.L. Makani*  
**V.L. MAKANI**  
**JUDGE**  
**24/05/2021**