IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 69 OF 2018

TECHNO IMAGE LIMITED ..... PLAINTIFF

VERSUS

1. **WAJIBU MANGUNGU [Legal Personal Representative of Ally Mohamed Mangungu]**
2. **VINCENT FRED MRISHO** ..... **DEFENDANTS**

RULING

Date of Last Order: 02/07/2021 &
Date of Ruling: 14/07/2021

S.M KALUNDE, J:-

The story goes that, on 10th June, 2008, the plaintiff and 1st defendant signed an sale agreement for the sale and purchase of a residential house situated on **Plot No. 17 Block "F" Msasani Village, Kinondoni District within the defunct Dar es Salaam City**. Upon completion of the transfer formalities, the plaintiff was registered as the lawful owner of the property on 28th August, 2008. It was agreed that the 1st defendant will yield up vacant possession to the plaintiff upon payment in full of the agreed purchase price. Unfortunately, the 1st defendant did not honor his obligation. It turned out that the property was being occupied by the 2nd defendant as a tenant of

the 1st defendant. The tenancy of the 2nd defendant was to, allegedly, expire on 22nd October, 2008.

Upon expiry of the lease agreement the plaintiff issued a notice to the 2nd defendant requiring him to vacate the property. The 2nd defendant did not heed to the call. Aggrieved by the conduct of the 2nd defendant, the plaintiff filed **Land Case No. 297A of 2008** against the defendants claiming inter alia for judgment and decree as follows:

(a) A declaratory order that he is a legal owner of house on Plot No. 17 Block "F" Msasani Village, Kinondoni Municipality, Dar es Salaam registered under the certificate of title No. 24063 (hereinafter referred to as the suit house);

(b) The 1st defendant be compelled to hand over the suit house to the plaintiff;

(c) The 2nd defendant be compelled to immediately vacate the suit house;

(d) Both defendants be ordered to jointly pay the plaintiff an aggregate amount calculated for the period which the 2nd defendant remained in the suit house at the rate of Tsh. 300,000/= per month as rent payable with effect from December, 2008 being loss suffered by the plaintiff for failure to utilize the suit house;

(e) The defendants be ordered to pay interest at the rate of 18% on the amount payable under paragraph 4 above;

(f) The defendants be ordered to pay interest at the rate of 12% per annum on decretal amount;

(g) Any other reliefs as the court deems just and equitable to grant; and

(h) Costs be borne by the defendants.

Upon hearing the parties, on 16th May, 2015, this Court (**Hon. J.S. Mgetta, J**) delivered its judgment in favour of the plaintiff in the following terms:

1. The plaintiff is declared as a legal owner of house on Plot No. 17 Block "F" Msasani Village, Kinondoni Municipality, Dar es Salaam registered under the certificate of title No. 24063 (hereinafter referred to as the suit house);
2. The 1st defendant is accordingly ordered to hand over the suit house to the plaintiff with immediate effect;
3. The 2nd defendant and/or his agent, servant and or any person claiming any right on behalf of the 2nd defendant are ordered to immediately vacate the suit house be compelled to immediately vacate the suit house to allow the plaintiff to utilize it for purposes for which it was purchased;
4. The 2nd defendant is ordered to pay the plaintiff an aggregate amount of money at the rate of Tsh. 300,000/= every month with effect from December, 2008 until vacation and or handing over the suit to the plaintiff;

5. The 2nd defendant is ordered to pay 12% on the aggregate amount payable under paragraph 4 herein above; and
6. Both defendants be condemned to pay the plaintiff costs of this suit.

Upon successful completion of **Land Case No. 297A of 2008,** on 14th June 2018, the plaintiff filed the present suit against the defendants. The plaintiff grievance is that as a result of failure to obtain vacant possession in time, the plaintiff was forced to rent two other premises, one situated at Plot. No. 205 Hananasif Street, Kinondoni and another on Plot No. 68, Block 363, Mikocheni B, Dar es Salaam, for her office and businesses. He was, thus, forced to pay costs for relocation, maintenance, renovation, and repair works as well as rentals for the respective premises. He thus claimed for judgment and decree against the defendants in the following terms:

(i). A declaration that the 1st and 2nd defendants are liable to the plaintiff jointly and severally as pleaded in paragraphs 4, 5, 9, 10, 16 and 17 herein;

(ii). That the 1st and 2nd defendants, jointly and severally, to pay the Plaintiff Tanzania **Shillings Five Hundred and Thirteen Million, Two Thousands and Seven Hundred and Twenty One, Cents Twenty Eight only (Shs. 513,002,721.2)** as special losses and damages suffered by the Plaintiff in paragraphs 14, 15 and 16 herein;

(iii). That the 1st and 2nd defendants to pay the Plaintiff Tanzania **Shillings One Hundred Million (Shs. 100,000,000/=)** as general damages suffered by the plaintiff as pleaded in paragraphs 4 and 17 herein;

(iv). That the Court orders payment by the Defendants of 20% interest on the amounts payable under the prayers ii and iii above;

(v). That the defendants pay 17% interest on decretal amounts from the date of the decree until the date of full satisfaction of the decree;

(vi). That the defendants be ordered to pay the costs of the case; and

(vii). Any other relief(s) as the Court may deem just and equitable to grant.

On being served the 1st defendant filed their written statement of defence in which they strongly refuted the plaintiff contentions. Theirs was that, the plaintiff claims relating to occupation of the suit property and incidental claims thereto were fully and dully determined by this Court through **Land Case No. 297A of 2008.** They are also alleged that the suit property was a residential property and thus renting another space for business purposes was to the disadvantage to the plaintiff himself as the same was not related to the occupation of the suit property.

Together with the above arguments, the 1st defendant filed a Notice of Preliminary Objection coached in the following terms:

1. That the suit is ***Res Judicata*** in view of the judgment and Decree of this Court dated 16th May, 2015 (Hon. J.S. Mgetta, J) in Land Case No. 297A of 2008 between the same parties and in respect of the same subject matter and cause of action; and

2. The suit is time barred.

Hearing of the preliminary objections raised by the 1st defendant was conducted through written submissions. The 1st defendant submissions were drawn and filed by **Mr. Dennis Michael Msafiri,** learned counsel and submissions of the plaintiff were drawn and filed by learned counsel **Muganyizi Shubi**. Submissions were duly filed in accordance with the schedule ordered by the Court. I also invited parties to submit on whether this Court had jurisdiction to entertain the matter. I ordered so, in a bid to afford the Court an opportunity to consider the matter in its totality and avoid delays in arguing about the subject.

I will now dispose of the preliminary objection **seriatim**. That said, I will first consider the question whether the present suit is res judicata in view of the decision in **Land Case No. 297A of 2008**.

In support of this point, Mr. Msafiri argued that the substance of claims claimed by the plaintiff in the present suit were substantially granted against both defendants in their

capacities through **Land Case No. 297A of 2008.** He added that the decision was not reversed or quashed on appeal, he thus concluded that the present suit was res-judicata. In support of that position, he referred this Court to the decision in **Gerald Chuchuba v. Rector, Itaga Seminary** [2002] T.L.R. 213 and in **Peniel Lotta vs. Gabriel Tanaki & Others** [2003] T.L.R. 314.

In light of the decisions in the above cases, the counsel contended that the parties in the former suit are the same to those in the present suit as they are litigating in their same capacity; he also argued that the cause of action and subject matter was the same and further that claim in the former suit are substantially similar to those in the present suit. The counsel added that, the matter was decided by this Court which had competent jurisdiction to hear and determine the case. In his view the fact that the plaintiff has made a new calculation of the purported accrued losses, does not make the present suit a new one. In his opinion, the present suit was an amplification of the former suit which was dully determined by a competent court. The counsel reasoned that the present suit was unmaintainable for being res judicata. He prayed the same be dismissed with costs.

In response Mr. Muganyizi argued that the two suit fall under different substantive causes of action hence defeating the

plea of *res judicata.* He argued that the former suit was based on breach of the terms of the sale agreement while the present suit is based under tort of trespass to property and a claim of restitution of the costs incurred at the instance of the unlawful occupation of the suit property by the defendants. He said that the decision in **Land Case No. 297A of 2008** formed the basis of the present suit in which the plaintiff is claiming compensation for untimely office relocation, maintenance, renovation, and repair works in respect of office premises rented pending issuance of vacant possession of the suit property. He said the costs would have been avoided had the defendants handed over the suit property on time. He said the present claims were different from those awarded in Land Case No. 297A of 2008.

Further to that, the counsel argued that the award in **Land Case No. 297A of 2008** related to losses suffered by the plaintiff of defendant's occupation of the suit property but not for losses incurred elsewhere as was the case in the present suit. he added that the present suit raised new triable issues which were not determined in the previous suit. to cement his position, he cited the provisions of **section 9 of the Civil Procedure Code, Cap. 33 R.E. 2019**. He thus concluded that the preliminary objection be dismissed with costs.

The main question begging for determination here is whether the raised objection is merited. It is common knowledge

that the doctrine of res judicata as known to our jurisdiction finds its roots under section 9 of **the Civil Procedure Code** (supra). The respective section provides that:

> *"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 plea of *res judicata* as enshrined under section 9 of **the Civil Procedure Code** (supra) was extensively illustrated by the Court of Appeal in **Peniel Lotta vs. Gabriel Tanaki & Others** [2003] T.L.R. 314 where **Lugakingira, J.A**, observed that:

> *"The Doctrine of res judicata is provided for in section 9 of the Civil Procedure Code, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties of their privies on the same issue by a court of competent jurisdiction in the subject of the suit. The scheme of section 9, therefore, contemplates five conditions which, when co – existent, will bar a subsequent suit. The conditions 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."

As expounded in **Peniel Lotta vs. Gabriel Tanaki & Others** (supra) for a plea of res-judicata to subsist, the following conditions must co-exist:

> (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."

In accordance with the pleadings and submissions by the parties, there is no dispute that the parties in the previous suit are the same parties in the present case and they are litigating in their same capacities as in the previous suit. There is also no dispute that the court which decided former was competent to try the present suit. That said items (ii), (iii) and (iv) have been substantially established.

The main issue for my consideration, in the present case, is whether the matter directly and substantially in issue in the present suit was directly and substantially in issue; and was heard and finally decided in Land Case No. 297A of 2008.

I will first examine the substance in Land Case No. 297A of 2008. In that case the plaintiff played to be declared a lawful owner of the suit property and that the 2nd defendant be ordered to vacate the suit premises and the same be handed to him. He also prayed for payment of Tshs. 300,000/= per month being loss for denial of utilization of the suit property. Paragraph 17 of the plaint in in Land Case No. 297A of 2008 read:

> "17. That the refusal by the Second Defendant to vacate the property has denied the Plaintiff its right to utilization of its property, and **is causing the Plaintiff financial loss of Tshs. 300,000/= per month for continuing to pay unbudgeted rent** instead of moving into its own property." [Emphasis mine]

From paragraph 17 above it is clear that, the Tshs. 300,000/= per month was claimed to carter for **"unbudgeted rent"** which the plaintiff was incurring because of the defendant's failure to vacate from the suit premise. On the basis of that prayer, the Court ordered the 2nd defendant to pay the plaintiff Tshs. 300,000 per month with effect from December, 2008 until vacation and or handing over the suit to the plaintiff. The costs for alternative accommodation of the plaintiff were

therefore a subject in Land Case No. 297A of 2008 and they were substantially determined in that case.

In the present case the plaintiff wanted this Court to find that the 1st and 2nd defendants are liable to the plaintiff jointly and severally as pleaded in paragraphs 4, 5, 9, 10, 16 and 17 herein. The substance in the said paragraphs is reflected in paragraph 5 of the plaint where the plaintiff alleges that:

> *"The plaintiff claim against the **Second Defendant** arises out of the Second Defendant's trespass into the plaintiff's property and his unlawful occupation of the Plaintiff's property **from 05th December, 2008 to September 2015** which occasioned sufferance, damages and financial loss to the Plaintiff."*

Under paragraph 14 the plaintiff alleged that due to delay in granting vacant possession he rented and renovated the house situated at Plot. No. 203 Hananasif Street, Kinondoni; Plot No. 68, Block 363, Mikocheni B, Dar es Salaam; and House No. 68, Block 363, Mikocheni "B", Dar es Salaam. The costs for renovation and renting are included under paragraph 15 (a), 15 (b), 15 (c) and 15 (d) of the plaint. The total value of the alleged claim is reflected under 16 and 17 and reproduced under prayer (ii) and (iii) of the plaint. That is, Shillings Five Hundred and Thirteen Million, Two Thousand and Seven Hundred and Twenty-One, Cents Twenty Eight only (Tshs. 513,002,721.2) as special losses and damages suffered by the Plaintiff. They include costs

for renovation and rental charges for the house. For ease of reference paragraphs 15 (b), 15 (c) and 15 (d) of the plaint reads:

> *"(b)* ***Shs. 300,000.00*** *per month as rental charges for the premises at plot Number 205 Hananasif Street;*
>
> *(b)* ***US$. 800.00*** *per month as rental charges for the premises at plot Number 203 Hananasif Street;*
>
> *(b)* ***US$. 2,300.00*** *per month as rental charges for the premises at plot Number 205 Hananasif Street;"*

A reading of paragraph 15 (b) of the plaint one would notice that the Tsh. 300,000/= every month which was sought and granted in Land Case No. 297A of 2008 is reappearing again. A new set of rents is introduced under paragraphs 15 (c) and 15 (d) of the plaint. These are new claims, somewhat an improvement or amplification, as the 1st respondent called it, of the initial claim included in Land Case No. 297A of 2008. They are both intended to carter for rent costs incurred by the plaintiff between December 200 to September 2016 when the suit property was handed over to the plaintiff.

Gleaning from the judgment and decree in **Land Case No. 297A of 2008** it is apparent that one of the issues was whether the 2nd defendant was a trespasser on the suit property and that issue was answered in the affirmative. Upon such conclusion the

ordered that the 2nd defendant was ordered to pay the plaintiff an aggregate amount of money at the rate of Tsh. 300,000/= every month with effect from December, 2008 until vacation and or handing over the suit to the plaintiff. The said amount was to accrue an interest of 12% on the aggregate amount.

My reading of the pleadings in both cases informs me that the judgment and decree in **Land Case No. 297A of 2008** was meant to carter for loss suffered by the plaintiff for failure to utilize the suit house from December, 2008 until the suit property was finally handed over to him. The issue of the claims and losses suffered by the plaintiff during this period was thus substantially in issue and determined through **Land Case No. 297A of 2008.** The plaintiff can therefore not raise another claim that between 05th December, 2008 to September 2015 he rented another house and thus the costs of renting another house were not considered when the Court ordered payment of Tsh. 300,000/= every month with effect from December, 2008 until vacation and or handing over the suit to the plaintiff. I am therefore satisfied that ingredients number (i) and (v) have also been established.

Before I pen off, I think it is important to highlight on the rationale of the principle of *res judicata*. As I am aware this principle was brought to ensure that there is finality litigations and that parties were precluded from reopening litigations that

were otherwise closed or determined. This view was stated in **Umoja Garage vs. National Bank of Commerce Holding Corporation** [2003] TLR 339 where the Court observed that:

> *"The rationale behind the doctrine of res judicata is to ensure finality in litigation and is also meant to protect an individual from multiplicity of litigation."*

On the strength of the above cited authorities, I am satisfied that the ingredients of *res judicata* have been proved to co-exist in the present case. That said, the first point of preliminary objection has merits. It therefore sustained. The suit is dismissed with costs for being *res judicata*.

Order Accordingly.

DATED at **DAR ES SALAAM** this **14th JULY, 2021**.

S.M. KALUNDE

JUDGE