

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

LAND CASE NO. 53 OF 2022

PRAXEDA RUTAHANGWA PLAINTIFF

VERSUS

RICHARD MALIPULA 1ST DEFENDANT

KABANGO INVESTMENT 2ND DEFENDANT

Date of last Order: 22/09/2022

Date of Ruling: 26/10/2022

RULING

I. ARUFANI, J

This ruling is for the points of preliminary objections raised by the counsel for the first defendant in the present suit that: -

- (1) The suit is bad in law for being res judicata.
- (2) The court is functus officio to determine the suit.

The plaintiff was represented in the matter by Mr. Amandus Mweyunge, learned advocate and the first defendant was represented by Mr. Erick Kamala, learned advocate. Hearing of the above listed points of preliminary objections proceeded in absence of the second defendant as he has never entered appearance to the court from when the matter was filed in the court. The court ordered the counsel for the appellant and first

defendant to argue the stated points of preliminary objections by way of written submissions and I commend them for filing their submissions in the court within the time.

The counsel for the parties commenced their submissions with a brief background of the matter which I have found it is appropriate to start with same as it will assist to make this ruling more comprehensive. The facts which are not in dispute in this matter is that the plaintiff and the first defendant are neighbours. The first defendant and one Ntisile Nzyela who is not a party in the present suit sued the plaintiff in Land Application No. 128 of 2009 filed in the District Land and Housing Tribunal for Kinondoni District at Magomeni (hereinafter referred as the tribunal) claiming the plaintiff had trespassed their lands located at Mbezi Luis Ubungo District in Dar es Salaam Region which they are sharing borders.

After full trial the tribunal found the boundary between the plaintiff and the first defendant in the present suit is a road and the boundary between the plaintiff and Ntisile Nzyela is a coconut tree. The plaintiff was dissatisfied by the decision of the tribunal and filed Land Appeal No. 83 of 2010 in this court which was dismissed for being baseless. After dismissal of the mentioned appeal the tribunal ordered a tribunal broker going by the name of Rhino Investment Company Limited to demarcate and hand over the land in dispute to the decree holders.

It was stated the tribunal's broker demolished part of the wall and buildings of the plaintiff and handed over the part which was declared it belonged to Ntisile Nzyela to her. It was stated further that, the boundary of the plaintiff and the first defendant was not demarcated by the said tribunal's broker. That caused the second defendant to be ordered to remove the plaintiff from the land declared is the property of the first defendant. The plaintiff filed Misc. Application No. 509 of 2021 before the tribunal to dispute the said execution by arguing that, the execution of the decision of the tribunal had already been carried out by Rhino Investment Company Limited.

The application was not successful and the tribunal ordered the stated execution to proceed between the plaintiff and the first defendant. The plaintiff was dissatisfied by the decision of the tribunal and lodged Land Appeal No. 42 of 2022 in this court but the appeal was struck out after being found it was incompetent. The second defendant executed the order issued by the tribunal by demolishing the fence wall and shop frames built by the plaintiff. After the stated demolition the plaintiff filed the present suit in this court claiming the defendants have trespassed into her land.

Now the first defendant has assailed the plaintiff's suit basing on the afore stated points of preliminary objections. The counsel for the first

defendant argued in relation to the first point of preliminary objection that, section 9 of the Civil Procedure Code, Cap 33 R.E 2019 (henceforth the CPC) states clearly about applicability of the principle of res judicata in our jurisdiction. He referred the court to the case of **Felician Credo Simwela V. Quamara Massod Battezy & Another**, Civil Appeal No. 10 of 2020 (unreported) where the conditions to be established for the principle of res judicata to apply were stated.

He stated that, the issue to determine here is whether the suit before the court is barred by the doctrine of res judicata. He argued that, the cause of action in Land Application No. 128 of 2009 filed before the tribunal was who was the lawful owner of the suit land between the parties. He stated the afore mentioned case together with Land Appeal No. 83 of 2010 which upheld the decision of the tribunal declared the first defendant and Ntisile Nzyela are the lawful owner of the suit land.

He argued that, the suit filed in this court by the plaintiff is about the same cause of action, same reliefs and the same parties determined in Land Application No. 128 of 2009, Land Appeal No. 83 of 2010 and Misc. Land Application No. 509 of 2021. He stated that, all those matters were conclusively determined by the tribunal and this court and that makes the present Land Case No. 53 of 2022 be res judicata against the Land Application No. 128 of 2009. He submitted that the plaintiff is

precluded by section 9 of the Civil Procedure Code to institute the present suit in the court.

He went on arguing that, the rationale behind the stated doctrine is that there should be finality to litigation. He argued that, the series of the matters filed in the court by the plaintiff is an abuse of court process and they are intending to deprive the first defendant his rights. He referred the court to various cases which one of them is the case of **Umoja Garage V. NBC Holding Corporation**, [2003] TLR 339 where it was stated the rationale behind the doctrine of res judicata is to ensure finality in litigation. He also referred the court to the Book of **Mulla, Code of Civil Procedure**, Vol 1 15th Edition cited in the above case where it was stated res judicata is not confined to issues which the court is asked to decide but covers issues of facts which are so clearly part of the subject of litigation.

In arguing the second point of preliminary objection the counsel for the first defendant referred the court to the **Black's Law Dictionary**, 8th Edition at page 696 which define what is functus officio. He also referred the court to the cases of **Bibi Kisoko Medard V. Minister for Lands Housing and Urban Developments and Another**, [1983] TLR 250 and **Mohamed Enterprises (T) Limited V. Mohamed Nasser** [2013] EA Vol. 1, 249 where it was stated that, once a decision has been reached

and made known to the parties the adjudicating tribunal thereby becomes functus officio.

The counsel for the first defendant argued that, as this court entertained Land Appeal No. 83 of 2010 which upheld the decision of the tribunal delivered in Land Application No. 128 of 2009 which involved the same parties and the same issues, the present suit is res judicata. He stated the court is functus officio to entertain this matter as is bound by its own decision. He based on the above submission to pray the court to dismiss the plaintiff's Land Case No. 53 of 2022 pending in this court with costs.

In reply the counsel for the plaintiff strongly opposed the submission by the counsel for the first defendant by stating that, the suit at hand is new as it has just happened on 4th March, 2022 as stated at paragraph 5 (viii) of the plaint of the present suit. He argued that, in the afore mentioned paragraph that, they were surprised to see the tribunal has granted another order of execution on the matter which had already been executed by way of demolition conducted on 18th June, 2015 and the report filed in the tribunal. He argued in the new execution it was indicated they have taken 20 x 70 meters which shows their intention is not a road but to get a piece of land from the plaintiff.

It was argued by the counsel for the plaintiff that, the land in dispute was surveyed and the Survey Maps shows clearly that the road between the plaintiff and the first defendant is five meters and not twenty meters. He stated the first defendant and his wife have been using the said road even before execution of the impugned order of the tribunal. He contended that in the said execution the Street Government Authorities were not involved to assist in identifying properly the road which is the boundary between the plaintiff and the first defendant. He submitted that, the plaintiff was willing for identification of the road as per directives of the Street Government Authorities but what was done by the defendants is contrary to the order issued by the tribunal and that shows the defendants have trespassed the land of the plaintiff.

He referred the court to the case of **Hamza Byarushengo V. Mwanga Hakika Microfinance Bank Limited**, Land Case No. 45 of 2019, HC Land Division at DSM, (unreported) and **Peniel Lotta V. Gabriel Tanaki & others**, Civil Appeal No. 61 of 1999, CAT at Arusha where five conditions required to be established are in co-existence in a suit to invoke the principle of res judicata were set and discussed the stated five conditions in his submission.

He started with the first condition which states the matter directly and substantially in issue in the subsequent suit must have been directly

and substantially in issue in the former suit. He argued that, the matter in the former suit was different from the matter in the present suit. He stated that, while the dispute in the former suit was about boundaries and the boundaries were identified and execution was carried out but the dispute in the present suit is about trespass committed by the defendants in the land of the plaintiff measuring 20 x 70 meters. He stated that, while the dispute and claims of the plaintiff in the present suit arose on 4th March, 2022, the stated claims were not in the former suit which was decided on 27th May, 2010.

He stated in relation to the second condition which states the former suit must be between the same parties or privies claiming under them that, the parties in the former suit are different from the parties in the present suit. He stated that, while the parties in the former suit were Ntisile Nzyela and Richard Malipula against Praxed Rutahangwa the parties in the present suit are Praxed Rutahangwa against Richard Malipula and Kabango Investment.

As for the third condition which requires the parties to have litigated under the same title in the former suit, he stated the parties in the present suit have not litigated in the former suit. He stated that, while in the former suit the first defendant and Ntisile Nzyela were applicants and the plaintiff in the present matter was a respondent in the former suit but in

the present matter the parties are different. He referred the court to the case of **Ubaya Salehe Mnyimadi V. Benjamin Sengerema Chayai & Another**, Misc. Land Appeal No. 36 of 2020 where it was stated that, although some of the parties in the present suit resemble the parties in the former suit but they are different in the former suit.

He stated in relation to the fourth condition which states the court which decided the former suit must have been competent to try the subsequent suit that, the value of the subject matter in the present matter is Tshs. 500,000,000/= which is totally beyond the pecuniary jurisdiction of the tribunal.

As for the fifth condition which states the matter in the previous suit must have been heard and finally determined in the former suit, he referred the court to the case of **Hamza Byarushengo** (supra) where it was stated the purpose of res judicata in a matter is understood to be substantially in issue if the whole of the subject matter in both proceedings is identical and not merely one of many issues arising for determination. He also referred the court to the case of **Jeremy Woods & Another V. Robert Choudury & Another**, Com. Case No. 18 of 2007, HC Commercial Division at DSM (unreported) where it was held that, it does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy.

He submitted that, in the light of what is stated herein above it is clear that the reliefs prayed in the former suit are totally different from the reliefs prayed in the present suit. He cited again the case of **Hamza Byarushengo** (supra) where after the court found there were some differences between the former suit and the subsequent suit it overruled the objection based on res judicata. He stated that, matters which requires proof should be determined during hearing of the suit and the suit should not be rejected at the stage of preliminary objection. He fortified his argument with the case of **Mukisa Biscuit Manufacturing V. West End Distributors Ltd**, [1969] EA 696 which states preliminary objection should be on pure point of law.

With regards to the second point of preliminary objection which states the court is functus officio to determine this suit, the counsel for the plaintiff referred the court to the case of **Mohamed Enterprises (T)** (supra) and stated that, there is no any court which has previously heard and determine the matter at hand. Finally, he prayed the court to overrule the preliminary objection with costs and allow the suit at hand to proceed.

In rejoinder the counsel for the first defendant stated that, in Land Application No. 128 of 2009 the claim of the first defendant and Ntisile Nzyela was trespass alleged was committed by the plaintiff and the issue framed for determination was who was the lawful owner of the land

alleged was trespassed by the plaintiff. He argued that, the tribunal did not order for identification of the road as alleged by the plaintiff's counsel but it declared the boundary between the plaintiff and the first defendant is a road but the plaintiff has extended up to the land of the first defendant.

He stated the principle of res judicata is a pure point of law which does not contravene the principle laid in the case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra). He stated that, the court is functus officio as this matter was fully determined by this court in the Land Appeal No. 83 of 2010 where the issues, parties and subject matter were the same. He based on the above submission to pray the court to dismiss the plaintiff's suit in its entire with costs.

The court has carefully considered the rival submissions from the counsel for the parties in respect of the points of preliminary objections raised in the instant matter by the counsel for the first defendant and find the issue to determine here is whether the raised points of preliminary objections are meritorious. Starting with the first objection which states the suit is res judicata the court has found the doctrine of res judicata is provided under section 9 of the Civil Procedure Code which 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."

The court has found the object of the cited doctrine of res judicata is to bar the parties to go to court on the same issue which has already been determined to its finality by a competent court. The stated object can be seen in the cases of **Umoja Garage** (supra) and **Peniel Lotta V. Gabriel Tanaki & Others**, [2003] TLR 312 where it was held in the latter case that: -

"The object of the doctrine of res judicata is to bar multiplicity of suit and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."

The court has found in order to say a suit is res judicata to the former suit and as rightly argued by the counsel for the plaintiff there are conditions which must be established are in co-existence into two matters. Those conditions can be derived from section 9 of the Civil Procedure Code which were well summarized in the case of **Peniel Lotta** (supra)

and can also be found in the case of **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited & Two Others**, Civil Appeal No. 2008, CAT at Tanga (unreported) where it was stated that: -

"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These 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."

While being guided by the afore stated principle of the law the court has found that, in order to be able to determine whether the present suit is res judicata the court is required to look into both suits to see whether the conditions stated hereinabove for the doctrine of res judicata to be invoked have been established. Starting with the first condition which requires a matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit the court has found the counsel for the first defendant argued that, the issue in all mentioned matters was about ownership to the land which the

counsel for the first defendant argued it has already been determined in the cases filed in the tribunal and this court.

The court has found that, although it is true that the matter in issue in the former suit and in the present suit is about ownership of the land but as rightly argued by the counsel for the plaintiff there are some differences between the land stated was in issue in the former suit and the land stated is in issue in the present suit. The court has found the judgment of the former suit delivered in Land Application No. 128 of 2009 shows the dispute between the plaintiff and the first defendant was about boundary of their land which both parties stated were demarcated by road.

The court has found that, while the judgment of the tribunal shows the evidence given at the tribunal in the former suit by the first defendant in respect of their dispute was that, the plaintiff had trespassed into his land measuring four meters but the counsel for the plaintiff argued in his submission that, the land which the plaintiff is claiming it has been trespassed by the defendants in the present suit is measuring 20 X 70 meters and the defendants demolished her fence and frames of her shops.

That makes the court to come to the view that, as rightly argued by the counsel for the plaintiff, if the size of the land the first defendant was claiming in the former suit was trespassed by the plaintiff was measuring

only four meters it cannot be said the claim of the plaintiff in the present suit of 20 X 70 meters, she alleged has been trespassed by the defendants was substantially and directly in issue in the former suit. The court has also found that, as correctly stated by the counsel for the plaintiff, the claim of the plaintiff in the present suit cannot be said was involved in the former suit. That is because while the former suit was determined on 27th May, 2010 the plaintiff alleges the claim in the present suit arose on 4th March, 2022 when the defendants invaded her land and demolished her wall fence and frames of shops.

Besides, the court finds that, as rightly argued by the counsel for the plaintiff even the reliefs sought in the former suit are not the same as the reliefs the plaintiff is claiming in the present suit. The court has found while among the reliefs the first defendant was claiming in the former suit as appearing in the decree of the tribunal annexed in the documents filed in this court by the first defendant was a declaration that the plaintiff had trespassed into his land which its boundary was demarcated by the road but the reliefs the plaintiff is claiming in the present suit includes payment of Tshs. 280,000,000/= being loss alleged was caused to the plaintiff and her tenants by the act of the defendants to demolish her fence wall and her frames of shops.

The position of the law as stated in the case of **Jeremy Woods & Another** cited in the case of **Hamza Byarushengo** (supra) is very clear that, the subject matter in the subsequent suit must be covered in the previous suit to enable the principle of res judicata to be invoked in a subsequent suit. It is also stated in the Book by C. K. Takwani titled **Civil Procedure with Limitation, 1963**, Seventh Edition at Page 84 that, a matter is said to be actually in issue when it is alleged by one party and denied by another and it is said to be constructively in issue when it might and ought to have been made a ground of attack or defence in the former suit.

Therefore, if the claim of the plaintiff in the present suit was not alleged by the plaintiff and denied by the defendant in the former suit it cannot be said the matter in issue in the former suit is directly and substantially the same in the present suit. The above view of this court is being fortified further by the position of the law stated in the case of the **Registered Trustees of Chama cha Mapinduzi V. Mohamed Ibrahim Versi and Sons & Another**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported) where it was stated that

"The fact that the property involved is one and the same does not necessarily render the cause of action identical or convert the matters directly and substantially in issue in the two suits to be the same."

The court has been of the further view that, although the dispute between the parties in the present suit is about ownership of the land and the issue in the former suit was about ownership of the land but it cannot be said the issue of ownership of the land determined in Land Application No. 128 of 2009 and in Land Appeal No. 83 of 2010 is the same issue of ownership of the land which the plaintiff is claiming in the present suit. It is the view of this court that the issue as to whether the land which was in dispute in the former suit is the same land which the plaintiff is claiming in the present suit, is an issue which can only be determined after receiving evidence from the parties and not at this preliminary stage of the matter.

It is also the view of this court that, although the counsel for the first defendant is arguing what was done to the plaintiff's land by the second defendant was execution of the decision delivered by the tribunal in the former suit but the plaintiff's counsel argued the land which the first defendant was claiming in the former suit has already been handed over to the first defendant through execution conducted by tribunal's broker namely Rhino Auction Mart on 18th June, 2015. The counsel for the plaintiff argued further that, even the report of the mentioned tribunal's broker to show execution of the decree of the tribunal had already been implemented was filed in the tribunal.

The above stated position of the matter caused the court to come to the settled view that, as the first condition for the principle of res judicata to be invoked in a subsequent suit has not been established in the present suit, it cannot be said the present suit is barred by the doctrine of res judicata. The court has arrived to the above finding after seeing the position of the law as held in the cases of **Hamza Byarushengo** and **Peniel Lotta** cited in the submission of the counsel for the plaintiff is that, all five conditions for the doctrine of res judicata to stand must be proved are in co-existence in both suits to justify invocation of the doctrine of res judicata in a case. As the first condition has been found it has not been established the court has found there is need of going to the rest of the conditions required for the doctrine of res judicate to be invoked in a case.

Coming to the second point of preliminary objection which states the court is functus officio to entertain the present suit the court has found that, the basis of the stated objection as argued by the counsel for the first defendant is that the suit before the court was determined by this court in Land Appeal No. 83 of 2010 which upheld the decision of the tribunal delivered in Land Application No. 128 of 2009. The court has found that, as it has already been found in the first point of preliminary objection that the dispute determined in Land Application No. 128 of 2009

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which the appeal preferred against it via Land Appeal No. 83 of 2010 was dismissed it is different from the present suit then it cannot be said the court is functus officio to entertain the present suit.

Therefore, the position of the law stated in the cases of **Bibi Kisoko Medard** and **Mohamed Enterprises (T) Limited** cited in the submission of the counsel for the first defendant where it was stated courts becomes functus officio once a decision has been reached and made known to the parties are not relevant in the present suit and are distinguished from the present suit. The court has come to the stated finding after seeing the matter directly and substantially in issue in the present suit has never been directly and substantially in issue in the matter determined in Land Application No. 128 of 2009 or Land Appeal No. 83 of 2010 or any matter. Consequently, the court has found the second point of preliminary objection raised by the counsel for the first defendant that the court is functus officio to entertain the present matter is devoid of merit.

In the strength of what I have stated hereinabove the court has found both points of preliminary objections raised by the counsel for the first defendant are devoid of merit and are hereby overruled in their entirety and the costs to be within the suit. It is so ordered.

Dated at Dar es Salaam this 26th day of October, 2022



I. Arufani

JUDGE

26/10/2022

Court:

Ruling delivered today 26th day of October, 2022 in the presence of Mr. Juventus Katikiro, learned advocate for the plaintiff who is also holding brief of Mr. Erick Kamala, learned advocate for the first defendant. The second defendant is absent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

26/10/2022