

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION**

AT DAR ES SALAAM

LAND CASE No. 137 OF 2021

BETWEEN

MISHED CHUNILAL KOTAK..... PLAINTIFF

VERSUS

OMARY SHABANI1ST DEFENDANT

KELLEN ROSE RWAKATARE KUNTU.....	} As joint Admini- strators of estate of the late Getrude Pangalile Rwakatare	} 2nd DEFE- NDANT
HUMPHREY KAULILA KENETH RWAKATARE		
TIBE KENNETH RWAKATARE.....		
MUTA ROBERT RWAKATARE.....		

Date of last Order: 22/09/2022

Date of ruling: 24/10/2022

RULING

I. ARUFANI, J

This ruling is for the points of preliminary objections raised in the instant suit by the counsel for the first defendant which read as follows:-

- 1. Basing on the decision of this court (Her Ladyship Maghimbi, Judge) dated 12th July, 2021, this honourable court is functus officio as to question of ownership of a house No. 108 on Plot No. 13 Block 75 Aggrey Street Kariakoo area by the plaintiff.*
- 2. The plaintiff has no locus standi to file this suit in respect of house No. 108 on Plot No. 13 Block 75 Aggrey Street Kariakoo area.*
- 3. This suit is res judicata regarding the ownership of the house No. 108 on Plot No. 13 Block 75 Aggrey Street Kariakoo area.*

4. Basing on the decision of this court (Her Ladyship Maghimbi, Judge) dated 12th July, 2021, this honourable court has no jurisdiction to determine ownership of the house No. 108 on Plot No. 13 Block 75 Aggrey Street Kariakoo area by the plaintiff.

The brief background of this matter as can be found in the pleadings and submissions filed in this court by the counsel for the parties is to the effect that, the plaintiff in the present land case filed in this court Miscellaneous Application No. 617 of 2020 (henceforth the application) urging the court to investigate his claim as an objector in respect of the order of immediate eviction of the plaintiff and his tenants from the house No. 108 on Plot No. 13 Block 75 Aggrey Street Kariakoo area in Dar es Salaam Region (hereinafter referred as the suit premises).

The stated order of immediate eviction of the plaintiff and his tenants from the suit premises was issued in Execution No. 72 of 2019 of this court which was filed in the court by the first defendant. The first defendant was seeking for an order of immediate eviction of the judgment debtors in Land Case No. 65 of 2009 who were Selemani Mwanjeka (not a party in this suit) and the late Getrude Rwakatare who is being represented in the present suit by the second to fifth defendants as her legal representatives. The plaintiff asserted in the application that the suit premises is his property as it was sold to him by the late Getrude

Rwakatare on 4th April, 2014 and the Certificate of Title No. 89750 in respect of the suit premises is registered in his name.

After conducting investigation of the plaintiff's claim the court found there was no convincing ground which had been adduced by the plaintiff to move the court to alter the order of immediate eviction of the plaintiff and his tenants from the suit premises issued by the court in Execution No. 72 of 2019. The court found the late Getrude Rwakatare had no good title to pass to the plaintiff in the present suit and dismissed the application for lacking merit. Thereafter the plaintiff filed the present suit in this court praying to be declared is the legal owner of the suit premises.

At the hearing of the above raised points of preliminary objections the plaintiff was represented in the instant suit by Mr. Francis A. M. Mgare, learned advocate and the first defendant was represented by Mr. Adinan Abadallah Chitale, learned Advocate. The rest of the defendants indicated in their joint written statement of defence that they are admitting the claims of the plaintiff. By consent of the counsel for the parties the objections raised by the counsel for the first defendant were argued by way of written submissions.

The counsel for the first defendant stated in his submission in relation to the first point of preliminary objection that the court is *functus officio* to entertain the issue of ownership of the suit premises. He argued that,

as the plaintiff adduced evidence before the court through his written affidavit and his objection failed to succeed the hands of the court are tied up. He argued that, what was determined by the court in the application filed in the court by the plaintiff is what the plaintiff is praying to be granted in the present suit. He submitted that is not allowed in law as the plaintiff is turning this court to be an appellate or revisional court over its own decision.

He stated that, the plaintiff is praying the court to overturn the decision given by Hon. Maghimbi, J in the application filed in the court by the plaintiff. He submitted that, as the plaintiff was declared in the said application, he never acquired any lawful title over the suit premises he cannot pray the court to grant an order of declaration of ownership in his favour over the same suit premises. To support his submission, he referred the court to the case of **Tanzania Telecommunication Co. Ltd & Three Others V. Tri Telecommunications Tanzania Ltd**, Civil Revision No. 62 of 2006, CAT at DSM (unreported) where the Court of Appeal stated it is *functus officio* to entertain application for revision which had already been dismissed by the Court in the previous application for revision.

He argued in relation to the second point of preliminary objection which states the plaintiff has no locus standi to file the suit in the court in

respect of the suit premises that, the plaintiff filed the application in the court under Order XXI Rule 57 (1) & (2), 58, 59 and 95 of the Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred as the CPC). He argued the plaintiff used the cited provision of the law to ask the court to investigate the intended immediate eviction order which was to be carried out by the first defendant against the plaintiff and his tenants from the suit premises.

He stated that, the provision of the law upon which the application was based deals with objection to attachment and sale of the property in a case and not about eviction of a party in a case. He cited in his submission the case of **Dorice Keneth Rwakatare V. Nurdin Abdallah Mushi & 5 Others**, Misc. Land Application No. 300 of 2019, HC Land Division at DSM (unreported) where the circumstances upon which claims in an objection proceeding that a property is not subject for attachment was discussed. He argued that, the nature of the prayer made by the plaintiff in the application was not within the ambit of the provisions of the law cited in his application.

He submitted that, the right to file a fresh suit envisaged under Order XXI Rule 62 of the CPC does not come into play in favour of the plaintiff. He stated the right of ownership of the property which the plaintiff is claiming in the present suit has already been decided by Hon. Maghimbi,

J. He submitted that the plaintiff has no locus standi to file in the court the suit under Order XXI Rule 62 of the CPC. He submitted further that, existence of attachment order is a condition *sine qua non* for the applicability of Order XXI Rules 57 (1) & (2), 58, 59 and 62 of the CPC.

He argued the third and fourth points of preliminary objection together and stated the present suit is res judicata thus the court has no jurisdiction to determine the same. He stated res judicata is the rule of law which bars courts from entertaining a case which was previously litigated by the same parties in the same subject matter and quoted in his submission the provision of section 9 of the CPC which provides for the stated principle of res judicata. He submitted that, the claims of the plaintiff in the present suit were determined and decided in the application filed in the court by the plaintiff where it was decided the first defendant is the lawful owner of the suit premises.

He argued that, during hearing of the application the plaintiff adduced evidence through written affidavit that he is the lawful owner of the suit premises which he lawfully purchased from the late Getrude Rwakatare on 4th April, 2014. He stated the same person who was applicant in the application has filed the instant suit in the court praying to be declared is the legal owner of the suit premises. He submitted that

shows the present suit is res judicata thus the court has no jurisdiction to entertain it.

He referred the court to the case of **Odhiambo Eduour V. Jane Thomas Abuogo**, Civil Appeal No. 21 of 2012, CAT at Tanga (unreported) where it was stated that, it was wrong for the learned trial judge to re-open the matter already determined. He also referred the court to the case of **Siemens Limited & Another V. Mtibwa Sugar estates Limited**, Civil Appeal No. 106 of 2016, CAT at DSM (unreported) where it was stated that, revisional power of the Court of Appeal is exercised under exceptional circumstances. At the end he prays the court to uphold all the points of preliminary objections he has raised and argued and dismiss the entire suit with costs.

In reply the counsel for the plaintiff argued in relation to the first point of preliminary objection that, the court is not *functus officio* to entertain the present suit because the reliefs claimed in the application were different from the one being sought in the present suit. He stated in the previous application the plaintiff asked the court to investigate his claim and after the investigation, the court be pleased not to evict him and his tenants from the suit premises. He argued the stated reliefs are different from the one sought in the present suit as the plaintiff is asking for a declaratory order that he is the lawful owner of the suit premises.

He argued that, in the previous application the court was asked to investigate the plaintiff's claims and not to establish the right which the plaintiff is claiming to the suit premises in the present suit. He referred the court to the case of **Katibu Mkuu Amani Fresh Club V. Dodo Ubwa Mamboya Khamis Khamis Machamo Keis**, Civil Appeal No. 88 of 2002 (unreported) which was cited with approval in the case of **Dorice Keneth Rwakatare** (supra) which dealt with the issue of objection proceedings. He argued that, a court can only be *functus officio* in a case once it gives its original order and cannot depart from it in absence of an application for review. He also referred the court to the case of **Laemthong Rice Company Ltd V. The Principal Secretary, Ministry of Finance**, [2002] TLR 389 to support his argument.

He argued that, after the court dismissed the plaintiff's application for objection proceedings, the remedy available to the plaintiff is to file the suit in the court to establish his right to the suit premises pursuant to Order XXI Rule 62 of the CPC. He cited in his submission the case of **Omoke Oloo V. Werema Magira**, [1983] TLR 144 to support his argument. He submitted that, upon dismissal of the objection proceedings the aggrieved party is not entitled to file either appeal or revision to the appellate court rather is entitled to file a fresh suit in the court to establish the right is claiming to the property.

He submitted that, there is nowhere in the application determined by this court the court declared the first defendant is the lawful owner of the suit premises. He stated the case of **Tanzania Telecommunication Co. Ltd** (supra) cited by the counsel for the first defendant in his submission is distinguishable from the case at hand. He submitted the party in the said case, initiated appeal and at the same time moved the Court of Appeal to exercise its revisionary powers *suo moto*. At the end he invited the court to hold the court is not *functus officio* to entertain the present suit.

As for the second point of preliminary objection which states the plaintiff has no locus standi to institute the present suit in the court the counsel for the plaintiff argued that, locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with.

To support his argument, he referred the court to the case of **Lujuna Shubi Ballonzi Senior V. Registered of Chama cha Mapinduzi**, [1996] TLR 204. He argued that, as the plaintiff bought the suit premises from the late Getrude Pangalile Rwakatare, then he acquired interest to the suit premises. He argued the plaintiff has ownership right to the suit premises and bolstered his argument with the case of **Katibu Mkuu Amani Fresh Club** (supra). He submitted that, the provisions of the law

cited in the application and specifically Order XXI Rule 57 (1) of the CPC governs attachment of any property in execution of a decree and all other aspects. He stated eviction of the objector from the suit property is covered under the cited provision of the law.

He went on arguing that, the issue as to whether the plaintiff has a locus standi to file the suit at hand in the court is a question of evidence which need proof from the plaintiff to prove he has a right to the suit premises. He stated that, such a proof can only be done during trial of a case and not at this pleading stage. He argued this is not a pure point of law and referred the court to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1966] EA 696 where the meaning of the term preliminary objection was stated. He submitted that, the case of **Dorice Keneth Rwakatare** (supra) cited by the counsel for the first defendant is distinguishable from the case at hand. He stated in the cited case the applicant sought to protect her alleged interest on the suit property on the sole ground that she was not made a party to the decree which was being executed and not the property was not liable for attachment.

As for the third and fourth points of preliminary objection the counsel for the plaintiff argued that, the plaintiff's suit is not res judicata because as argued in the first point of preliminary objection the reliefs sought in

the application are different from the reliefs sought in the present suit. He argued that, decision on an objection proceeding cannot rendered a subsequent suit on the same dispute *res judicata*. He argued the case of **Odhiambo** and that of **Siemens** cited by the counsel for the first defendant are irrelevant and distinguishable from the present suit and shows how they are distinguishable from the present suit. In conclusion he prayed the points of preliminary objections raised by the counsel for the first defendant be overruled with costs.

In rejoinder the counsel for the first defendant made a very long submission to elucidate what he argued in his submission in chief that, the court is *functus officio* to entertain the suit filed in this court by the plaintiff. He argued that, as the court decided in the objection proceeding filed in this court by the plaintiff that the first defendant is the lawful owner of the suit premises then the court is *functus officio* to entertain the question of ownership of the land in dispute filed in the court by the plaintiff.

He went on insisting that, the plaintiff has no *locus standi* to file the present suit in this court because the issue of ownership of the suit premises is seeking to be determined by this court in his favour has already been decided by the court in the objection proceeding, he filed in this court. It is because of the same line of argument the counsel for the

first defendant argued that, the suit is res judicata thus the court has no jurisdiction to entertain it. Finally, he prays the court to uphold all points of preliminary objections he has raised and dismiss the entire suit with costs.

The court has carefully considered the rival arguments fronted in the submissions filed in this court by the counsel for the parties in respect of the four points of preliminary objections raised in the instant suit by the counsel for the first defendant. The court has found the main issue to determine here is whether the raised points of preliminary objections worth to be uphold as prayed by the counsel for the first defendant. In determining the merit of the raised points of preliminary objections the court will deal with one point after another as argued by the counsel for the parties.

Starting with the first point of preliminary objection the court has found the counsel for the first defendant has based his submission on the argument that, as the issue of ownership of the suit premises the plaintiff is seeking to be determined by this court was decided by the court in the objection proceeding filed in this court by the plaintiff, then the court is *functus officio* to entertain the present suit. The court has found the question to determine her is whether after determination of the objection proceeding filed in the court by the plaintiff the plaintiff cannot institute a

fresh suit in the court to claim for his right of ownership, he asserts he has in the suit premises.

As the counsel for the first defendant is arguing the court is *functus officio* and the counsel for the plaintiff is arguing the court is not *functus officio* it is proper to have a look on what is the meaning of the phrase *functus officio*. The term *functus officio* is a Latin phrase which is defined in the **Black's Laws Dictionary**, 8th Edition at page 696 to mean: -

"Having performed his or her office, an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

That being the meaning of the term *functus officio* the issue to determine here is whether after the court decided the objection proceeding filed in the court by the plaintiff and found he had failed to establish his claims, then the court is *functus officio* to entertain the present suit on the ground that the reliefs is claiming in the present suit have already been conclusively determined by this court in the objection proceeding.

The court has failed to agree with the counsel for the first defendant that the court is *functus officio* to entertain the suit at hand on a ground that the reliefs the plaintiff is seeking from this court have already been conclusively determined in the objection proceedings decided by this court

in the application filed in this court by the plaintiff which is mentioned at the outset of this ruling. The court has come to the above stated finding after seeing that, as rightly argued by the counsel for the plaintiff the reliefs the plaintiff was seeking in the objection proceedings which was dismissed by the court are not similar to the reliefs is claiming in the present suit.

The court has come to the stated finding after seeing that, the prayer of the plaintiff in the objection proceedings was for the court to investigate his claim of ownership to the suit premises pursuant to Rule 57 of Order XXI of the CPC and after investigation to abstain from evicting him and his tenants from the suit premises. In the suit at hand the plaintiff is praying the court to declare him is a legal owner of the suit premises and to declare the first defendant has no claimable interest to the suit premises.

The court has found that, as rightly argued by the counsel for the first defendant the claim of the plaintiff in the objection proceedings was simply to urge the court to investigate his claim to the suit premises to see if he has any interest to the suit premises as stated in the case of **Katibu Mkuu Amani Fresh Club** (supra) and not to declare him is the owner of the suit premises which is his main prayer in the present suit. The court has been of the view that, although it is true that the plaintiff

adduced evidence through affidavit to establish the right, he is claiming in the suit premises and the court found he has failed to establish he has legal title over the suit premises but that is not a sufficient ground to make the court to be *functus officio* to entertain the present suit.

The court has found what was done by the plaintiff in adducing his evidence by way of affidavit was to comply with the requirement of the law provided under Rule 58 of Order XXI of the CPC which requires a claimant or objector to adduce evidence to establish his interest over the suit premises. The court has also found that, what was done by the court in dismissing the application of the plaintiff is what is provided under Rules 57 and 60 of Order XXI of the CPC which states where the court is satisfied the claimant or objector has failed to establish his claim or objection in an objection proceeding the court is required to disallow the claim or objection.

The court has considered the position of the law stated in the case of **Tanzania Telecommunication Co. Ltd & Three Others** (supra) cited by the counsel for the first defendant but find as rightly argued by the counsel for the plaintiff the cited case is distinguishable from the present suit. The court has come to the stated finding after seeing the said case was not dealing with the suit instituted in the court after the objection proceedings being disallowed. As rightly argued by the counsel

for the plaintiff It was dealing with the application for revision of the proceedings of the High Court which was filed in the Court of Appeal after the previous similar application for revision being dismissed.

As what the plaintiff was seeking in the objection proceedings was investigation of his claim for the purpose of raising an eviction order issued by the court if he would have been found he has a lawful interest over the suit premises and in the present suit the plaintiff is praying the court to declare him the legal owner of the suit premises the court has found it is not *functus officio* to entertain the present suit. The court has been of the view that, it is not right to say as argued by the counsel for the first defendant that the plaintiff is appealing or seeking for revision of the decision of this court made in the objection proceedings filed in the court by the plaintiff. The court has found the plaintiff is doing what is provided under Rule 62 of Order XXI of the CPC which states as follows:-

*"Where a claim or an objection is preferred, **the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.**" [Emphasis added]*

From the wording of the above quoted provision of the law it is crystal clear that a party against whom an order in an objection proceeding is

made may institute a suit in the court to establish the right which he is claiming to the property in dispute. The stated view of this court is getting support from the case of **Rajab Rajab Maringo V. Zaina Said Kiboga**, Land Appeal No. 203 of 2020, HC Land Division at DSM (unreported) where it was stated inter alia that: -

"Where a claim or an objection is preferred, the party against whom an order is made has no right of appeal. He has a right of instituting a suit to establish the right which he claims to the property in dispute as provided under Order XXI Rule 62 of the CPC."

From the wording of the above cited case, it is apparently clear that it is not true that the plaintiff cannot rely on the provision of Order XXI Rule 62 of the CPC to institute the fresh suit in the court to claim for his right or interest over the suit premises as argued by the counsel for the first defendant as is allowed by the cited provision of the law to do so. It is because of the above stated reason the court has found the first point of preliminary objection raised by the counsel for the first defendant that the court is *functus officio* to entertain the plaintiff's claims in the present suit is devoid of merit and it cannot be upheld.

Coming to the second point of preliminary objection the counsel for the first defendant states the plaintiff has no locus standi to institute the suit at hand in the court. The counsel for the first defendant argues that,

as the plaintiff was challenging an eviction order issued against him and his tenants in the course of execution of the decree of the court and there was no order of attachment issued by the court against the suit premises, then the plaintiff has no locus standi to institute the instant suit in the court.

The counsel for the first defendant argues that, the plaintiff was not required to lodge the objection proceedings he lodged in the court under Rule 57 of Order XXI of the CPC as the order issued by the court was not an order to attach the suit premises but an order to evict the plaintiff and his tenants from the suit premises. He submitted that the plaintiff has no locus standi to institute the suit he has instituted in the court under Rule 62 of Order XXI of the CPC. The court has found as stated in the case of **Lujuna Shubi Ballonzi Seniour** (supra) cited in the submission of the counsel for the plaintiff locus standi is governed by a common law.

It states a person bringing a matter to a court of law should be able to show that he has a right or interest which has been breached or infringed. That being what a person bringing a matter to the court is required to show the court has found as rightly argued by the counsel for the plaintiff this point cannot properly be determined without requiring evidence from the parties to establish whether the plaintiff has right or interest which has been breached or infringed. If there is such a

requirement, then it is crystal clear that, as stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd** (Supra), this point was not supposed to be raised at this stage of the matter as a point of preliminary objection.

Notwithstanding what the court has stated hereinabove it has also found proper to have a look on what is provided under the provisions of the law upon which the objection proceedings filed in the court by the plaintiff was made. The court has found the objection proceedings was made under Order XXI Rules 57, 58 and 59 together with section 95 of the CPC. Rule 57 (1) of Order XXI of the CPC states as follows: -

"Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit."

The court has found the wording of the above cited provision of the law and as provided in the marginal note of the quoted provision of the law it deals with claim or objection arising from attachment of a property attached in execution of a decree of a court on ground that such property is not liable to such attachment. Since the order the plaintiff was challenging in the objection proceedings, he filed in the court was not an

order for attachment of the suit premises but an order for eviction of the plaintiff and his tenants from the suit premises the question to determine here is whether the plaintiff has a locus standi to institute the present suit in the court.

The court has found as stated earlier in this ruling the claim of the plaintiff in the present suit is to be declared is the legal owner of the suit premises as he purchased the same from the late Getrude Pangalile Rwakatare. It is not in dispute that the stated claim was not considered in the suit which gave rise to the decree which was being executed in Execution No. 72 of 2019 as he was not a party in the stated suit. As the said claim was not considered in the stated suit it is the view of this court the plaintiff has a locus standi to institute the suit in the court to claim for the alleged right. The court has found that, although it is true that the objection proceedings filed in the court by the plaintiff was dismissed by the court but still the plaintiff has a locus standi to institute the suit in the court to claim for the right is alleging he has in the suit premises.

The court has come to the above stated finding after seeing it was stated in the case of **Omoke Oloo** (supra) that, Order XXI Rules 57, 58, 59, 60 and 61 of the CPC do not provide that the only way open to a party objecting to an attachment of a property in execution of a decree is through objection proceedings. The court has considered the argument

by the counsel for the first defendant that the above referred case is not relevant to the present suit because the issue of ownership of the plaintiff to the suit premises was determined by the court in the objection proceedings he filed in the court.

The court has found as rightly argued by the counsel for the plaintiff that, as the claim of the plaintiff in the objection proceedings was not to be declared is the legal owner of the suit property it cannot be said he has no locus standi to institute the present suit in the court. To the contrary the court is of the view that a third party like the plaintiff in the present suit whose claim or objection to the execution of a decree of a court in respect of a certain property has been denied he can institute in a court a fresh suit to establish his right to the property affected by execution of a decree as done by the plaintiff in the present suit.

The court has gone through the case of **Dorice Keneth Rekwatare** (supra) and specifically the excerpt quoted in the submission of the counsel for the first defendant but find the same is supporting the position of the law stated hereinabove. The court has found the position of the law stated in the cite case is very clear that, a person preferring an objection proceeding under the provision of the law cited hereinabove is required to establish he was not a party to the decree in execution and that the property in dispute is not liable to attachment in such execution.

It does not state a person whose objection proceedings has been dismissed he has no right of instituting a suit in the court to claim for his right or interest to the attached property.

To the view of this court and as stated in the case of **Rajab Rajab Maringo (supra)**, the plaintiff has a right of instituting the suit in the court to claim for his right to the attached property. The argument by the counsel for the first defendant that the plaintiff has no locus standi to institute the suit in the court under Rule 62 of Order XXI of the CPC as he was not entitled to initiate objection proceedings in the court under the provisions of the law cited in the objection proceedings filed in the court by the plaintiff has not been accepted by the court. In the strength of all what I have stated hereinabove the court has found the second point of preliminary objection raised by the counsel for the first defendant that the plaintiff has no locus standi to institute the suit in the court is devoid of merit.

Going to the third and fourth points of preliminary objection which were argued jointly by the counsel for the parties which states the present suit is res judicata as the issue of ownership of the plaintiff to the suit premises was determined in the objection proceedings the court is in agreement with the counsel for the parties that the stated principle of res judicata is provided under section 9 of the CPC. The stated principle of

the law has been considered by the court in number of cases. Some of those cases are **Peniel Lotta V. Gabriel Tanaki & others**, Civil Appeal No. 61 of 1999, CAT at Arusha and **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited & Two Others**, Civil Appeal No. 2008, CAT at Tanga (both 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."

From the conditions stated hereinabove the court has taken the fifth condition which states the matter in issue which was decided in the previous suit must be the same as the matter in the subsequent suit so as to render the subsequent suit res judicata. The court has found as stated earlier in this ruling the reliefs sought in the previous suit and what was decided in the previous suit is not the same reliefs which are being sought in the present suit. Although it is true that the subject matter which

the plaintiff is claiming to be declared is the lawful owner in the present suit is the same property, he was praying for its ownership to be investigated in the objection proceedings but that is not enough to render the present suit res judicata.

The above view of this court is being fortified by the position of the law stated in the case of **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."

Although it is true as argued by the counsel for the first defendant that the court dealt with the issue of plaintiff's ownership to the suit premises in the ruling determined the objection proceedings filed in the court by the plaintiff but the court has found that is not enough to render the present suit res judicata. The court has come to the stated view after seeing the position of the law as stated in the case of **Omoke Oloo** (supra) is very clear that, objection proceedings does not render the subsequent suit on the same subject matter res judicata. The position of

the law stated hereinabove caused the court to find the suit at hand is not res judicata.

The court has gone through the case of **Odhiambo Eduour** (supra) cited in the submission of the counsel for the first defendant to support his submission but find as rightly argued by the counsel for the plaintiff it is not applicable in the present suit as the court is not re opening what has been decided by this court. As for the case of **Siemens Limited (supra)**, the court has also found it is not relevant in the present suit as it was dealing with the revisional power of the Court of Appeal and not the power of this court.

In fine the court has found all the four points of preliminary objections raised by the counsel for the first defendant in the matter at hand are devoid of merit and are hereby overruled in their entirety and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 24nd day of October, 2022



I. Arufani

JUDGE

24/10/2022

Court:

Ruling delivered today 24nd day of October, 2022 in the presence of Mr. Francis Mgare, learned advocate for the plaintiff and in the absence of all defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

JUDGE

24/10/2022