

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

**LAND CASE NO. 175 OF 2021**

**ALEX MSAMA MWITA ..... PLAINTIFF**

**VERSUS**

**HUSSEIN MWINYI MPETA ..... 1<sup>ST</sup> DEFENDANT**

**MUGITUTI MATIKO trading as**

**ACTAS SECONDARY SCHOOL ..... 2<sup>ND</sup> DEFENDANT**

**WILLIAMSONS GARMENTS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of Last Order: 10/3/2022*

*Date of Ruling: 06/4/2022*

**A. MSAFIRI, J**

The 3<sup>rd</sup> defendant in this case, while filing their Written Statement of Defence, which was filed on 17/11/2021, also raised preliminary objections on points of law to wit;

- a) This suit cannot be maintained be maintained by this Court as it is res judicata against the decisions of this Court in Land Case No. 178 of 2008.
- b) The plaintiff has no cause of action against the 3<sup>rd</sup> defendant.
- c) The plaintiff has not categorically stated in the Plaint when the cause of action arose against the third defendant as mandatorily required by the law under Order VII Rule 1 (e) of the Civil Procedure Code, Cap 33 R.E. 2019 as amended by G.N. No. 760 of 2021.

*Alle.*

d) The verification clause in the Plaint is incurable (sic) defective for purportedly verifying paragraph 11 which does not feature or appear in the entire body of the Plaint, thus contravene the mandatory provisions of Order VI Rule 15 of the Civil Procedure Code, Cap 33 R.E 2019 as amended by G.N. No. 760 of 2021.

The 3<sup>rd</sup> defendant prayed for dismissal of the suit with costs.

The date was set for hearing of a preliminary objection and by mutual consent, the hearing was by way of written submissions. The submissions by the 3<sup>rd</sup> defendant in support of a preliminary objection was drawn and filed by K. M. Nyangarika, advocate for the 3<sup>rd</sup> defendant.

Submitting on the first point of objection, Mr. Nyangarika stated that this suit cannot be maintained by this Court as it is res judicata. That the plaintiff has pleaded and claimed in his Plaint under paragraphs 6 and 7 that he is the lawful owner of a property on Plot 29 Mbezi Industrial Area, Kinondoni Municipality Dar es Salaam and he purchased the same from the 1<sup>st</sup> defendant on 12/01/2008. That, he developed the property in dispute and erected a school in the name of ACTAS SECONDARY SCHOOL, and the plaintiff is conducting business thereon which is supervised by the 2<sup>nd</sup> defendant.

Mr. Nyangarika submitted further that in other words, the plaintiff pleads in the suit that himself and the 2<sup>nd</sup> defendant is one and the same thing. The counsel stated that, for the doctrine of res judicata to apply under section 9 of the Civil Procedure Code, Cap 33 R.E 2019, the plaintiff in

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the subsequent suit must be some way, a party to that subsequent suit as a judgment binds only parties and their privities.

That, the res judicata is attracted even where a party did not enter appearance or contest the issues. That, a person not a party to the previous litigation is equally bound where in the subsequent litigation he claims through a party to the previous litigation.

The counsel argued that, in the present case, the plaintiff and the 2<sup>nd</sup> defendant are one and the same, therefore, the plaintiff was properly sued in his trade name as the 2<sup>nd</sup> defendant and the judgment was rightly entered against him in the said trade name in Land Case No. 178 of 2008. That, the plaintiff should be bound by the said judgment and is not allowed to re-open the case. The counsel cited numerous authorities to support his point for which I am grateful and have taken into consideration while determining the preliminary objection.

In reply, on the first point of preliminary objection, the counsel for the plaintiff Mr. Kusalika first referred this Court to the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (1969) EA 696. He stated that the 1<sup>st</sup> point of preliminary objection has been misplaced as it does not qualify to the quality of the preliminary objection as per the cited case. That, the 3<sup>rd</sup> defendant is demonstrating by visiting evidence on annexures which at this juncture is premature.

Mr. Kusalika went on to submit in opposition of the 1<sup>st</sup> point of objection that, in the reliefs sought, the plaintiff is praying for nullification of proceedings of Land Case No. 178 of 2008 which 2<sup>nd</sup> defendant was

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alongside with 3<sup>rd</sup> defendant. That, the judgment was obtained fraudulently between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the said case.

He argued that, the current matter is not res judicata basing on the reliefs sought, and that in order for the doctrine to be invoked, the conditions and ingredients must be met as stated in the provisions of Section 9 of the Civil Procedure Code.

He said further that, the plaintiff was not involved in Land Case No. 178 of 2008 which was between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and even the 1<sup>st</sup> defendant was not a party. That, the allegation in the current matter are different from Land Case No. 178 of 2008 and the plaintiff in this case is praying for nullification of the same. He also cited numerous authorities to buttress his submission, which have been of great assistance to the Court. He prayed for this 1<sup>st</sup> point of objection to be overruled with costs.

In rejoinder, on the 1<sup>st</sup> point of preliminary objection, the 3<sup>rd</sup> defendant reiterated his main submissions.

In determining the first limb of objection, the issue is whether the same has merit. The doctrine of res judicata has been laid down under the provisions of section 9 of the civil Procedure Code. It is provided 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* *Aelle.*

*competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided and has been heard and finally decided by such court”.*

In the case of **Peniel Lotia vs. Gabriel Tanaki & Others** [2003] TLR 312, the Court of Appeal set five conditions, which when co-existent, will bar a subsequent suit. The conditions were set as follows;

- 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.*
- v). The matter issue must have been heard and finally decided in the former suit.*

Basing on the above principle, is the present case re judicata before the Court?

It appears that, previous to this case at hand, the Land Case No. 178 of 2008 was instituted in this Court whereby the plaintiff was Williamson Garments Ltd (who is now 3<sup>rd</sup> defendant) has sued Mugituti Matiko t/a ACTAS Secondary School (now the 2<sup>nd</sup> defendant). The then plaintiff was praying for the reliefs among others, for an order for recovery of

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the land, that is to say Plot No. 29 Mbezi Industrial Area, Kinondoni, Dar es Salaam.

In the present matter, the plaintiff Alex Msama claims for a declaration that he is the rightful owner of land situated at Plot No. 29 Mbezi Industrial Area Kinonsoni Municipality.

In this, it is my view that the subject matter in Land Case No. 178 of 2008 i.e. a land located at Plot No. 29 Mbezi Industrial area Kinondoni, is one and the same subject matter in this case i.e. Land Case No. 175 of 2021. Therefore the first condition as set in the case of **Peniel Lotia**(supra) is met.

On the second condition, as observed, the parties in Land Case No. 178 of 2008 are now the 3<sup>rd</sup> defendant and the 2<sup>nd</sup> defendant in the present case. I have observed the submissions by the counsel for the 3<sup>rd</sup> defendant that, the plaintiff and the 2<sup>nd</sup> defendant is one and the same. That, the plaintiff in his Complaint has claimed that he is running a school in the disputed land which is known as ACTAS SECONDARY SCHOOL which is being supervised by the second defendant. The second defendant appears in the Complaint as MUGITITU MATIKO trading as ACTAS SECONDARY SCHOOL.

In his Complaint, the plaintiff claims that he was unaware of the existence of Land Case No. 178 of 2008 as the 2<sup>nd</sup> defendant did not inform him. In the circumstances, it is my view that in the former suit i.e. Land Case No. 178 of 2008 parties are the same to this current case. I say so for the reason that although the former suit was between the 2<sup>nd</sup> and 3<sup>rd</sup>

*Aelle.*



defendants, I am of the view that the now plaintiff by privities, was a party to the former suit through the 2<sup>nd</sup> defendant who plaintiff claims is a supervisor of his business.

In the **Peniel Lotia's case**, it was held that, a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest therein.

It is clear that the plaintiff and the 2<sup>nd</sup> defendant have a common interest in the suit property. The plaintiff has claimed that he has been conducting business of running a school known as Actas Secondary School which he has erected on the suit property. The 2<sup>nd</sup> defendant is named to be trading as ACTAS SECONDARY SCHOOL. The plaintiff stated that the 2<sup>nd</sup> defendant is supervising the said school. In that, I am of the opinion that, the plaintiff cannot dissociate himself from Land Case No. 178 of 2008 but he is deemed to be a party under a ground of privity. I find that the conditions number two and three have been met.

The fourth condition is about the competency of the court which tried the former suit. Land Case No. 178 was filed in this Court and was heard whereby the parties then filed for a settlement decree. By order of this court, a judgment and decree was entered as per the terms and conditions contained in the deed of settlement. Therefore, the court which heard and entered a decree was a competent court and had jurisdiction to try the matter.

On the fifth condition, I am of the view that the same also has been met as I have observed herein above, the Land Case No. 178 was filed before this Court, parties were heard and agreed on settlement where

*Actas.*

this Court finally entered a judgment and decree on the same. Therefore, although the matter did not went for full trial, the matter was heard and finally, decided by a competent court.

The counsel for there plaintiff has prayed for this Court to overrule this point of objection for the reasons that it does not qualify to a quality of a preliminary objection as per **Mukisa Biscuits Case**.

In the case of **Mukisa Biscuits (supra)**, it was observed that,

*"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may disposed of the suit ....."*

I find that the issue of whether the matter before the Court is res judicata or not is a pure point of law. In order to ascertain whether the matter is re judicata, the Court will have to go through the pleadings to satisfy itself whether the matter has been properly filed before the Court. This action does not water down the preliminary objection raised.

Basing on the above analysis, I find that the first ground of preliminary objection has merit and I sustain it. Since this alone is capable of disposing this case, I find it unnecessary and quite academically to determine on the rest of the grounds of preliminary objection raised by the 3<sup>rd</sup> defendant.

The case is hereby dismissed as this Court has no jurisdiction to entertain this matter. The plaintiff shall bear the costs of the suit.

*Aelle*



It is so ordered.

Dated at Dar es Salaam this 6<sup>th</sup> day of April, 2022.



A handwritten signature in blue ink, appearing to read "A. Msafiri". The signature is written in a cursive style and is positioned above a horizontal line.

**A. MSAFIRI.**

**JUDGE**