

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 168 OF 2022

QUALITY GROUP LIMITED..... APPLICANT

VERSUS

**EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT t/a
TRADE AND DEVELOPMENT BANK (TDB) 1ST RESPONDENT**

**DAVID T. TARIMO AND NELSON E. MSUYA (Joint Receiver Managers
of the 1st Respondent) 2ND RESPONDENT**

KNIGHT FRANK (T) LIMITED 3RD RESPONDENT

RULING

Date of Last Order: 17.05.2022

Date of Ruling: 25.05.2022

A.Z.MGEYEKWA, J

The applicant has filed a Chamber Summons accompanied by an affidavit. The application was brought under section 95, section 68 (c) and Order XXXVII Rule 1 (a) and Rule 4 of the Civil Procedure Code Cap.33 [R.E 2019]. The application was supported by an affidavit deponed by Mr. Eliya Rioba, the learned Advocate for the applicant. On their sides, the

respondents resisted the application and have demonstrated his resistance by filing a counter-affidavit deponed by Mr. Pladius Mwombeki, learned counsel for the respondents.

The applicant is seeking an order of injunction to restrain the respondents, by themselves, their agents, assigned, and/or servant from disposing and selling the applicant's property located under Plot No. 25 Pugu Road, Dar es Salaam registered under Certificate of Title No. 186081/42 LO 23378 pending hearing and determination of the main suit which is currently pending before this Honourable Court.

When the matter came up for orders on 17th May, 2022, the applicant had the legal service of Mr. Eliya Rioba, learned counsel, and the respondent had the legal service of Mr. Pladius Mwombeki, learned Advocate. Before the hearing of the application, the application encountered preliminary objections from the respondent's counsel. He raised three objections as follows: -

1. *The application by Applicant is res judicata.*
2. *This Court id fanctus officio to determine this application.*
3. *The application is an abuse of the Court process and therefore frivolous and vexatious.*

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the appeal. That

is the practice of the Court founded upon prudence which we could not overlook.

Submitting in support of the first limb of the objection, Mr. Mwamboki submitted that the instant application is res judicata. He referred this court to section 9 of the Civil Procedure Code, Cap.33 which provides five conditions, and the same are explained in the case of **Badugu Gining Co. Ltd v CRDB Bank PLC & 2 Others**, Civil Appeal No. 265 of 2019. He stated that the matter in issue must be directly the same, same parties, parties have litigated in the same title in the formal suit and the court must be competent to try the subsequent suit. He valiantly submitted that the matter in issue must have been finally decided in the formal suit. It was his submission that the applicant's claims have been decided twice in two different cases. He added that the subject matter was already been decided and the parties were Eastern and Southern Africa Trade Bank v Quality Group Ltd and the judgment was delivered on 1st August, 2019.

The learned counsel for the respondent went on to submit that the respondent has raised their counter affidavit. Supporting his submission he referred this court to annexure 'SRB2'. He added that the said application contains the same prayers as in the instant chamber summons. He added that the prayers were stated in Misc. Land Application No. 44 of 2019, where Quality Center Ltd & Quality Group Ltd

v Price Water Koppers, Eastern, and Southern Africa Trade Bank and Development Bank, David Tarimo & Nelson Msuya. He went on to submit that the gist of the application was the subject matter in the instant application. Fortifying his submission he referred this court to annexure 'SRP2' and the application was determined on merit.

As to the 1st item, the learned counsel for the respondent argued that the court in determining the Misc. Application No. 44 of 2019 and Commercial Case were competent courts and their decisions are binding.

On the 3rd item, Mr. Mwombeki argued that in Application No.44 the applicant filed the application with her sister company, and the 2nd respondent who is the Bank was always been sued by her agency. He added that the parties are all agencies of the 1st respondent in the matter at hand and the court made a final analysis. The learned counsel for the respondent continued to argue that the applicant also filed a Land Case No.33 of 2019 whereas the parties are the same as in Application No. 44 and the applicant abandoned his case thus the same was dismissed. Supporting his argumentation he referred this court to annexure SBR2.

On the 4th item, Mr. Mwombeki argued that there is another recent Ruling with respect to Misc. Land Application No. 379 of 2021 parties are Quality Group Ltd v Night Frank Tanzania Ltd whereas in the said application the

applicant was seeking orders restricting the respondent from advertising sale on the same property in dispute before this court. He added that the application was dismissed. To substantiate his submission he referred this court to annexure 'SRB5'.

Concerning the second limb of the objection, Mr. Mwombeki contended that once a matter is finalized by a competent court with jurisdiction, a court of the same jurisdiction cannot proceed to determine the matter. He reiterated his submission made on the first limb of objection. Insisting, he claimed that the subject matter in dispute was decided by the High Court-Commercial Court in Commercial Case No. 174 of 2019 which gave possession to the 1st respondent through its agency the 2nd respondent. It was his submission that the applicant was required to file an appeal instead of filing fresh applications.

On the 3rd objection, the learned counsel for the respondent argued that the applicant has filed a frivolous application to stop the 1st respondent to exercise their rights as mortgagees while they are aware that an application with the same prayers was determined and finalized. It was his humble submission that the application at hand plans to abuse the court process since they are aware that the matter regarding the same plot was finalized. To buttress his contention he cited the case of **Fikiri**

Liganga & Charles J. Cuthbert v Attorney General & Tanganyika Law Society, Misc. Cause No. 5 of 2017. He lamented at whenever the respondent is trying to develop the suit land the applicant runs to the court to file an application to destruct the buyer.

On the strength of the above, the learned counsel for the respondent insisted that this application is abusing the court process.

In response, Mr. Rioba for the applicant forcefully submitted that this doctrine of res judicata as a general rule does not apply in the instant application because the same arises from an interlocutory order. He was certain that the said order did not finalize the matter. He claimed that an application for a temporary injunction can be dismissed on ground of being res judicata if there was a previous application that was heard on merit and dismissed for want of merit. Mr. Rioba went on to argue that in case an application for temporary injunction is brought on facts that did not exist in the previous application then the general principle in interlocutory order comes into force. Fortifying his submission he cited the case of **FINCA Tanzania v Leonard Andrew Korange**, Misc. Application No. 25 of 2021. The learned counsel went on to submit that the matters in Commercial Case No. 174 of 2019, Misc. Application No.44 of 2019, Case No. 33 of 2019 as well as Misc. Application No. 379 of 2021 are completely different from the matter at hand. It was his view that the applicant is challenging

the illegality of the ongoing sale contrary and not to overturn the decisions of any court on possession of the property. To buttress his submission he referred this court to the point of facts mentioned in paragraphs 10 & 11 of the applicant's affidavit. Mr. Rioba admitted that in Commercial Case No. 174 of 2019, the High Court delivered possession of the property to the 2nd respondent in the present application.

He went on to submit that in Misc. Application No.44 of 2019 an application for a temporary injunction, the prayer for maintaining *status quo* was rejected. Supporting his submission he referred this court to annexure SRB2. He added that the Commercial Case No. 33 of 2019 was dismissed in the preliminary stage for non-appearance of the Plaintiff and the Land Application No. 379 of 2021 was dismissed since the elements of granting a temporary injunction were not sufficient. The learned counsel for the applicant went on to submit that interlocutory orders are capable of being uttered or vary but only on proof of new facts or situations which have emerged subsequently. Fortifying his submission he cited the case of **Petrolux Service Station Ltd v NMB Bani PLC & Adil Auction Mart Ltd**, Misc. Land Application No. 86 of 2020.

On the second limb of the objection, the learned counsel of the applicant contended that the general rule of *functus officio* means once a matter is

finalized by a court with jurisdiction, then a similar court cannot overturn the decision. He stated that in the present case the applicant is seeking court intervention to restrict the respondents' illegal conduct to dispose of the applicant's property. It was his view that Mr. Mwombeki's submission is misleading, he urged this court to disregard this limb of objection.

Arguing for the third limb of the objection, the learned counsel for the applicant claimed that this ground requires tendering of evidence thus the same is not a fit point of objection. Supporting his submission he referred this court to the case of **JV Tangerm Construction Company Ltd v Tanzania Ports Authority & Another**, Commercial Case No. 117 of 2017. The learned counsel for the applicant urged this court to dismiss the application with costs for being unfounded and baseless.

In his rejoinder, the learned counsel for the respondents reiterated his submission in chief. Stressing on the point of *res judicata* he referred this court to the annexures filed by the applicant and the prayers made thereto. He insisted that this application was determined to its finality by a competent court. He stressed that this court is *functus officio* and the application is an abuse of the court process.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserve. I should state at the outset that the main issue for determination is *whether the*

Misc. Land Application No. 168 of 2022 is res judicata.

As rightly argued by the learned counsel for the respondent the doctrine of res judicata is provided in section 9 of the Civil Procedure Code Cap.33 [R.E 2002]. For ease of reference, I reproduce the same hereunder:-

" 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 under whom they or any of them claim to litigate 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 object of *res judicata* is to bar multiplicity of suits and guarantee finality to litigation. It makes a conclusive a final judgment between the same parties on the same issue by a Court of competent jurisdiction in the subject matter of the suit. In the case of **Peniel Lotta v Gabriel Tanaki & Another**, Civil Appeal No. 61 of 1999 the Court of Appeal set out five conditions of *res judicata* arising from the scheme of section 9 which when coexistent, bars 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 previous suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally settled; in the former suit.

Applying the above principles of *res judicata* in the matter at hand, I have opted to start with the second principle whether the parties in the former suit and applications were similar to those in the instant case. The records reveal that in Commercial Case No.174 of 2018. Eastern and Southern Africa Trade and Development Bank was the Plaintiff and Quality Group Limited was the Defendant. In Misc. Land Application No.44 of 2019, the parties were Quality Group Limited v Price Water House Coopers, Eastern and Southern Africa Trade and Development Bank t/a Trade and Development Bank, David T. Tarimo, and Nelson E. Msuya. In the instant application, the parties are Quality Group Limited v Eastern and Southern Africa Trade and Development Bank t/a Trade and Development Bank, David T. Tarimo, and Nelson E. Msuya (Joint Receiver/ Managers of the 1st respondent), and Knight Frank (T) Ltd. In my considered view, the parties who were involved in all cases are the same. In my view, the constructive *res judicata* is applicable in the matter at hand. The applicant in the present application has added two respondents, however, reading

the records it is revealed that David T. Tarimo and Nelson E. Msuya were the Receiver/ Managers in Commercial Case No. 174 of 2018.

As to the first principle, whether the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. The record reveals that the subject matter in all proceedings are the same. In Commercial Case No.174 of 2018, the court ordered Quality Group Limited to handover the mortgaged property located on Plot No. 25 Land Office No. 23376, Pugu Road Industrial area at DSM under certificate of occupancy No. 186081/42 to receivers/managers appointed by the Plaintiff namely David T. Tarimo and Nelson E. Msuya. In the matter at hand, the applicant is alleging that he is the lawful owner of a property located under Plot No. 25 Pugu Road Industrial area at DSM under certificate of occupancy No. 186081/42. The applicant is claiming that the respondents are on the move to illegally dispose of the applicant of the suit property. In Misc. Land Application No. 44 of 2019, the subject matter is the same property. The same subject matter is involved in the matter at hand.

In Misc. Land Application No.44 of 2019, the matter was related to interim injunctive order. Hon. Kulita, J found himself *functus officio* to entertain the application after noting that the High Court, Commercial Division has

already made a decision on the same property, therefore, the prayer to maintain *status quo* was rejected. Therefore, I have noted that the parties have been litigated under the same title in the former suit.

As to the fourth principle, the Court which decided the previous suit must have been competent to try the subsequent suit; the High Court, Commercial Division was a competent court that decided the Commercial Case No. 174 of 2018.

With respect to the fifth principle, the matter in issue must have been heard and finally settled. The record reveals that the matter in Commercial Case No. 174 of 2018, the matter was finally determined whereas the court ordered Quality Group Limited to handover the mortgaged property located on Plot No. 25 Land Office No. 23376, Pugu Road Industrial area at DSM under certificate of occupancy No. 186081/42 to receivers/managers appointed by the Plaintiff namely David T. Tarimo and Nelson E. Msuya. Therefore, in my view adding the 2nd and Knight Frank (T) Limited in the matter at hand does not validate the application at hand. I am not in accord with the learned counsel for the applicant that the matter in Commercial Case No. 174 of 2019 and Misc. Land Application No. 44 of 2019 was quite different from the matter at hand since the subject

matter was the same suited landed property situated in Plot No. 25 Pugu Road Industrial area at DSM.

For the sake of clarity, the cited case of **FINCA** (supra) is distinguishable, in **FINCA's** case the discussion was based on a stay of execution and it was noted that the principle of *res judicata* does not apply in interlocutory orders which includes an application for stay of execution. While in the matter at hand the same subject matter was determined in its finality in a Commercial Case No. 174 of 2019 the suit property was handed over to the receivers/ managers of the 1st respondent. In my respectful view, I am in accord with Mr. Mwombeki's submission that this court is *functus officio* to determine a subject matter which was already been decided by a competent court with jurisdiction to determine the matter.


The learned counsel for the applicant is fully aware that the application at hand is meant to challenge the suit landed property which was decreed by the High Court – Commercial Division in Commercial Case No. 174 of 2018 but the applicant decided to craftily elude the 1st respondent to conceal the connection between the current application and the former Commercial suit. His futile attempt to challenge the decree is not correct the applicant was required to follow appropriate avenues to challenge the court's decree.

Having said so, I fully subscribe to the learned counsel for the respondents this application is *res judicata* and this court is *functus officio* to determine the matter at hand. I also sustain the last objection that the act of the learned counsel for the applicant to move this court to grant his application which is based on the same property which was already been determined and decreed is an abuse of the court process. Guided by the above principles I find merit in the respondents' counsel's preliminary objections and I hereby dismiss the application with costs.

Order accordingly.

DATED at Dar es Salaam this 25th May, 2022.




A.Z.MGEYEKWA

JUDGE

25.05.2022

Ruling delivered on 25th May, 2022 in the presence of Mr. Pladius Mweombeki, learned counsel for the Respondents.




A.Z.MGEYEKWA

JUDGE

25.06.2022