

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

LAND CASE NO. 40 OF 2021

ERNEST KIBARABARA MASHIKA MREMA.....1ST PLAINTIFF

ROSE MREMA.....2ND PLAINTIFF

VERSUS

JANETH ELLY TEMU.....1ST DEFENDANT

JONAS ERNEST MREMA.....2ND DEFENDANT

R U L I N G

Date of Last Order: 05.04.2022

Date of Ruling: 06.04.2022

T. N. MWENEGOHA, J.

The birth of this case, is a matrimonial dispute between the 1st and the 2nd defendants here in above named, vide Matrimonial Cause No.11 of 2015, before the District Court of Kinondoni. When the marriage between the two defendants came to an end by the decree of Kinondoni District Court issued on the 3rd of April 2017, it was ordered among others that, the landed properties named **House No. MZS/KLM/85** situated at Manzese Kilimani, **House No. UBU/NHC/010/91**, situated at Urafiki Ubungo and **House No. UBU/NHC/120** situated at Shekilango, all are matrimonial properties. Hence, they were subject to division by the parties, Janeth Elly Temu and Jonas Ernest Mrema.

Both parties were not satisfied with the decision of the trial court, hence appealed before the High Court Dar es Salaam District Registry. The 1st defendant was not happy with the decision of the District Court on the grounds among others that, the distribution was unfair as she was given only 30% of the share after valuation of the said properties while the remaining 70% was to go to the 2nd defendant. She also claimed that, the house located at Boko which was used by them as a matrimonial home was not included in the decision of the District Court.

On the other hand, the 2nd defendant in his cross appeal faulted the District Court for declaring the named landed properties to be matrimonial properties without regarding the fact that they are not. The case was registered as Consolidated Civil Appeal No. 98 of 2017 and 143 of 2017, preceded over by Hon. Mtungi J.

At the end, the 1st defendant's appeal, vide Civil Appeal No. 198 of 2017 was allowed, where all landed properties including their matrimonial home at Boko were declared to be matrimonial properties. For the three houses mentioned in the decision of the trial District Court of Kinondoni, the 1st defendant was given a 40% share after evaluation of the same and the 2nd defendant acquired 60%. In respect of the house at Boko, the court ordered that, the same be divided equally (50%) each. Either, the 2nd defendant's cross appeal was dismissed for lack of merits. When the decree was in its execution stage, the 1st and 2nd plaintiffs above appeared to object the same, claiming that, the landed properties in question belonged to them. Their objection failed; hence this case was filed.

The plaintiffs in the case are claiming among others, a declaration that, the four landed properties mentioned herein earlier belong to them. The act by the plaintiffs prompted a quick reaction by the 1st defendant who advanced three preliminary objections on point of law that; -

1. The suit is res judicata.
2. The court is functus officio
3. The plaint contains defective verification clause, contrary to Order VI Rule 15 (2) of the Civil Procedure Cap 33 R.E 2019.

The objections were argued orally. Both defendants appeared in person while the plaintiffs enjoyed the legal services of Advocate Mkwikwimi Robert, the 2nd defendant did not dispute the objections against this suit.

Arguing on the 1st objection, the 1st defendant maintained that, the instant case is res judicata owing to the decision by Mutungi J, over the same issue where he made a declaration that, the landed properties in question are matrimonial properties. She maintained further that, during the case before Hon. Mtungi J, the plaintiffs were privy as they gave the respondent a 2nd defendant herein a power of Attorney, hence this case should be dismissed.

The plaintiffs' counsel in reply of the 1st objection maintained that the case is not res judicata as per section 9 of the Civil Procedure Code, Cap 33 R.E 2019. The parties in this case are different from the parties in the previous case. He insisted that, the suit at hand has never been heard by any court, it is a new case capable of being determined by this court.

In rejoinder, the 1st defendant insisted that, in the previous case, the plaintiffs were being represented by their son, who is the 2nd defendant.

At this juncture, I find it necessary to determine merit or otherwise of this objection, before going into the 2nd and 3rd objections. The arguments by the 1st defendant in this objection is that, the plaintiffs were privy to the previous case before Hon. Mtungi, J by virtue of the power of attorney they gave the 2nd defendant to represent them in the said case. I went through the Judgment of Consolidated Civil Appeal No. 98 of 2017 and 143 of 2017, preceded over by Hon. Mtungi, J dated 25th October, 2018. At page 13, the last paragraph supports what the 1st defendant has argued in her submissions that the plaintiffs in the present case were privies to the previous case. In the said Judgment, it has been clearly stated that, the 1st plaintiff referred as Pastor Mrema gave an affidavit in lieu of oral testimony that the properties in question belong to him. This fact proves the participation of the 1st plaintiff in the previous case, hence making him a privy to the said case. He had a knowledge of the case and what was going on in the said case. That is where the provision of section of section 9 of the Civil Procedure Code, Cap 33 R. E. 2019 comes to play that;-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

Guided by the above provision of law and the reason given herein above, I am of the settled view that, the Land Case No. 40 of 2021 is a res judicata case. Therefore, it is the findings of this court that, the 1st preliminary objection by the 1st defendant has merit and it is sustained

accordingly, **see Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd. (1969) EA.** That being the case, I see it fit to end here as this objection alone is capable of disposing the entire suit to its finality without even discussing the remaining two objections.

In the event, the case is struck out with costs.




T. N. MWENEGOHA
JUDGE
06/04/2022