

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

LAND CASE NO. 226 OF 2021

YUSUPH MAKAME 1ST PLAINTIFF
OTTO LINGISED I MUHANGO..... 2ND PLAINTIFF
DEODATUS KAMUGISHA 3RD PLAINTIFF
MOHAMED I MWEMBE 4TH PLAINTIFF
YOHANA CHACHA MAHINDI 5TH PLAINTIFF
LOCUS PAUL 6TH PLAINTIFF
DISMUS KUWENAWENA 7TH PLAINTIFF

VERSUS

AL HUSHOOM INVESTMENT (T) LTD 1ST DEFENDANT
BOKO ESTATE (1979) LTD 2ND DEFENDANT

Date of last Order: 27/05/2022

Date of ruling: 30/05/2022

RULING

I. ARUFANI, J

This ruling is for the points of preliminary objection raised by the counsel for the first defendant in the application at hand which read as follows:-

- 1. The instant suit is barred in law for being res judicata contrary to section 9 of the Civil Procedure Code, Cap 33 R.E 2019.*
- 2. The suit is barred in law for want of the land valuation report.*
- 3. The plaint is defective for not complying with the requirement of Order VII Rule 1 (i) of the Civil Procedure Code, Cap 33 R.E 2019.*

The above listed points of preliminary objections were argued by way of written submission. While the applicants were represented in the matter by Mr. Vedastus S. Majura, learned advocate the first respondent was represented by Mr. Ramadhani Karume, learned advocate. The counsel for the first defendant prayed to abandon the third point of preliminary objection and argued the first and second points of preliminary objection.

He stated in relation to the first point of preliminary objection that, the present suit is res judicata against **Misc. Land Application No. 339 of 2021** and **Land Case No. 13 of 2018** filed in this court by the first defendant which both of them were determined to their finality by this court. He listed in his submission the elements of the plea of res judicata as set out under section 9 of the Civil Procedure Code, Cap 33 of 2019 which read as follows: -

- 1. The matter which is directly and substantially in issue in the present case must also have been directly and substantially in issue in a former case.*
- 2. The previous suit must have been finally and conclusively determined.*
- 3. The former suit and the latter suit must be shown to be between the same parties or between parties under whom they or any of them litigating under the same title.*

4. The previous suit was tried by a court of competent jurisdiction.

Starting with the first element of res judicata listed hereinabove the counsel for the first defendant stated that, the first defendant instituted Land Case No. 13 of 2018 in this court against Wilson Michael and Eight Others and the first defendant was declared lawful owner of all parcel of Land known as Boko Estate comprised under Certificate of Title No. 26470 situated at Boko area within Kinondoni District in Dar es Salaam Region. He stated that, after the first defendant being declared lawful owner of the mentioned parcel of land, they instituted application for execution No. 30 of 2021 in the court and on 21st September, 2021 the court issued an eviction order for all judgment debtors from the suit premises.

He stated further that, the said order of eviction was objected by the plaintiffs in the suit at hand through objection proceedings they filed in the court but their objection proceedings were dismissed by the court on 26th November, 2021 and the court reaffirmed the decision made in Land Case No. 13 of 2018. He submitted that, as the first defendant was declared lawful owner of the suit premises in all three matters mentioned hereinabove the present suit is res judicata to the mentioned cases.

He argued in relation to the second element of res judicata listed hereinabove that, it is their views that, the two previous matters namely

Land Case No. 13 of 2018 and Misc. Land Application No. 339 of 2021, finally and conclusively determined the question of ownership of the suit premises and the first defendant was declare lawful owner of the suit premises. As for the third element of res judicata listed above the counsel for the first defendant stated that, as the first defendant was a party to all three matters and the plaintiffs in the present suit were parties in the two matters out of the three matters, the third element of res judicata has also been met.

He argued in relation to the fourth element of res judicata that, as clearly stipulated under section 37 (1) of the Land Disputes Courts Act, Cap 216 R.E 2019, the High Court is vested with powers to entertain land cases whose value exceeds TZS 300,000,000/=. He stated that, the value of the suit premises indicated in the valuation report shows the court was well clothed with both territorial and pecuniary jurisdiction to try the matter hence the matter was finally and conclusively determined by the court with competent jurisdiction. To support his submission in relation to the first point of preliminary objection he referred the court to the cases of **Lotta V. Tanaki and Others** [2003] 2 EA 556 and **Onesmo Olengurumo V. Hon. Attorney General**, Misc. Civil Cause No. 36 of 2019 HC at DSM (unreported).

He argued in relation to the second point of preliminary objection that, the need for valuation report in instituting land cases is of essence. He stated that, Order VII Rule 1 (f) and (i) of the Civil Procedure Code provides for compulsory requirement that, plaint must contain facts showing that the court has jurisdiction and a statement of value of the subject matter for the purpose of ascertaining pecuniary jurisdiction of the court and fees required to be paid in court. He argued further that, as provided under section 37 (1) (a) of the Land Disputes Courts Act, the High Court has pecuniary jurisdiction for immovable properties which its value exceeds TZS 300,000,000/=.

He stated that, the question is how the court satisfy itself about the actual value of an immovable property. He referred the court to the case of **Sospeter Kahindi V. Mbeshi Mashini**, Civil Appeal No. 56 of 2017, CAT at Mwanza (unreported) where it was held the issue of jurisdiction raised cannot be determined without evidence on the value of the subject matter. He also referred the court to the case of **Acacia Gold Mine V. Augustino Nestory Sasi**, Land Appeal No. 89 of 2018, HC at Mwanza (unreported) where it was stated that, in determination of value of a subject matter of a suit for purpose of knowing pecuniary jurisdiction, the court or tribunal is required to rely on some scientific valuation report and not on what the applicant estimates in his or her application. At the end

he prays the court to base on the afore stated points of preliminary objection to dismiss the suit with costs.

In reply the counsel for the plaintiffs stated in relation to the first point of preliminary objection that, the first defendant instituted Land Case No. 13 of 2018 against the defendants who are not plaintiffs in the present case and the case was heard and determined ex parte. He stated that, after the first defendant procured the said ex parte judgment she filed in the court Execution Application No. 30 of 2021 upon which the plaintiffs herein were not parties and they had no knowledge of the dispute.

He stated further that, following the notice of eviction dated 22nd June, 2021 served to the village authorities which showed the eviction order was intended to be executed on the land of the plaintiffs in the present suit, the plaintiffs instituted objection proceedings in the court which was decided against them. He argued that, it is a general rule that a party against whom objection proceeding is made, may institute a suit in the court to establish right he or she has in respect of the property in dispute. He stated that, the stated position of the law is provided under section 62 of the Civil Procedure Code.

He referred the court to the case of **Amour Habib Salum V. Hussein V. Hussein Bafagi**, Civil Application No. 76 of 2010, CAT which

was cited by the High Court in the case of **Sembuli Alli Ngagiwe V. Mwezi Ramadhani**, Land Revision No. 1 of 2021 (unreported) where it was stated that, the course that is open for a person aggrieved by decision made in an objection proceeding is to file a suit in the court to establish the right he or she is claiming in the property in dispute. He submitted that, basing on the above stated position of the law the current suit before the court is correctly and properly filed in the court.

He argued in relation to section 9 of the Civil Procedure Code that, firstly, the doctrine of res judicata applies to suit and it does not apply in an application. He stated that, the submission by the counsel for the first defendant that the present suit is res judicata to Misc. Land Application No. 339 of 2021 is misconception of the meaning of section 9 of the Civil Procedure Code. Secondly, the counsel for the plaintiffs argued that, the plaintiffs in the present case were not parties in the original suit, Land Case No. 13 of 2018 which was heard and determined ex parte. He submitted that, the doctrine of res judicata cannot apply in a suit which was heard and determined ex parte.

Thirdly, the counsel for the plaintiffs stated that, the subject matter in the former suit and in the present suit is not the same completely. He stated that, while the plaintiffs' land in dispute is un-surveyed, the first defendant claims their land is surveyed. Therefore, it cannot be said the

subject matter is directly and substantially the same. He stated that, the case of **Onesmo Olengurumo** (supra) is distinguishable from the case at hand as it was about constitutionality of some sections in the Criminal Procedure Act which the court held it was a public matter while the matter at hand is purely a private one.

The counsel for the plaintiffs argued in relation to the second point of preliminary objection that, Order VII Rule 1 (f) and (i) of the Civil Procedure Code are quite very clear that there is no requirement of having a valuation report in filing a suit in the court from the cited provision of the law. He stated that, the need for having valuation report in filing a suit in the court is the defendant's own version and not the requirement of the law and should not be raised as a point of preliminary objection for the purpose of being determined by the court.

He referred the court to the case of **Mukisa Biscuit Manufacturing Company Limited V. West End Distributors Limited**, [1969] EA 696 where the meaning of what is preliminary objection was stated. He submitted that, from the meaning of preliminary objection stated in the above cited case the point of preliminary objection raised by the first defendant do not qualify to be called a point of preliminary objection. He based on the above stated submission to urge the court to dismiss both points of preliminary objection raised by the first defendant with costs.

The court has carefully considered the submission made to this court by the counsel for the parties in relation to the points of preliminary objection raised in the matter by the counsel for the first defendant. The court has found the issue to determine in this matter is whether the matter at hand is res judicata to the above-mentioned cases and whether the suit is barred in law for want of land valuation report. I will deal with the stated issues seriatim. Starting with the first point of preliminary objection which asks whether the present suit is res judicata the court has found that, as rightly argued by the counsel for the parties 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 that, the elements contained in the above cited provision of the law for the plea of res judicata to succeed are well stated under the cited provision of the law. However, some of the elements are the one cited in the submission of the counsel for the first defendant which

I have already listed earlier in this ruling. I will use the said elements to determine the first issue which has been derived from the first point of preliminary objection.

Starting with the first element the court has found the counsel for the first defendant has argued the issue in the present suit resembles the issues in Miscellaneous Land Application No. 339 of 2021 and Land Case No. 13 of 2018. The court has found the counsel for the first defendant stated the issue in the present suit is about ownership of the land comprised under Certificate of Title number 26470 which he argued was determined by the court in Land Case No. 13 of 2018 and the court declared the first defendant who was plaintiff therein is the lawful owner of the mentioned land.

The court has also found the issue in the current suit as can be derived from the plaint filed in this court by the parties is about ownership of the land located at Mwembetogwa area of Boko, Bunju Ward within Kinondoni District in Dar es Salaam Region which the plaintiffs in the present suit are claiming to be declared they are the lawful owner of the same. The court has considered the argument by the counsel for the plaintiffs that the subject matter in the former suit is completely different from the subject matter in the current suit as the disputed land in the

former suit is a surveyed land while in the current suit the land in dispute is un-surveyed but failed to see any merit in the said argument.

To the view of this court the issue in both suits is about ownership of the land located at Boko Area of Bunju Ward within Kinondoni District in Dar es Salaam Region. The court has been of the view that, the argument that the land in dispute in the former suit is different from the land in dispute in the current suit cannot make the issue in the former suit to be different from the issue in the present suit as the issue in both suits is about who is the lawful owner of the land in dispute. The issue as to whether the land in dispute in the former suit is surveyed and the land in the current suit is un-surveyed is the fact which cannot be ascertained before receiving evidence of the matter from the parties. Therefore, the court has found the first element of issue in dispute in the former suit and in the current suit is the same.

Coming to the second element of finality and conclusive determination of the previous suit the court has found that, although the counsel for the plaintiffs argued the former suit was heard and determined ex parte and the doctrine of res judicata cannot apply in a suit which was heard and determined ex parte but he did not support his argument with any law or authority. It is the view of this court that, no matter whether the matter was heard and determined inter parte or ex parte what is

required to be looked in this element is whether the court has exercised its judicial mind in the matter filed in the court and come to a decision on a matter before the court.

The issue of a matter decided ex parte to operate as a finally and conclusively determined matter for purpose of invoking a doctrine of res judicata was stated in the book by C. K. Takwani titled **Civil Procedure with Limitation Act, 1963**, Seventh Edition at page 109 that, a matter can be said to have been heard and finally decided notwithstanding that the former suit was disposed of ex parte. Since the matter was determined by issuing an ex parte judgment and there is no matter pending in the court in respect of the same matter it is to the view of this court that the matter was finally and conclusively determined.

Coming to the argument by the counsel for the plaintiffs that the doctrine of res judicata do not apply to the application the court has found there is no authority cited to support the said argument. To the view of this court the said doctrine of res judicata applies to the application too.

As for the third element of the parties in the former suit to be parties in the present suit the court has found the submission by the counsel for the first defendant shows that, although the plaintiffs in the present suit were not parties in the above-mentioned case but after the first defendant instituted Execution Application No. 30 of 2021 and obtained an order of

evicting the judgment debtors from the suit premises, the plaintiffs in the present suit instituted in the court an objection proceeding which was Miscellaneous Land Application No. 339 of 2021 which was dismissed by the court and the decision made in Land Case No. 13 of 2018 that the first defendant is the lawful owner of the suit land was confirmed.

The court has found that, although it is not disputed that the first defendant was a plaintiff in the former suit and she was declared lawful owner of the land comprised under Certificate of Title number 26470 located at Boko Area, Kinondoni District in Dar es Salaam Region in Land Case No. 13 of 2018 but it is also not disputed that the plaintiffs in the present suit were not parties in the mentioned land case. As stated by the counsel for the first defendant in his submission the parties in the mentioned suit were the first defendant as the plaintiff versus Wilson Michael and Eight Others as the defendants and the said defendants are not parties in the present matter. The court has found the plaintiffs in the present suit were parties in the objection proceedings they filed in the court registered as Miscellaneous Land Application No. 339 of 2021.

That being the position of the matter the court has found the issue to determine here is whether after the plaintiffs instituted objection proceedings in the court, they were not allowed to institute the suit in the court in respect of the right they were claiming in the said objection

proceedings. The court has found that, as rightly argued by the court for the plaintiffs the position of the law as provided under Order XXI Rule 62 of the Civil Procedure Code is very clear that, a party in an objection proceeding which has been determined against his favour is allowed to institute a suit in the court to establish the right he was claiming in objection proceedings. For clarity purpose the cited provision of the law 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."

From the wording of the above quoted provision of the law it is crystal clear that a party whose claim or objection in relation to any property attached in the course of execution of a decree of the court has been decided against his favour, he is allowed to institute a suit in the court to establish the right he is claiming from the property in dispute. The stated view of this court is getting support from the case of **Amour Habib Salum** (supra) cited in the case of **Sembuli Ali Ngagiwe** (supra) and cited in the submission of the counsel for the plaintiffs where when the Court of Appeal was considering application of Order XXI Rule 62 of the Civil Procedure Code it stated as follows:-

"The law is very clear. An order which is given in determination of objection proceedings is conclusive. A party who is aggrieved thereby and intend to pursue the matter further has no right to appeal. The course that is open to him or her is to file a suit in the court to establish the right he/she claim to the property in dispute."

That means an objection proceeding cannot render a subsequent suit on the same subject matter res judicata. The above position of the law was stated in the case of **Omoke Oloo V. Werema Magira**, [1983] TLR 144 where it was stated that: -

"A decision in objection proceedings would not render a subsequent suit on the same dispute res judicata and so a party can decide to bypass objection proceedings and resort to a suit to recover his wrongly seized property."

Therefore, despite the fact that the plaintiffs were parties in Miscellaneous Land Application No. 339 of 2021, the mentioned application was objection proceedings which was decided against the plaintiffs. Therefore, it cannot render the current suit res judicata. In the premises the court has found the third element of the doctrine of res judicata has not been established successfully. As for the fourth element the court has found it has not been disputed anywhere that the court

which tried the matter had no competent jurisdiction to try the matter filed in the court.

In the premises the court has found that, although the three elements of the doctrine of res judicata to apply in the present suit have been established in affirmative but as one of the elements which is in respect of the parties in the former suit and the parties in the present suit are not the same or claiming under the same title, the first point of preliminary objection raised by the counsel for the first defendant cannot be sustained. That is because in order for the doctrine of res judicata to succeed all elements must cumulatively be established. Therefore the first point of preliminary objection cannot be sustained.

With regards to the second point of preliminary objection where it is stated the suit is barred in law for want of land valuation report the court has considered the submission by the counsel for the first defendant and it has gone through Order VII Rule 1 (f) and (i) of the Civil Procedure Code which is alleged was violated by the plaintiffs. The court has found the cited provision of the law read as follows:-

1. *"The plaint shall contain the following particulars-*
 - (f) the facts showing that the court has jurisdiction;*
 - (i) a statement of the value of the subject matter of the suit for the purpose of jurisdiction and court fees, so far as the case admits."*

From the wording of the above quoted provision of the law it is to the view of this court very clear that it is not stated therein that it is mandatory for a person instituting a land case in the court or tribunal to accompany his land case with a land valuation report as argued by the counsel for the first defendant. What a party instituting a land case in the court is obliged to do is to give the facts which will show the court has territorial jurisdiction to entertain the matter and a statement of the value of the subject matter for the purpose of showing the court has pecuniary jurisdiction to entertain the matter and for the purpose of determining how much court fees is supposed to be paid in the matter.

That being the position of the law the court has found it is stated at paragraph 13 of the plaintiffs' plaint that, the lands in dispute between the parties in the current suit are located within Kinondoni District and the pecuniary value of the property is more than Tshs. 400,000,000/= which is within pecuniary jurisdiction of this honourable court to entertain the matter. The pecuniary jurisdiction of the court on immovable property as rightly argued by the counsel for the first defendant is provided under Section 37 (1) (a) of the Land Disputes Courts Act which states that, the court has jurisdiction to entertain proceedings of immovable property which its value exceeds three hundred million shillings. That being the position of the law the court has found that, as the plaintiffs have stated

the value of their lands is more than four hundred million shillings it is the view of this court that the plaint of the plaintiffs has not violated the requirement of the law provided under Order VII (f) and (i) Rule 1 of the Civil Procedure Code.

The court has gone through the case of **Sospeter Kahindi** (supra) which was decided by the Court of Appeal but failed to see anywhere stated it is mandatory for a person instituting a land case in the court or tribunal to accompany his plaint with a land valuation report. The issue which was before the Court of Appeal in the above cited case was not about failure to annex valuation report of the land. The issue was about propriety of the move of the complainant who instituted the dispute before the Ward Tribunal asserting the value of the land in dispute was TZS 10,000/= to change his mind after adducing his evidence and after visiting the locus in quo and bring evidence to show the value of the land in dispute was TZS 19,200,000/= which is beyond pecuniary jurisdiction of the Ward Tribunal to entertain the matter. Therefore, the above cited case is distinguishable from the case at hand.

Coming to the case of **Acacia Gold Mine** (supra) cited by the counsel for the first defendant in his submission the court has found that, although it is true that it was stated in the cited case that the courts and tribunals can only rely on some scientific valuation evidence to establish

the value of property and not to rely on what the applicant estimates in the application but the court is not bound by that decision as is a decision of the High Court. The court has arrived to the above stated finding after seeing that, Order VII Rule 1 (i) of the Civil Procedure Code states categorically that what is required to be contained in the plaint is a statement of value of the subject matter involved in the suit and there is nowhere stated there is a requirement of accompanying a plaint with a valuation report.

It is also my considered view that, to put such a requirement in our law will cause some hardship to people who want to file their case in the court and they have no ability of hiring a scientific valuer to prepare for them a scientific valuation report to be accompanied in their plaint. To my view, the stated requirement might have been relevant where there is a dispute over the value of the subject matter in a suit filed in the courts or tribunals which to the view of this court will require such evidence to be brought to the court to determine the said dispute and not even where there is no dispute over the value of the subject matter of the suit filed in the court.

In the final result the court has found both points of preliminary objection raised and argued in this court by the counsel for the first

defendant are devoid of merit and they are hereby dismissed in their entirety and the costs to follow the event. It is so ordered.

I. Arufani

I. Arufani

JUDGE

30/05/2022

Court:

Ruling delivered today 30th day of May, 2022 in the presence of Mr. Majura Vedastus, learned advocate for the plaintiffs and in the presence of Mr. Ramadhani Karume, learned advocate for the first defendant and in the absence of the second defendant. Right of appeal to the Court of Appeal is fully explained to the counsel for the parties.



I. Arufani

I. Arufani

JUDGE

30/05/2022