

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

**LAND CASE NO. 120 OF 2021**

**JUNACO (T)  
LTD..... PLAINTIFF**

**VERSUS**

**EQUITY BANK (T) LTD.....1<sup>ST</sup>  
DEFENDANT**

**COPS AUCTION MART &  
COURT BROKERS LIMITED.....2<sup>ND</sup>  
DEFENDANT**

Date of last Order: 26.01.2022  
Date of Ruling: 14.02.2022

**RULING**

**V.L.MAKANI, J**

Defendants in this case have raise two points of preliminary objections that:

- 1. The suit is bad in law in that it offends provisions of section 38(1) of the Civil Procedure Code Cap 33 RE 2019.*
- 2. The suit is glaringly an abuse of the Court process.*

Advocate Seni Malimi drew and filed submissions on behalf of defendants. The reply was drawn and filed by Advocate Adronicus Byamungu on behalf of the plaintiff.

Submitting for the preliminary objection Advocate Malimi gave a brief background of the matter and added that the present suit offends section 38 (1) of the Civil Procedure Code Cap 33 RE 2019 (**The CPC**). He said that it is a matter of law that any matter that arises from the execution, discharge or satisfaction of the decree is to be dealt with by the execution Court and not by the separate suit. That this suit is not proper, being a complaint on the manner the 1<sup>st</sup> defendant is executing the decree in Land Case No.10 of 2019. That the plaintiff is complaining that the intended auction is alleged wrong in that there are payments in excess of TZS 460,000,000/= already made by the plaintiff to 1<sup>st</sup> defendant under land case No.10 of 2019 (paragraph 12 (vi) of the plaint). That it is obvious that the plaintiff is complaining the manner of execution of the settlement deed in land case No.10 of 2019 allegedly being done outside the decree. That the claims cannot constitute new cause of action and can not warrant institution of the new case. That all concerns raised in the plaint are matters that revolve around the decree in land case No.10 of 2019 in terms of manner of its execution, discharge or satisfaction of the same. Counsel submitted further that, pursuant to section 38 (1) of the CPC all issues arising from execution of a decree are to be dealt with by the executing court and not

by a separate suit. He said that if the issues arising from execution are to be adjudicated as a separate suit, then re litigating the matter under the decree will be inevitable. That all the claims under the plaint are execution matters that there is nothing new or cause of action that can be tried by a new suit. That the plaintiff is complaining on the manner that the 1<sup>st</sup> defendant has moved to auction the mortgaged property allegedly the process being out of the consent decree. However, the decree under consideration emanates from the deed of settlement dated 3<sup>rd</sup> November 2020(JTL-2). That under paragraph 8 of the said deed of settlement the plaintiff agreed that in event of default the 1<sup>st</sup> defendant would proceed to realize the guarantees and the mortgaged properties and take other necessary measures to recover the settlement sum (now decretal sum) that is the mode of execution the parties agreed. Counsel said that in case of any complaint, plaintiff can seek relief from the executing Court and not by way of the separate suit. He insisted that the complaint by the plaintiff touching the decree in Land Case No.10 of 2019 in any manner whatsoever, are accommodated and should rise from the matter where the decree was extracted and not being a separate matter. Counsel relied in the case of **CRDB Bank Ltd vs Mathew Kilindu and another, Civil Application No.74 of 2010 (CAT-DSM)**. Counsel maintained that this suit is not a genuine court action by the plaintiff to seek relief but to delay recovery of the

amount it borrowed from the 1<sup>st</sup> defendant and now is in default to pay.

On the second point of preliminary objection, counsel submitted that under section 38 of the CPC any complaint regarding execution has to be referred to the executing court and not by way of separate suit. He said that the plaintiff proceeded to file new suit and it is apparent that plaintiff is running from pillar to post to prevent the 1<sup>st</sup> defendant from recovering its debt by filing one court action after the other in an abuse of the court process. Counsel relied in the case of **Harish Ambaran Jina (by his attorney Ajar Patel) vs AbdulRazak Jussa Suleiman (2004) TLR 343**. Counsel prayed for the plaint to be struck out with costs.

In reply, Advocate Byamungu said that while contemplating the action the action to be taken by the plaintiff against the defendants for the actions as pointed out in the statement of claim in the plaint the guide star was the commercial court decision in **commercial case No.34 of 2001 CRDB Bank Ltd vs Rukanga Butcher & General Supplies & 4 others**. He said that in this case the applicants filed a chamber summons under section 38 (1) of the CPC seeking among orders injunction against eviction also an order to set aside sale of their respective houses. The bank had a decree for payment of a certain sum of money but went ahead and sold the applicant's property for recovery of that

money without going through the court execution process in that it did not apply for execution. It appointed its own auctioneer and sold the mortgaged properties which were also the subject under the decree. He said that the applicants thereafter maintained a good suit in the High Court. That accordingly all options including the one wrong suggested by the defendants were well researched and calculated accurately therefore the present suit is competent and valid. He said that defendants have misconstrued the gist of this suit. That defendants are premising this suit on Land Case No.19 of 2019 to reinforcement their preliminary objection on the basis of the cited provision of section 38 (1) of the CPC. He said that there is no execution of the decree proceedings in Land Case No.19 of 2019 ever commenced by the Defendants upon which the present suit is alleged to be hinged. Counsel advised that the Court may wish to call for records Land Case No.19 of 2019. He said that the only law relating to the execution of the decree is the CPC. That anything carried outside the CPC can not amount to execution of decree. That all actins pertaining to realization of the decree are sanctioned by orders of the court ranging from lodging application for execution, order of execution, appointment of court broker, issuance of notices, attachment of the property, proclamation of sale and sale itself. He said that if anything is done without the same being sanctioning by the court, can not be said to arise from execution proceedings, therefore constituting a separate

cause of action. Counsel said that execution by the court were carried out by the court nor did it authorize the same. That it was an out of the court execution in which the court has no hand and they constitute a separate and distinct cause of action for a fresh suit because they are actions of the defendants on their own frolic. That in the situation, the court distances itself from actions of the defendants it did not authorize. He submitted further that, this case is not about or seeking to challenge anything in Land Case No.19n of 2019 including any execution that may be commenced or issue under that case. That the defendant's actions now being challenged were sanctioned by the court or emanated from execution proceedings in the court, that the plaintiff would not have filed this suit and the course suggested by the defendants under section 38 (1) of the CPC would have followed. That the defendants are not executing the decree. That they issued the notice subject of this case without any reference to the decree or the case. That the notice was not sanctioned by the court and the 2<sup>nd</sup> defendant was not appointed by the court. He said that the referenced payments to the 1<sup>st</sup> defendant by the plaintiff are made and accepted under land case No.19 of 2019 at the same time the 1<sup>st</sup> defendant is seeking to enforce the same payment outside the court by invoking powers under mortgage to sell the plaintiffs property. That if both processes are deemed valid and allowed to proceed simultaneously, the eminent possibility is that the 1<sup>st</sup> defendant is seeking to recover twice. He said that there is no any agreement throughout

the deed of settlement that the 1<sup>st</sup> defendant would invoke any means whether unlawful or illegitimate to sell the plaintiffs properties in order to recover the decreed sum and that the plaintiff would not object to any illegality committed in the process. Counsel concluded that section 38 (1) of the CPC is not applicable because the defendant's action does not arise from execution of the decree in Land case No.19 of 2019. That the actions by defendants are not and do not amount to execution of decree. He said that the efforts by plaintiff to protect its rights can not be or amount to abuse of legal process. He prayed for the preliminary objections raised to be dismissed with costs.

In rejoinder, Advocate Malimi reiterated his main submission and distinguished the case of **Rukanga** (supra) is distinguished from the facts and circumstances of this case in that the decree under Rukangas case was a summary judgment after the applicant had failed to obtain leave to defend and that the bank proceeded to dispose securities after obtaining the summary judgment and on the strength of the mortgage deeds.

In the course of preparing the ruling I noted that there was Land Case No.19/2019 and on 05/04/2020 a deed of settlement was registered as a consent judgment. Therefore, I invited the parties to first address me on whether this present suit is res judicata of land case No.19 of 2019.

Advocate Byamungu raised another issue that defendants have filed a winding up petition in the commercial division. He prayed for this matter to be stayed pending the winding up petition. In that regard therefore, the issue raised suo moto by the Court and that raised by Advocate Byamungu were all addressed together.

Submitting on the raised issues, Advocate Byamungu was of opinion that the suit is not res judicata. That the concern by the court arises from the suit in land case No.19/2019 in which the 1<sup>st</sup> defendant was granted certain reliefs arising from deed of settlement negotiated and recorded by the Court. That the cause of action in this suit arises from unilateral action by the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant intention to sell the suit property. That action is independent of land case No.19 of 2019. That the action does not arise from the decree and it is not initiated through or raised by the court that issued the decree, that is land case No.19 of 2019. Counsel added that the first impression it would make sense to think that this suit could be res judicata in light of the decree in land case No 19 of 2019 but the controversy was settled by Kalegeya J (as he then was) in commercial case No.34/2001 between CRDB Bank Ltd vs Rukaya Butchery and General Supplies Ltd & 3 others. He said that in that case there was a decree in favour of CRDB Bank against respondent in which CRDB Bank was awarded certain reliefs against respondent on of



which was an order for sell of one of respondents' property (Hse654, Sinza B, Kinondoni, CT 25 951) That Crdb Bank without going through the execution process (going to Court) went on its own unilaterally and appointed an auctioneer who in turn auctioned the property. That one of respondents interested in the property filed an application under commercial case No.34/2001 to challenge the sale. Counsel continued to submit that he is aware that the applicant in this decision filed a suit and it is the basis of filing this suit to challenge the out of court execution and it was the only way to challenge execution. Counsel observed that the suit is properly before the court and it is not res judicata.

On his side, advocate Malimi for defendants said that this suit intends to litigate issues under land case No.19/2019 that the same is fortified by looking at plaint vis a viz the plaint in land case No.19/2019. That paragraph 4 of the current suit and paragraph 3 of the land case No.19 of 2019 substantially the claims are the same. That the plaint in land case No.19 is one of the annexures in the current suit. That reliefs in the current suit are substantially the same as in the land case No.19 of 2019. That paragraph 17 in the plaint in land case No.19/2019 is substantially dealing with the same issues in paragraph 12 and 13 of the current suit. That there is no way the court can deal with the issues in the present suit without dealing with issues in land case No.19/2019. He said that the principle of res judicata under

section 9 of the CPC bars multiplicity of suit that once a matter has been adjudicated it is not supposed to be litigated. He said that one key condition of the principle is that the former suit should be between the same parties and the matter is directly and substantially the same with the current suit. He relied on the case of **Daniel Lotta vs Tamaki & Others (2003) TLR 312**. Counsel said that the plaint shows that there are payments made and many other issues. He said that re hearing this suit is re-opening Land case No19/2019 in which there is a consent judgement. He said that CRDB case cited by Byamungu is distinguishable from this suit in that judgment it was a default judgment (summary suit, the defendant failed to get leave to defend). He said that in this present suit it is a consent judgment with terms of settlement. That the CRDB case can not be applied in this case. Secondly, he said that the applicant in CRDB case were complaining on a property already. Then complainant was no order for execution had been issued. He said that in this case there is a consent between the parties that in case of default the other party can dispose the suit property. That this present has moved further in that the parties have agreed if there is a default then security can be realized. That the plaintiff and the 1<sup>st</sup> defendant in land case No.19/2019 created their judgment through a deed of settlement. That the plaintiff herein is shifting goal posts. Nothing can be done without going back to land case No.19/2019 which will be relitigating the matter and is contrary to res judicata. Counsel added that

in CRDB Bank case the court termed it "out of court execution". So, in Land Case No.19/2019 there was an agreement between the parties out of Court execution as agreed by the parties. That is paragraph 8 of annexure JTL 2. Counsel added that in CRDB case no such arrangement but a normal default judgment so this case of CRDB is not applicable to the circumstances of this matter. He said that substantially this case wants to reopen land case No.19/2019 which practice offends section 9 of the CPC on res judicata.

On the other hand, Advocate Byamungu made a clarification that when a part enters a consent judgment then it is a decree of the court capable of being executed. Any out of court execution is not proper and it is subject to challenge by fresh suit. That it was prudent for the plaintiff to plead of land case No.19/2019 in this present case to bring the court to perspective of what transpired in the past. But this did not touch on the present cause of action which is - the defendant wants to sell the suit property illegally and this was a new event. That the plaintiff took action when the defendant intimated to sell the property illegally so there is no res judicata because the facts and circumstances giving rise to this new cause of action are different.

Advocate Byamungu went on to submit that there are winding up proceedings commenced in the Commercial

Court- Misc. commercial cause No.50/2021 by the 1<sup>st</sup> defendant against the plaintiff. Counsel referred this court to section 283 of the Companies Act and the case of **North, Mara Gold Mine Ltd vs Diamond Motors Ltd, Civil Appeal No.29 of 2017.**

On the issues of winding up, Advocate Malimi invited the court to note that section 283 of the companies Act is essentially in respect of the actions against the companies.

Having gone through the records of the case file and parties' submissions the main issue for consideration is whether the preliminary objections raised by defendants have merit. Simultaneously, the legal issue on whether this suit is res judicata to the land case No.19 of 2019. The issue of winding up proceedings by the 1<sup>st</sup> defendant shall dealt with.

I shall first deal with the issue of res judicata as it touches the competence of the instant land case.

The doctrine of res judicata is provided for under section 9 of the Civil Procedure Code, Cap 33 R.E 2019. The section provides

*“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”.*

Perhaps I should briefly explain the meaning and purpose of the doctrine of res judicata. The doctrine of res judicata is a doctrine which enacts the doctrine of estoppel in civil proceedings. Once a court of competent jurisdiction conclusively decides a matter neither of the parties can question the matter when brought in another court if the proceedings are between the same parties or parties claiming directly under them. The rationale behind the rule is that it is in the interest of justice that litigation should come to a speedy end and that certain rules must be derived to prevent litigation from dragging on indefinitely. The doctrine is also intended to prevent harassment of the parties by each other. In other words, a party should not be vexed twice on the same point or matter. Lastly the doctrine is intended to protect the credibility and integrity of the courts in the sense that there should not be a possibility of two courts to come to a different conclusion on the same evidence, thus exposing the first court to ridicule.

Under section 9 of the Civil Procedure Code, Cap 33 R.E 2002 there are four major requirements for the doctrine of res-judicata to apply.

- (i) The first requirement is that the matter which is directly and substantially in issue in the present case must also have been directly and substantially in issue in the former case.
- (ii) The second requirement is that the previous suit must have been finally and conclusively determined.
- (iii) The third requirement is that the former suit and the subsequent suit must be shown to be between the same parties or parties claiming under the same title or must be between parties who have a right under the title of the original parties.
- (iv) The last or fourth requirement is that the previous suit must have been determined by a court of competent jurisdiction.

Now applying the above principles to the present case can it be said, as alleged by the defendants, that the case is res judicata? I have seen a copy of the consent judgment and decree of the High Court in Land case No.19 of 2019 which was between the plaintiff herein against the 1<sup>st</sup> respondent and others. There is no dispute

at all that it involved the same parties. The consent judgment arose from plaintiffs claim as contained in the paragraph (a) of the deed of settlement that:

*“A declaration that the defendants’ action and attempts to sell the properties on Plot No.43 Regent Estate, Msasani, Dar es Salaam held under CT No.186150/22 and on plot No.279 with CT No.1861/50/60 (**the suit property**) are purported ones invalid, wrongful and illegal”*

On the same vein the statement of claim in land case No.120 of 2021 contained in the 4<sup>th</sup> paragraph to the plaint states that:

*“The plaintiffs claim in this suit against the defendants’ is for declaration that the intended sale on 7<sup>th</sup> august 2021 of the plaintiff’s property on plot No.43 Regent Estate Msasani Area comprises in certificate of title No.186/150/60 Land office No.2523 is unlawful and for permanent injunction restraining the 1<sup>st</sup> defendant and or its agents from selling or making any further attempt to dispose of the property aforesaid. The plaintiff further claims for general damages and costs.”*

It is without doubt therefore that the matter in land case No.19 of 2019 that is directly and substantially the same with the matter in the instant case. In both cases, the

plaintiff is seeking for the order of the court to declare that any sale or attempt to sell the suit property is illegal.

It is the principle of the law that a consent judgment is as valid as any other judgment of the court. Both parties to the present suit are not at issue that land case No.19 of 2019 was concluded by a consent judgment following parties agreement through a deed of settlement. Simply consent judgment was not challenged by any part; therefore, it remains as the final and conclusive decision on the suit property between the parties.

On the issue of parties, as aforesaid parties parties in land case No.19 of 2019 were JUNACO (T) LTD against EQUITY BANK (T) LTD and others. Likewise, parties in land case No.120 of 2021 are JUNACO (T) LTD against EQUITY BANK (T) LTD and another. It is therefore without doubt that the parties were the same.

Lastly it is on record that land case No.19 of 2019 was tried by The High Court of Tanzania (Dar es salaam Registry). Its competence is obvious and undisputed. It is fully vested with jurisdiction over the land cases. And this on my view accomplish the fourth requirement in establishing the doctrine of res judicata.

From the foregoing it is clear that the present land case No.120 of 2021 is res judicata to the land case No.19 of



2019. Consequently land case No.120 of 2021 is improper before this Court. I shall not dwell much on discussing the preliminary objections raised and legal issues in the present cases proceedings. This is because the issue of res judicata has the consequences of disposing of the whole case. In the end result this suit is hereby dismissed with costs.

It is so ordered.

**V.L. MAKANI**  
**JUDGE**  
**14/02/2022**