

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 54 OF 2022

NUNU RAJABU SAGHAF ..... PLAINTIFF

VERSUS

ALELIO NGOYAI LOWASSA ..... 1<sup>ST</sup> DEFENDANT

KIMINA AUCTION MART ..... 2<sup>ND</sup> DEFENDANT

RULING

*Date of Ruling 20.06.2022*

*Date of the last order 22.07.2022*

**A.Z.MGEYEKWA**

On 16<sup>th</sup> March, 2022 Nunu Rajabu Saghaf, the Plaintiff herein, instituted this suit against Alelio Ngoyai Lowasa and Kimina Auction Mart, the Defendants seeking the following reliefs:-

- a) *A declaration Order that the disputed land known as Plot Number 412, Block L, Jangwani Beach Area Kinondoni Dar es Salaam belongs to the Plaintiff;*

- b) That, the 1<sup>st</sup> Defendant be declared a trespasser on Plot No. 412, Block L, Jangwani Beach Area Kinondoni Dar es Salaam.*
- c) An Order for eviction of the 1<sup>st</sup> Defendant and demolition of any structures erected thereon;*
- d) That, the Defendants be permanently restrained to make a disturbance to the Plaintiff regarding the suit property.*
- e) That, the Defendants be ordered to pay general damages to be assessed by the Court.*
- f) An Order compelling Defendants to pay the Plaintiff Tshs. 27,357,200.00 being compensation for special damages caused on the suit land;*
- g) Interest on (f) above at 31% p.a. compound interest from the date of accrual of the cause of action to the date of Judgment and interest at 12% from date of Judgment to the date of payment in full.*

The 1<sup>st</sup> Defendant filed a Written Submission Defence and raised a point of Preliminary Objection that the suit land is res judicata.

When the matter was called for hearing of the preliminary objection on 20<sup>TH</sup> June, 2022, the Plaintiffs enjoyed the legal service of Mr. Denis Michael Msafiri whereas, the 1<sup>st</sup> Defendant had the legal service of Mr. John Kamugisha, learned counsel.

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 suit.

The learned counsel for the 1<sup>st</sup> Defendant started his onslaught by submitting that the Plaintiff claimed that he purchased the suit land, Plot No. 412 at Jangwani Beach Area, Kinondoni, Dar es Salaam from Sabath Mshabaa Mrosso holding the Power of Attorney of Asgarali Nazarali Bharwani. The learned counsel went on to submit that the Asgarali Nazarali Bhwarwani lodged a suit against the 1<sup>st</sup> Defendant in the District and Housing Tribunal for Kinondoni at Mwananyamala in Application No. 401 of 2007.

He went on to submit that the suit was litigated upon by the parties and was finally dismissed with costs in 2016 for nonappearance of the Plaintiff pursuant to Regulation 11 (1) (b) of GN. No. 174 of 2003. To fortify his submission he referred this court to Annexure 'MKB-1'. The learned counsel for the 1<sup>st</sup> Defendant went on to submit that Asgarali Nazarali Bhwarwani filed Land Application No. 377 of 2016 trying to set aside the dismissal order, however, the application was struck out with costs for being incompetent.

The learned counsel for the 1<sup>st</sup> Defendant continued to submit that in 2021, Sabath Mshabaa Mrosso holding the Power of Attorney of Asgarali Nazarali Bharwani instituted another fresh suit in this Court, Land Case

No. 57 of 2021 against the 1<sup>st</sup> respondent claiming the same reliefs as prayed in Land Application No. 401 of 2007 in the District Land and Housing Tribunal for Kinondoni at Mwananyamala, the same was dismissed for being incompetent. He further contended that the Plaintiff alleged to have purchased the suit land from the previous Plaintiff who lost three times, is suing the 1<sup>st</sup> Defendant claiming the same subject matter, seeking to be declared lawful owner of the disputed property in Plot No 412 located at Jangwani Beach Area, Kinondoni, Dar es Salaam similar cause of action as claimed in Land Case No. 57 of 2021. To fortify his submission, he cited the provision under Section 9 of the Civil Procedure Code Cap 33 [R.E. 2019].

Submitting on the law governing res judicata, the learned counsel for the 1<sup>st</sup> Defendant referred this court to section 9 of the Civil Procedure Code Cap 33 [R.E. 2019], Mr. Kamugisha stated that in the subsequent suit, the Plaintiff is seeking to be declared the lawful owner of the suit landed property on Plot No. 412 located at Jangwani Beach Area, Kinondoni, Dar es Salaam which was the same subject matter in the former suits.

On the condition that in the former and subsequent suits parties litigating must be have be the same or privies calcimining under them, Mr. Kamugisha contended that although the Plaintiff was not joined as a part

in the former suits, but he is a privy due to the fact that she is a purchaser of the disputed property which was being litigated in the previous suits. He went on to submit that the District Land and Housing Tribunal for Kinondoni at Mwananyamala determined the matter in Land Application No. 401 of 2007 and it had jurisdiction to do so, and the High Court in Land Case No 57 of 2021, had jurisdiction to try the same because the value of the subject matter was advanced. It was his view that the dismissal orders in the previous suits as shown above amount to the conclusive determination of the suit. Thus, the Plaintiff cannot pursue this suit as a fresh case whose facts, subject matter, causes of action, and reliefs claimed are substantially similar to the previous suits while the dismissal orders in the said previous suits remain intact.

On the strength of the above submission, the learned counsel for the 1<sup>st</sup> Defendant beckoned upon this court to dismiss this suit with costs.

In his reply, Mr. Msafiri contended that the suit is not *res judicata* in terms of the provisions in section 9 of the Civil Procedure Code Cap 33 [R.E. 2019] because the matter was not determined to its finality. He submitted that a suit to be *res judicata* there must be a previous suit, must be involve the same parties, same subject matter, reliefs claimed and tried by a competent court. The applicant invokes the Court's jurisprudence in the cases of **Paniell Lotta v Gabriel Tanaki and two Others**, Civil Appeal

No. 61 of 1999 (unreported) and the case of **Mariana Guest House Limited and Another v Mbaraka Zahara & another**, Civil Appeal No. 51 of 1998 CAT in which he stated that:-

*'...for a decision to be said to be final it must also be a decision on the merits of the controversy. To determine whether a decision is on the merits one has to look at the underlying principle which forms the authoritative aspect of the decision, otherwise known as the ratio decidendi. In a commentary on section 11 of the Indian Code of Civil Procedure, 1908, which is in parimateria with our section 9, MULLA, 14<sup>th</sup> ed. P. 136 says;*

*Res judicata by its very words means a matter on which the court had exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. The section requires that there must be a final decision ... The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter res judicata; it is essential that it should have been heard and finally decided. In other words, what operates as res judicata is the ration or what is fundamental to the decision'*

Mr. Msafiri further contended there was no any prayer for declaration of ownership by Asgarali Nazarali Bharwan in Land application No. 401 of 2007, and that there was no counter claim by the 1<sup>st</sup> Defendant, however,

that the Plaintiff herein is a new person whose cause of action arose on 21<sup>st</sup> November, 2019 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants invaded the suit property. He further, referred this court to the learned Sudipto Sarka & R Manohar in the book Sarkar's Law of Civil Procedure, 8<sup>th</sup> Edition at Pages 71-72 states that:-

*'In order that matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits. Where for example, the former suit was dismissed by the trial court for want of jurisdiction, or default of Plaintiff's appearance or on the ground of non-joinder or misjoinder of parties or .... The decision not being on the merits would not be res judicata in a subsequent suit.'*

The learned counsel for the Plaintiff went on to submit that the 1<sup>st</sup> Defendant's counter claim in this suit was raised and pursued in Land Application No. 401 of 2007 in the District Land and Housing Tribunal. Hence, the preliminary objection is devoid of merit, he urged this court to dismiss it in its entirety with costs.

In the alternative, Mr. Msafiri submitted that, if this court will uphold the objection then the 1<sup>st</sup> Defendant counter claim and grounds should be dismissed for the same reasons and grounds as the Plaintiff's suit.

In his rejoinder, the Defendant's counsel reiterated his submission in chief. Stressing on the point of *res judicata*, he claimed that this court dismissed Land Case No. 57 of 2021. Since this is a subsequent suit the same is hit by *res judicata*.

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 instant suit is res judicata*.

The doctrine of *res judicata* serves two purposes, one, the public policy demand peace and harmony so that the citizen may have enough time to struggle for a better life and human development; two; the winner in litigation should know that he has all rights over any other person and he should enjoy fruits of the court decision. Likewise, the loser should know that he has no right over the disputed subject matter, hence start looking for an alternative. The Court of Appeal has set out five conditions of *res judicata* in the case of **Paniel Lotta** (supra), the same arises from the scheme of section 9 of the Civil Procedure Code Cap.33 [R.E 2002] which when coexistent, bars a subsequent suit 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 party in the subsequent suit must have litigated under the same title in the former suit.*
- iv. *The matter must have been heard and finally decided.*
- v. *That the former suit must have been decided by a court of competent jurisdiction.*

Applying the above principles of *res judicata* in the matter at hand, starting with whether the parties to the suit are the same, it is not disputed that Nuru Rajabu Saghaf, the Plaintiff was not involved in the previous suits. However, as rightly pointed out by Mr. Kamugisha, the Plaintiff is privy due to the fact that she is a purchaser of the disputed property which was being litigated in the previous suits.

Regarding, the subject matter and whether the matter was determined to its finality, it is clear that the subject matter in previous suits and the subsequent suit is the same. There is no dispute that Plot No. 412 located at Jangwani Beach Area, Kinondoni, Dar es Salaam was the subject matter in the present case, before the District Land and Housing Tribunal in Application No. 401 of 2017 and before this court in Land Case No. 57 of 2021. Therefore, instituting a suit concerning the same subject is improper since the previous suit was dismissed by this court.

It is worth noting that the dismissal of the suit has the effect of barring subsequent proceedings on the same cause of action, and the same subject matter even where the parties are different. The matter becomes constructively *res judicata*, regardless that it was not finally determined or heard on merit since the orders to dismiss the suit for want of prosecution has the same effect as orders emanating from a matter determined on merits. It is settled principle that he who abandons his case which in consequence thereof lead to dismissal of the same, he had no causes of action to institute it. Therefore, the Plaintiff is barred from instituting a case involving the same subject matter. Had it been an order to strike out the case then the Plaintiff could come back to the court.

I fully subscribe to the submission made by the learned counsel for the 1<sup>st</sup> Defendant that the matter before this court is constructive *res judicata*. I, therefore, sustain the preliminary objection and dismiss this suit without costs.

Order according.

DATED at Dar es Salaam this 22<sup>nd</sup> July, 2022.

A circular seal of the High Court of Tanzania, Land Division. The seal features a central emblem with a scale of justice and a book, surrounded by the text "THE HIGH COURT OF TANZANIA" and "LAND DIVISION".  
A. Z. MGEYEKWA  
JUDGE  
22.07.2022

Ruling delivered on 22<sup>nd</sup> July, 2022 in the presence of Mr. Denis Msafiri, learned advocate for the Plaintiff also holding brief for Mr. Kamugisha, learned counsel for the 1<sup>st</sup> Defendant.



A.Z.MGEYEKWA

JUDGE

22.07.2022

Right to appeal fully explained.