

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

LAND CASE NO. 127 OF 2021

RUKIA ADAM JUMA PLAINTIFF

VERSUS

NMB BANK PLC 1ST DEFENDANT

KUDRA MWIGULU t/a MORATA GENERAL TRADING 2ND DEFENDANT

MOHAMED SULTAN HAMIMU t/a MARIANA

INVESTMENT AND GENERAL TRADING 3RD DEFENDANT

JAGA AUCTION MART LIMITED 4TH DEFENDANT

EMMANUEL RICHARD MALIMA 5TH DEFENDANT

ADAM JUMA 6TH DEFENDANT

Date of last Order: 09/06/2022

Date of Ruling: 12/08/2022

RULING

I. ARUFANI, J

The court is called upon to determine a point of preliminary objection raised by the counsel for fifth defendant in the matter at hand which read as follows: -

"That this suit is barred by the doctrine of res judicata and has been instituted to abuse the court process as similar suit(s) were instituted by the 6th defendant who is the husband to the plaintiff, and upon such suit institution this honourable court ultimately ended by dismissing the same."

When the matter came for hearing the afore quoted point of preliminary objection the plaintiff was represented by advocate Daniel Ngudungi who was assisted by advocate Jackline Kulwa. On the other side while advocate Mlyambebele Ng'weli represented the fifth defendant and held brief of advocate Daimu Kambo for the first defendant, the sixth defendant was resented by advocate Jamhuri Johnson. The hearing of the point of preliminary objection proceeded ex parte against the second, third and fourth defendants. That is because the mentioned defendants were duly served and they are well aware of the matter because even the second and third defendants have already filed their written statement of defence in the court but they failed to appear in the court.

Advocate Mlyambebele Ng'weli told the court that, paragraph 9 of the plaint shows the plaintiff is a legal wife of the sixth defendant. He said it is undisputed fact that the sixth defendant attempted to challenge the mortgage deed and public auction as averred at paragraph 21 of the plaint. He invited the court to take judicial notice that, the sixth defendant instituted Land Application No. 450 of 2018 and Land Application No. 65 of 2019 in the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (hereinafter referred as the tribunal). He stated that, the sixth defendant also instituted in this court Land Case No. 26 of 2019 which was dismissed by the court.

He argued that, all the mentioned cases were referring to Plot No. 272 Block "D" with Certificate of Title No. 44114 which is also a subject matter in the present suit. He submitted that, with the above undisputed facts in mind the attempt by the plaintiff to challenge the mortgage deed and the auction conducted in respect of the mortgaged property is violation of the court process in different forms. He stated that, since this court determined Land Case No. 26 of 2019 to its finality by dismissing the claims of the sixth defendant who was plaintiff in the mentioned suit, then this court is functus officio to entertain the same case and on the same subject matter.

To support his argument, he referred the court to the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012, CAT at DSM (unreported) where it was stated that, once a matter has been determined the court, judge or magistrate becomes functus officio. He submitted that, as the issue of mortgage deed in this matter has already been disposed of to its finality, then the court is functus officio to entertain this matter.

As for the issue of the matter to be barred by the doctrine of res judicata, the counsel for the fifth defendant referred the court to the case of **Peniel Lotta V. Gabriel Tanaki & Others**, [2003] TLR 312 where it was stated that, although the appellant was not joined in the former suit as an interested party but for the purpose of section 9 of the Civil

Procedure Code, he was deemed to have claimed under his mother who was a party in the former suit. He argued that, since the court has already determined the matter relating to the disputed mortgage deed and the public auction which sold the mortgaged property the plaintiff cannot challenge what has already been decided.

He submitted that, if the court will allow the plaintiff to proceed with the present matter there will be an endless suit on the same subject matter as other relatives will be in a position to institute fresh suits on the same subject matter. He based on the afore stated argument to pray the court to dismiss the plaintiff's suit with costs and the fifth defendant be allowed to proceed to continue to prove his counter claim.

In his reply, advocate Daniel Ngudungi told the court that, the point of preliminary objection raised by the advocate for the fifth defendant does not fit in the meaning of the term preliminary objection given in the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] TLR 696. He argued that, in order to say the suit is res judicata the court is supposed to know what was pleaded in the former suit and what is pleaded in the subsequent suit. He argued that, Land Application No. 450 of 2018 and Land Application No. 65 of 2019 of the tribunal have never been pleaded in any pleadings filed in this court by the parties. He stated that, it is only the ruling of Land Case No. 26 of

2019 of this court which has been pleaded in the counter claim filed in the court by the fifth defendant.

He argued that, in order to know this case is res judicata the court is required to read the claim in the Land Case No. 26 of 2019 together with the present case to ascertain the present claims are the same as claims in the former suit. He argued that, the claims before this court and the claims in the former suit are not the same. He invited the court to read the reliefs sought in Land Case No. 26 of 2019 and the reliefs sought in the present suit and stated the court will find they are not the same.

He argued that, in Land Case No. 26 of 2019 the plaintiff was challenging the validity of mortgage deed and auction of the suit property while in the present suit the reliefs sought are based on validity of the spouse consent based on fraud. He stated the plaintiff in the present suit is praying for nullification of sale of the matrimonial home, damages by way of punitive and general damages. He argued that, unless the stated facts are ascertained the court cannot determined the matter is res judicata without examine the evidence which is against the meaning of preliminary objection given in the case of **Mukisa Biscuit** (supra) as expounded in the case of **Karata Ernest & Others V. Attorney General**, Civil Revision No. 10 of 2010, CAT at DSM (unreported).

He submitted that, for a plea of res judicata to stand there are five conditions stated in the case of **Peniel Lotta** (supra) and enumerates the

stated conditions. He stated that, some of the conditions stated in the said case are to the effect that, parties in the former suit must be parties in the subsequent suit, the matter in issue in the former suit must be the same in the subsequent suit and the matter must have been heard and finally decided in the former suit by a court with competent jurisdiction.

He argued that, in the present suit the parties are at variance and all the former suits including Land Case No. 26 of 2019 were not determined on merit but on preliminary objection. He stated the suit filed in the tribunal was not heard and determined on merit but it was withdrawn from the tribunal as stated in the ruling delivered in Land Case No. 26 of 2019. He stated that, withdrawal of a suit cannot make the suit res judicata but it estopped a party to refile the same. He submitted that, in order for the principle of res judicata to stand five conditions stated in the case of **Peniel Lotta** (supra) must co-exist.

He argued that, Land Case No. 26 of 2019 was dismissed under Order XXIII Rule 1 (3) of the Civil Procedure Code and no more. He contended that, although the sixth defendant's suit was dismissed but that does not mean the matter was determined on merit. He referred the court to the case of **Petro Tlemu V. Richard Damite & Another**, Criminal Application No. 2 of 2014 where it was stated an incompetent appeal is supposed to be struck out and not to be dismissed because what is supposed to be looked at is the substance of the matter and not the word used.

He argued in relation to the issue of the court to become functus officio that, the matter should be on the same cause of action. He argued that, while in the present matter the plaintiff is alleging fraud and concealment of the right of the spouse but that was not the cause of action in the former suit and the plaintiff was not even a party in the former suit. She argued that, there is no law stating once a husband has instituted a suit in a court his wife is barred to institute a suit in the court on the same subject matter.

He argued that, the condition of litigating under the same title stated in the case of **Peniel Lotta** (supra) cannot apply in the present suit. He referred the court to the case of the **Registered Trustees of Chama cha Mapinduzi V. Mohamed Ibrahim Versi and Sons & Another**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported) where it was stated that, the fact that the property involved in both matters is the same but that does not necessarily render the cause of action identical or the same. At the end he prayed the court to dismiss the preliminary objection raised by the counsel for the fifth defendant with costs.

Advocate Jamhuri Johnson supported the submission made by the counsel for the plaintiff and emphasized that, in order for the principle of res judicata to stand the matter must be heard and determined on merit. He countered the argument made by the counsel for the fifth defendant by stating that, the prayer for the plaintiff's suit to be dismissed and the

fifth defendant be allowed to proceed with his counter claim, is like giving your cake and expect to have it. At the end he stated the Land Case No. 26 of 2019 was not heard and determined on merit and prayed the preliminary objection be overruled with costs.

In his rejoinder, advocate Mlyambebele Ng'weli stated the preliminary objection he has raised is not subject to the definition given in the case of **Mukisa Biscuit**. He argued that, as Land Application No. 450 of 2018 and Land Application No. 65 of 2019 of the tribunal have been brought to the attention of the court, the court has mandate to take judicial notice of the same pursuant to sections 58 and 59 of the Evidence Act Cap 6 R.E 2019. He stated that, the plaintiff in the present suit is privy to the sixth defendant and argued that, as the sixth defendant's attempted to challenge the mortgage deed and the auction sold the mortgaged property and failed, the plaintiff is not entitled to bring the same suit to the court.

He stated the court held the Land Case No. 26 of 2019 was res judicata and said when a matter is termed to be res judicata it entails the same has been heard and determined on merit. He submitted that, all the five conditions for the principle of res judicata to stand, co-exist in the present suit and prayed the plaintiff's suit be dismissed and the fifth defendant be allowed to continue to prove his counter claim as it has never been litigated in any of the previous suits.

After carefully considered the rival submissions from both sides the court has found the point of preliminary objection raised by the counsel for the fifth defendant has two limbs which are supposed to be determined by this court. The first limb is whether the present suit is barred by doctrine of res judicata and the second limb is whether the court is functus officio to entertain this matter. Before going to the merit of the afore stated issues the court has found proper to start with the argument raised by the counsel for the plaintiff that, under the definition of the term preliminary objection given in the case of **Mukisa Biscuit** (supra) the point of objection raised by the counsel for the fifth defendant does not qualify to be a preliminary objection.

The court has found it is true as argued by the counsel for the plaintiff that, the position of the law as stated in the case of **Mukisa Biscuit** and restated in the case of **Karata Ernest** (supra) cited by the counsel for the plaintiff it is crystal clear that, preliminary objection cannot be entertained if any fact has to be ascertained by requiring evidence to be adduced in a matter. For clarity purpose it was held in the case of **Mukisa Biscuit** that: -

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be***

ascertained or if what is sought is the exercise of judicial discretion.”[Emphasis added].

While being guided by the above stated definition of the term preliminary objection the court has found the argument by the counsel for the plaintiff that the point of law raised by the counsel for the fifth defendant does not qualify to be a preliminary objection is based on the ground that, Land Applications No. 450 of 2018 and 65 of 2019 of the tribunal stated by the counsel for the fifth defendant were filed by the sixth defendant in the tribunal have not been pleaded anywhere in the pleadings filed in the suit at hand.

The counsel for the plaintiff argued that, as those cases have not been pleaded by any party in the present matter, they cannot be used to determine the preliminary objection raised by the counsel for the fifth defendant without requiring those cases to be adduced in the suit as evidence. The court is in agreement with the counsel for the plaintiff that, if the counsel for the fifth defendant intends the preliminary objection, he has raised should be determined by basing on the mentioned cases while they are not pleaded anywhere in the pleadings filed in the present suit by the parties, the raised preliminary objection has not met the qualification stated in the definition of preliminary objection given in the case of **Mukisa Biscuit** (supra).

The court has arrived to the above view after seeing that, as rightly argued by the counsel for the plaintiff if determination of the point of preliminary objection raised by the counsel for the fifth defendant cannot be done without using those cases, and those cases are neither pleaded nor attached anywhere in the pleadings filed in the court by the parties, which means they must be adduced in the matter as evidence, then it cannot be said the preliminary objection raised by the counsel for the fifth defendant qualify to be a preliminary objection in the sense of the meaning of preliminary objection given in the case of **Mukisa Biscuit** (supra). That is because preliminary objection does not require evidence to be brought to the court out of what is pleaded in the pleadings filed in a suit and believed is correct to ascertain existence of what is stated in a raised preliminary objection.

The court has found the counsel for the fifth defendant urged the court to take judicial notice of the land applications filed in the tribunal pursuant to section 58 and 59 of the Evidence Act. The court has failed to see how it can take judicial notice of matters which are not before the court and it has not been told how it can get them for the purpose of using them to determine the preliminary objection raised by the counsel for the fifth defendant. The court has also found that, it cannot take judicial notice of the said land applications to find the present suit is res judicata because the counsel for the plaintiff has stated the mentioned

applications did not determine the issue of fraud and lack of spouse consent brought to this court by the plaintiff. That being the position of the matter the court has found it cannot use or take judicial notice of the mentioned land applications filed at the tribunal to determine the preliminary objection raised in the present suit by the counsel for the fifth defendant.

The court has found the counsel for the fifth defendant has argued the present suit is res judicata to the Land Case No. 26 of 2019 filed in this court by the sixth defendant and the decision of the mentioned case is pleaded and annexed in the counter claim of the fifth defendant. The court has found the object of the doctrine of res judicata which is enshrined under section 9 of the Civil Procedure Code is to bar the parties to come back to the court on the same issue which has already been determined to its finality by a competent court. The stated object can be seen in the case of **Peniel Lotta** (supra) where it was held that: -

"The object of the doctrine of res judicata is to bar the multiplicity of suit and guarantee finality to litigation. It makes a conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."

The court has found in order to be able to determine the present suit is res judicata against the mentioned Land Case No. 26 of 2019 there are

conditions which must be established are in existence in the two matters. Those conditions can be derived from section 9 of the Civil Procedure Code which were well summarized in the case of **Peniel Lotta** (supra) cited by counsel for the parties and can also be found in the case of **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited & Two Others**, Civil Appeal No. 2008, CAT at Tanga (unreported) where it was stated that: -

"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These 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 former suit must have been competent to try the subsequent suit and (v) the matter in issue must have been heard and finally decided in the former suit."

While being guided by the afore stated principle of the law the court has found that, in order to be able to determine whether the present suit is res judicata to the Land Case No. 26 of 2019 it is required to look into both suits to see whether the conditions stated hereinabove for the doctrine of res judicata to be invoked have been established. Starting with the first condition of the matter to be directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in

the former suit the court has found the counsel for the fifth defendant argued both cases referred to Plot No. 272 Block "D" with Certificate of Title No. 44114 located at Mbezi Beach Kinondoni Dar es Salaam. He argued further that the plaintiffs in both cases are challenging the mortgage deed and auction conducted to sale the mortgaged property.

After going through the pleadings filed in the court by the plaintiff in the present suit and in particular the reliefs sought and the ruling made by the court in Land Case No. 26 of 2019 annexed in the pleadings of the fifth defendant the court has found that, it is true that the afore mentioned property was a subject matter in the former suit and in the present suit and both suits are challenging the mortgage deed and the auction which led into the sale of the mortgaged property and parties are praying the auction to be declared is a nullity. The court has found that, although it is true that both Land Case No. 26 of 2016 and the current suit are challenging the mortgage deed entered in respect of the mentioned property and the auction which led into sale of the mentioned property but it was not made clear as to whether the grounds used to make the said challenge are the same in both cases.

The court has come to the above finding after seeing that while the plaint filed in the matter at hand shows the plaintiff is challenging the mortgage deed entered in respect of the mortgaged property and the auction which led into its sale on the ground of lack of spouse consent

and the property is a matrimonial home but the court was not informed the sixth defendant was using the same ground to challenge the validity of the mortgage deed and sale of the landed property in the former suit. The court has found that, although it is true that the property in the former suit is the same property in the present suit but that is not enough to establish the matters in both cases are directly and substantially in issue in both cases. The above finding of this court is getting support from the case of the **Registered Trustees of Chama cha Mapinduzi** (supra) where it was stated that: -

"The fact that the property involved is one and the same does not necessarily render the cause of action identical or convert the matters directly and substantially in issue in the two suits to be the same."

The position of the law stated in the above quoted excerpt caused the court to be of the view that, although it is true that the property involved in both cases is the same and the reliefs sought are the same but the grounds of challenging the mortgage deed and the sale of the property conducted by way auction might not be the same. The court has also found the counsel for the plaintiff argued the ground to challenge the mortgage deed and auction of the property is not the same in both suit and the said argument was not substantively disputed by the counsel for the fifth defendant. In the premises the court has found it cannot be said

the first condition of the matter to be directly and substantially in issue in the former suit and directly and substantially in issue in the current suit has been properly established.

Coming to the second condition for the doctrine of res judicata to be invoked which requires parties in both cases to be the same or privies claiming under them the court has found that, as rightly argued by the counsel for the plaintiff and sixth defendant and not disputed by the counsel for the fifth defendant the plaintiff in the present suit was not a party in the former suit. The court has found the counsel for the fifth defendant based on the case of **Peniel Lotta** (supra) to establish there is a constructive res judicata in the present suit because although the plaintiff was not joined in the former suit but is deemed to have claimed under the sixth defendant who is her husband and was a plaintiff in the former suit.

The court has found that, although it is true that the plaintiff in the present suit has a common interest in the subject matter of the suit and she ought to have been deemed he was claiming under the plaintiff who is her husband but the cause of action and reliefs claimed by the plaintiff in the present suit and the cause of action and reliefs claimed by the sixth defendant in the former suit appears to be different in two matters which makes the court to find the principle of constructive res judicata stated in the case of **Peniel Lotta** cannot be invoked in the present suit.

The court has come to the above finding after seeing that, the claims of the plaintiff as averred at paragraph 19 of the plaint and the reliefs sought in the plaint shows they are based on fraud and lack of spouse consent while the reliefs sought by the sixth defendant as appearing at page 3 of the ruling of the court made in Land Case No. 26 of 2019 annexed in the written statement of defence of the fifth defendant are different. It is the view of this court that, under the stated circumstances the principle of constructive res judicata cannot apply in the present suit.

The court has also found proper to go to the fifth condition of invocation of the principle of res judicata stated in the cases cited hereinabove which states the matter in issue must have been heard and finally decided in the former suit. The court has found the counsel for the plaintiff and sixth defendant argued extensively that Land Case No. 26 of 2019 was not heard and determined on merit while the counsel for the fifth defendant argued it was finally decided as it was dismissed. The court has found it is true as argued by the counsel for the plaintiff and the counsel for the sixth defendant that the mentioned case was not heard and finally determined on merit.

The court has found the ruling of the court in the Land Case No. 26 of 2019 shows it was determined basing on preliminary objection raised in the matter that the matter was wrongly filed in the court and was an abuse of court process. The court has found after the court deliberated

on the said preliminary objection it sustained the preliminary objection and dismissed the suit. The court has also found that, if you read the said ruling carefully you will find Land Applications No. 450 of 2018 and Land Application No. 65 of 2019 of the tribunal were also not heard and determined on merit.

That can be seen at paragraph 4 of the Ruling of the court where it is stated if the plaintiff wanted to challenge the decision which dismissed Land Application No. 450 of 2018 of the tribunal he was required to apply for restoration of the application to the tribunal. It is the view of this court that, if the said application was decided on merit the remedy would have not been to apply for its restoration as suggested but to appeal to the higher court. The court has also found it is stated in Land Application No. 65 of 2019 that it was withdrawn from the tribunal. That being the position of the said applications the court has found it cannot be said the mentioned land applications were heard and determined on merit to the extent of being basis of finding the present suit is res judicata to the previous matters as argued by the counsel for the fifth defendant.

Turning to the second limb of the preliminary objection which states the court is functus officio to entertain the present suit the court has found the counsel for the fifth defendant argued the court is functus officio to entertain this matter as the same matter was heard and finally determined by this court in Land Case No. 26 of 2019 which was dismissed. The court

has found that, although it is true that the above referred case was dismissed by this court but as rightly argued by the counsel for the plaintiff it is not all matters which are dismissed by court makes the court functus officio to entertain the same matter in future. The court has arrived to the stated view after drawing an inference from the case of **Petro Tlemu** (supra) where it was stated the court will become functus officio on matters which were heard and determined on merit and not even on matters which were not heard and determined on merit.

Since the court has already found the issues of fraud and lack of spouse consent alleged in the present suit have not been stated were issues in the former suits and were finally decided in the former suit the court has found it cannot be said the court is functus officio to entertain the matter at hand. That makes the court to find the principle stated in the case of **Mohamed Enterprises (T) Limited** (supra) that, once a matter has been determined by the court, the judge or magistrate becomes functus officio cannot be invoked in the case at hand.

In the final result the court has found the counsel for the fifth defendant has not managed to establish the suit at hand is barred by the doctrine of res judicata or the court is functus officio to entertain the matter or the matter is an abuse of court process as alleged in the preliminary objection raised by the counsel for the fifth defendant. Consequently, the preliminary objection raised by the counsel for the fifth

defendant is hereby found is devoid of merit and is accordingly overruled in its entirety and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 12th day of August, 2022



Jace
I. Arufani

JUDGE

12/08/2022

Court:

Ruling delivered today 12th day of August, 2022 in the presence of Ms. Jackline Kulwa learned advocate for the plaintiff. She is also holding brief of Mr. Daimu Kambo, learned advocate for the first defendant and brief of Mr. Mlyambebele Ng'weli learned advocate for the fifth defendant and Mr. Jamhuri Johnson, learned advocate for the sixth defendant. The ruling is delivered in the absence of the second, third and fourth defendants who failed to appeal in the court while they are dully served. Right of appeal to the Court of Appeal is fully explained.



Jace
I. Arufani

JUDGE

12/08/2022