

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

MISC LAND CASE APPLICATION NO. 699 OF 2022

(Originating from Land Case No. 290 of 2022 of the High Court Land Division)

HAROON HUSSEIN HAROON 1ST APPLICANT
JABEEN IQBAL NORAY 2ND APPLICANT
MOHAMED IKBAL HAJI MOHAMED 3RD APPLICANT
SHAMMAH IMAN ABEID 4TH APPLICANT
HASSANAT MOHAMED IKBAL HAJI MOHAMED 5TH APPLICANT
PRIVAN SAKARCHAND DHARAMSI CHAVD 6TH APPLICANT
ABDULLAH GULAMSHAF ALIMOHAMED 7TH APPLICANT
TANZIL GULAMSHAFI ALIMOHAMED 8TH APPLICANT
TONGSHUN PLASTIC PACKING COLOR PRINTING CO. LTD . 9TH APPLICANT
YASMIN RAFIK NURMOHAMED 10TH APPLICANT

VERSUS

COSMOS PROPERTIES LIMITED 1ST RESPONDENT
EXIM BANK (TANZANIA) LIMITED 2ND RESPONDENT
WALTER BUXTON CHIPETA AS RECEIVER & MANAGER .. 3RD RESPONDENT

Date of last Hearing: 13/12/2022

Date of Ruling: 14/02/2023

RULING

I. ARUFANI, J

The applicants filed in this court the present application seeking for a temporary or interim injunction order to restrain the respondents, their servants, agents and other persons deriving titles from them from

entering, selling and or exercising any legal action against the properties in dispute pending hearing and determination of main suit pending in this court. After the respondents being served with the application the counsel for the third respondent filed in the court a notice of preliminary objection containing the points of law which read as follows: -

- 1. That the court is functus officio to adjudicate this application in view of the decision in Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021 decided by the High Court Dar es Salaam District Registry (Hon. Mruma, J) dated 8th July, 2022 and 21st April, 2022 respectively;*
- 2. The present application is res judicata against Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021 and;*
- 3. The application is an abuse of the court process."*

When the matter came for hearing the raised points of preliminary objection, the applicants were represented by Mr. Alex Balomi, senior learned advocate who was assisted by Mr. Crispin Magesa, learned advocate and while the first respondent was represented by Mr. Ambrose Mkwera, learned advocate and assisted by Mr. Bonaventura Masesa learned advocate, the second and third respondents were represented by Mr. Elisa Abel Msuya, senior learned advocate who was assisted by Mr. Simon Barlow Lyimo and Ms. Ndehurio Ndesamburo, learned advocates.

Mr. Elisa Msuya told the court in his submission in chief in relation to the first point of preliminary objection that, the court is *functus officio* to entertain the present application as the similar application was heard and finally decided in Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021 entertained by the High Court of Tanzania, Dar es Salaam District Registry. He argued that, the parties in Misc. Civil Application No. 220 of 2022 which was decided on 8th July, 2022 by Hon. Mruma, J were Walter Buxton Chipeta and Exim Bank (Tanzania) Limited who were applicants and the respondents were Muhammad Awais Pardesi and Cosmos Properties Limited.

He stated the applicants in the mentioned application were praying the court to issue an order to restrain the mentioned respondents to disturb Walter Buxton Chipeta (who is third respondent in the present application) who was dully appointed as a Receiver Manager of the properties of Cosmos Properties Limited (the first respondent in the present application) which is also a subject matter in the present application to perform his duties and functions as a Receiver Manager. He submitted that the court granted the stated application as appearing at page 8 of the ruling of the court attached to the counter affidavit of the third respondent as annexure WBC 2.

He argued that, while the stated decision of the court has never been vacated by any court and is binding to this court, the applicants in the present application are praying the court to restrain the third respondent from continuing to carry out his function as a receiver manager of the properties in dispute. He stated it is their humble submission that, the order sought by the applicants in the present application cannot be granted as the court is functus officio to entertain the application.

To support his submission, he referred the court to the case of **Tanzania Telecommunications Co. Ltd & Three Others V. Tri Telecommunications Tanzania Ltd**, Civil Revision No. 62 of 2006, CAT at DSM where the case of **Kamundi V. R**, [1973] EA 540 which stated when the court makes an order finally disposing of the matter, the court is functus officio was cited. He also referred the court to the case of **Maria Chrysostom Lwekamwa V. Placid Richard Lwekamwa & Another**, Civil Application No. 549/17 of 2019 where it was stated where a judgment and decree has been made, the court of the same jurisdiction ceases to have power to entertain the same matter as it becomes functus officio.

He went on arguing that, although the applicants in the present application were not parties in Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021 but the issue is whether they are bound by the decisions made in the stated applications. He submitted that

the answer to the stated issue is in affirmative because the applicants are directly affected by the orders made by the court in the mentioned applications.

He stated the applicants are now seeking for an order to restrain the third respondent in the present application to proceed with his functions of receivership of the property in dispute and the said order is sought against the first and third respondents in the present application who in the previous applications were the second respondent and the first applicant respectively.

He submitted that the present application would have only been valid before the court if the order given in Misc. Civil Application No. 220 of 2022 has been vacated. He submitted the court cannot re-hear the application which has already been heard and determined by the court of the same grade. He prayed the court to struck out the application and stated if the applicants want to continue with the matter, they are required to follow the proper procedures and not the one of seeking for injunctive order they are seeking from this court.

He stated in relation to the second point of preliminary objection that, the present application is res judicata against Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021. He referred the court to the case of **Ester Ignas Luambano V. Adriano Gedam**

Kipalile, Civil Appeal No. 91 of 2014, CAT at Zanzibar where the court set out five conditions which are supposed to be established for the principle of res judicata to stand. He explained in his submission how the issue in dispute in the present application was heard and determined in the previous applications.

He stated the applicants in the present application were privies to the previous application as the applicants have alleged that they have derived their title from the second respondent in the present application who was the second applicant in Misc. Civil Application No. 220 of 2022. He stated the right of the applicants to litigate in the present application was litigated and determined in Misc. Civil Application No. 584 of 2021. He submitted that, as the applicants and the second respondent are privies, the applicants cannot claim ownership in the matter which has already been adjudicated and referred the court to the case of **Ester Ignas Luambano** (supra) to support his argument.

He argued in relation to the third point of preliminary objection that, the present application is a mere abuse of court process and prayed to adopt the submissions he has made in support of the first and second points of preliminary objections to support the third point of preliminary objection. He stated that, abuse of court process is where a party is well aware of a decision of the court but proceed to file in the court the same

dispute which has already been adjudicated. He submitted that the applicants are well aware of the previous applications mentioned hereinabove and prayed the application be struck out with costs.

In his reply Mr. Alex Balomi told the court that, the submission made by the counsel for the second and third respondents in support of the points of preliminary objections he has raised is devoid of merit and stated the points of preliminary objections raised are superfluous and they are improperly before the court. He stated they cannot be invoked in the present application as they are not forming party of the Land Case No. 290 of 2022 pending in this court. He stated the raised points of preliminary objections would have been meaningful if they were raised in relation to the main suit pending in this court and not in the present application.

He submitted that determination of the points of preliminary objection raised by the counsel for the third respondent is a mere moot court because in order to invoke the principle of *functus officio*, *res judicata* and abuse of court process requires existence of a suit and application like the present one in the court. He stated the submission made by the counsel for the second and third respondents is making reference to the previous applications heard in the High Court Dar es

District Registry and without mentioning the land case pending in this court upon which the application at hand is made.

He stated the parties in Misc. Civil Application No. 220 of 2022 and in Misc. Civil Application No. 584 of 2021 are totally different from the parties in the present application. He argued under that circumstances the doctrine of *functus officio* and *res judicata* are totally inapplicable in the matter at hand. He stated it is wrong to move the court to believe the parties in the present application were parties in the previous applications. He argued further that, the applicants in the present application are seeking for an order to protect their interest in the property in dispute while in the previous applications, the applicants were seeking for a declarator orders against the respondents not to disturb the third respondent in performing his functions as a Receiver Manager.

He argued that, the orders sought in the previous application by different parties cannot be used to render the present application *functus officio* or *res judicata*. He stated it is wrong to state the applicants in the present application are bound by the decision issued in the mentioned applications and it is wrong to submit the present application cannot be valid because of the stated decisions. He argued that, as the applicants might not be aware of the orders issued in the applications mentioned in the submission of the counsel for the second and third respondents, they

cannot seek to vacate orders issued in a matter which they were not parties.

He submitted section 9 of the Civil Procedure Code clearly stipulates the conditions required to be established for the doctrine of res judicata to be invoked and referred the court to the conditions stated in the case of **Ester Ignas Luambano** (supra). He stated it is misleading to say the fifth and sixth conditions for the principle of res judicata to stand provided under section 9 of the Civil Procedure Code have been established in the present suit as there is no previous suit which has been determined against the applicants which can render the present suit res judicata.

He stated the third point of preliminary objections raised by the counsel for the second and third respondents is also bound to fail because it has not met the conditions required to establish the present application is an abuse of court process. He argued that, it cannot be said the applicants who were not parties in the previous application have abused the court process by filing the present application in the court. He submitted that, the purported preliminary objections are full of facts and they do not qualify to be preliminary objections which can be determined at this stage of the matter.

He argued that, as the said points have been raised in the pleadings of the parties, they are supposed to be disposed of at the hearing of the

matter on merit. At the end he invited the court to use section 3A of the Civil Procedure Code to dismiss the points of preliminary objections raised by the counsel for the third respondent with costs and order the matter to proceed with hearing on merit. Mr. Ambrose Mkwera supported the submission made by the counsel for the applicants and prayed the points of preliminary objections raised by the counsel for the third respondent be dismissed with costs and hearing of the application be allowed to proceed on merit.

In his rejoinder the counsel for the second and third respondents stated that, what makes the court to be functus officio is not the parties but the order issued by the court. He stated he has not heard the counsel for the applicants stating the order issued by the court in the mentioned applications is not affecting the applicants in the present application. He submitted that as the applicants are affected by the stated orders of the court, they cannot be heard saying the orders have no legal effect and no order can be superimposed on the already issued orders until when they are vacated.

He went on stating that, the counsel for the applicant has not stated which facts have been referred and argued what he has argued are purely points of law. He stated as for the principle of res judicata the first and second respondents are privies and the stated argument is supported by

the case of **Ester Ignas Luambano** (supra). He submitted that there are Misc. Civil Applications No. 220 of 2022 and 584 of 2021 which allowed the third respondent to carry out the function of receivership and the cause of action in the stated applications and in the present application are the same.

As for the proposal that the points of preliminary objections should be heard and determined in the course of hearing the matter the counsel for the second and third respondents argued that is not proper because they are questioning jurisdiction of the court then those points cannot be heard in the merit of the application or main suit. As for the invitation of the court to section 3A of the Civil Procedure Code the counsel stated that, the same is bringing confusion as the counsel for the applicant has also prayed the points of preliminary objections be dismissed. At the end he prayed the application be dismissed with costs.

The court has keenly considered the rival submissions made to the court by the counsel for the parties in support and opposing the points of preliminary objection raised by the counsel for the third respondent in the present application. The court has found the major issue to determine in the matter is whether the points of preliminary objection raised by the counsel for the third respondent deserve to be sustained. In determining

the stated issue, the court will deal with the points of preliminary objection seriatim as raised and argued by the counsel for the parties.

Starting with the point of the court to be *functus officio* in entertaining the present application the court has found that, as rightly argued by the counsel for the parties and stated in the case of **Kamundi V. R** cited in the case of **Tanzania Telecommunications Company Limited** together with the case of **Maria Chrysostom Lwekamwa** cited to the court by the counsel for the second and third respondents the court is said is *functus officio* to entertain a case which it has issued or make an order which is finally disposing of the case. The stated position of the law can be put clear by the word used in the case of **Mohamed Enterprises (T) Limited V. Masoud Mohamed Naseer**, Civil Application N. 33 of 2012 where the Court of Appeal stated as follows: -

"Once judgment and decree are issued by a given court, judges (magistrates) of that court become "functus officio" in so far as the matter is concerned."

That being the meaning of the term *functus officio* the court has found the issue to determine here is whether the court is *functus officio* to entertain the application at hand as there are Misc. Civil Applications No. 220 of 2022 and 584 of 2021 which have already been finally determined and conclusively disposed of by the High Court Dar es Salaam

District Registry. The court has been of the view that, in order to say the court is functus officio it must be satisfied the order the applicants are seeking from this court has already been sought and finally disposed of in the previous mentioned applications.

The court has found that, the applicants in the present application are seeking for an order of temporary or interim injunction to restrain the respondents from entering, selling, and or exercising any legal action against their properties listed in the chamber summons pending hearing and determination of the main suit to wit Land Case No. 290 of 2022 filed in this court by the applicants. On the other hand, the court has found the order sought by the second and third respondents in Misc. Civil Application No. 220 of 2022 was a declaratory order that the act of the first respondent and one Muhammad Awais Pardesi to obstruct the third respondent to perform his functions of Receiver Manager of the properties of the first respondent are acts of contempt and obstruction to execution of lawful order or process.

The court has found that, although the ruling of the afore mentioned application shows at page 8 the court refused to find the respondents had committed the acts of contempt of lawful order or process, but as rightly argued by the counsel for the second and third respondents in the present application the court granted (at page 9 of the same ruling) an order to

restrain the respondents in the mentioned application not to obstruct the third respondent who was the first applicant in the mentioned application from performing his duties and functions of Receiver Manager.

To the view of this court the stated order was sought and granted specifically to Muhammad Awais Pardesi and Cosmos Properties Limited who were respondents in the mentioned application and not to other people who might have legal claim against the property in dispute as the one filed in this court by the applicants. The court has come to the stated view after seeing the court stated at page 9 of its ruling that: -

"Accordingly, I grant prayer No. 1 in the Chamber Summons and direct and order the respondents not to obstruct the 1st applicant, the Receiver Manager of the mortgaged properties Mr. Walter Buxton Chipeta from performing his duties and functions. Failure to comply with this order may constitute contempt of court orders."

The wording of the above quoted excerpt shows clearly that the order was issued against the parties who were respondents in the mentioned application and not against other people like the applicants who were not parties in the stated application. The court has found the counsel for the second and third respondents argued the stated order covered also the applicants because as the applicants stated they derived their title to the properties in dispute from the first respondent, Cosmos Property Limited

they cannot be heard saying they are not affected by the said order. The court has been of the considered opinion that, the question as to whether the applicants derived their title to the properties in dispute from the first respondent or not is a question which need much more details and mature consideration after receiving evidence from the parties to determine the same and not a question which can easily be determined at this stage of preliminary hearing of the application.

Since the order the applicants are seeking from this court is the order of temporary or interim injunction to restrain the respondents from entering, selling, and or exercising any legal action against their properties pending hearing and determination of Land Case No. 290 of 2022 they have filed in this court, and the order issued by the court in Misc. Civil Application No. 220 of 2022 was to restrain the other people who are not the applicants in the present application to obstruct the third respondent to carry out his function of Receiver Manager, the court has found it cannot be said the court is functus officio to entertain the present application.

The court has also found the counsel for the second and third respondents argued the court is functus officio to entertain the present application because the similar application was made and refused in Misc. Civil Application No. 584 of 2021 of the High Court Dar es Salaam District

Registry. The court has gone through the ruling of the mentioned application and found it is true that the order of temporary injunction was sought and the court refused to grant the same. However, the court has found the said order was not sought by the applicants in the present application but by the first respondent and it was order to restrain the second respondent and her directors, employees, servants, agents or assignees from interfering with properties which were in dispute in Civil Case No. 176 of 2021 pending determination of the mentioned case and not pending determination of Land Case No. 290 of 2022 pending in this court.

From what I have stated hereinabove the court has found it is not *functus officio* to entertain and determined the present application because what was sought and determined in the previous applications mentioned by the counsel for the second and third respondents are not the one the applicants in the present application are seeking from this court. Therefore, the court has found the first point of preliminary objection raised by the counsel for the third respondent is devoid of merit.

Coming to the second point of preliminary objection which states the present suit is *res judicata* against Misc. Civil Application No. 220 of 2022 and Misc. Civil Application No. 584 of 2021 the court has found 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 the object of the cited doctrine of res judicata is to bar the parties to go to 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 V. Gabriel Tanaki & Others**, [2003] TLR 312 where it was held that: -

"The object of the doctrine of res judicata is to bar multiplicity of suit and guarantee finality to litigation. It makes 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."

It is the view of this court that, in order to say a suit is res judicata to a former suit there are conditions which must be established are in co-existence in the current suit when compared with the previous suit. Those conditions can be derived from section 9 of the Civil Procedure Code which

were well summarized in the case of **Peniel Lotta** (supra) and can also be found in the cases of **Ester Ignas Luambano** (supra) and **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 application is res judicata the court is required to look into the present application and the two previous applications which the counsel for the second and third respondents is arguing they are rendering the present application res judicata. Starting with the first condition which requires a matter directly and substantially in issue in the subsequent suit is directly and substantially in issue in the former suit the court has found the

counsel for the second and third respondents argued that, the issue determined in the previous applications is similar to the issue to be determined in the present application.

He argued that, as the third respondent in the present application was seeking for an order to restrain the respondents in Misc. Civil Application No. 220 of 2022 not to disturb him in carrying out his duties as the Receiver Manager of the property in dispute and the applicants in the present application are seeking for an order of temporary injunction to restrain the third respondent to carry out his duties as the Receiver Manager then the first condition for the doctrine of res judicata to stand has been established.

The court has found that, as the order sought in Misc. Civil Application No. 220 of 2022 was an order to restrain the respondents not to disturb the third respondent to carry out his duties of receivership of the property in dispute and the order sought in Misc. Civil Application No. 584 of 2021 was an order of temporary injunction then the orders sought in the present application of temporary injunction to restrain the respondent to do anything in relation to the property in dispute is directly and substantially the same as the orders sought in the previous applications. Therefore, the first condition for the principle of res judicata to stand is in existence in the present application.

Coming to the second condition for the principle of res judicata to stand which states the former suit must have been between the same parties or privies claiming under them the court has found as rightly argued by the counsel for the applicants the parties in the previous applications and the parties in the present application are not the same. The court has come to the stated finding after seeing the applicants in the present application were not parties in the previous applications. The court has found while parties in Misc. Civil Application No. 584 of 2021 were the first and second respondents in the present application, the parties in Misc. Civil Application No. 220 of 2022 were the respondents in the present application together with Muhammad Awais Pardesi who is not a party in the present application.

The court has found the counsel for the second and third respondents in the present application argued the applicants have pleaded in their plaint they acquired their title to the property in dispute from the first respondent who was party in the previous applications then the applicants cannot be heard saying the matter at hand is not res judicata as they were directly affected by the orders given in the previous applications. The court has considered the stated argument but after going through the record of the matter it has found that, although it is true that the applicants have stated in their plaint that they derived their interest to the

properties in dispute from the first respondent but it cannot be said their interests were represented in the previous applications by the first respondent or any other party.

The court has come to the stated finding after seeing that, the term privity is defined in the **Black's Law Dictionary**, 8th Edition at page 1238 to cover a situation where someone whose interests are represented by a party to the lawsuit. That being the meaning of the term privity the court has found the dispute caused the first respondent to file Civil Case No. 176 of 2021 upon which the order of temporary injunction sought in Misc. Civil Application No. 584 of 2021 was based was different from the dispute in the Land Case No 290 of 2022 filed in this court by the applicants upon which the present application is based.

The court has found that, while in Civil Case No. 176 of 2021 upon which Misc. Civil Application No. 584 of 2021 was based the first respondent was challenging the act of the second respondent to refuse, delay and or deny to swap the properties in dispute which had been mortgaged to the second respondent with another property, the court has found the dispute in the Land Case No. 290 of 2022 pending in this court upon which the present application is based the applicants are seeking to be declared owners of the property in dispute.

The court has also found that, although the first respondent was a party in Misc. Civil Application No. 220 of 2022 where the third respondent was seeking for order to restrain the first respondent to obstruct him to perform his duties as the Receiver Manager but the issue of ownership of the applicants to the properties in dispute was not at issue so as to say the interest of the applicants were represented by the first respondent in the mentioned application. Under that, circumstances the court has found it cannot be said the parties in the previous applications and the parties in the present application are the same or were privies to the parties in the present application.

Having found the parties in the present application were neither parties nor privies in the previous applications and as stated in the cases of **Hamza Byarushengo V. Mwanga Hakika Microfinance Bank Limited**, Land Case No. 45 of 2019, HC Land Division at DSM, (unreported) and **Peniel Lotta** (supra) the five conditions required to be established for the principle of res judicata to stand must co - exist the court has found it cannot be said the principle of res judicata has been established in the present application. In the premises the court has found the second of preliminary objection raised by the counsel for the third respondent cannot be sustained.

As for the third point of preliminary objection which states the present application is an abuse of court process the court has found the counsel for the second and third respondents supported the same by using the submissions made in relation to the first and second points of preliminary objections. The court has found that, as the submission made to the court by the second and third respondents has failed to establish the first and second points of preliminary objections, there is no way it can be said the same submissions can establish the third point of preliminary objection because its existence was depending on existence of the preceding points of preliminary objections.

In the upshot the court has found the counsel for the second and third respondents has failed to satisfy the court the points of preliminary objections he has raised in the matter against the application of the applicants deserve to be sustained or upheld. Consequently, all points of preliminary objection raised by the counsel for the third respondent are hereby overruled in their entirety and the costs to be within the application. It is so ordered.

Dated at Dar es Salaam this 14th day of February, 2023



I. Arufani

I. Arufani

JUDGE

14/02/2023

Court:

Ruling delivered today 14th day of February, 2023 in the presence of Mr. Fredrick Mpanju, Advocate for the applicant, Mr. Bonaventura Masesa and Ms. Mariam Mabina, Advocates for the first respondent, Ms. Levina Kagashe together with Ms. Airine Mchau, Advocates for the second and third respondents. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani

JUDGE

14/02/2022