

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 273 OF 2022**

**PETER CALIST KUNDY.....1<sup>ST</sup> PLAINTIFF**

**ROGART SAMUEL KANIKI.....2<sup>ND</sup> PLAINTIFF**

**MARIAM NDEMBO.....3<sup>RD</sup> PLAINTIFF**

**EUNICE ANDREA NDIMBO.....4<sup>TH</sup> PLAINTIFF**

**ANUNSIATA DOUADOUA MHAKILICHA**

**W/O EMMANUEL MWIGUNE.....5<sup>TH</sup> PLAINTIFF**

**ARANYAELI NKIRWA NNKO.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ROSE ALFRED MWEYO.....1<sup>ST</sup> DEFENDANT**

**PERFECT PETER SAO (As administrator of the estate**

**of late Peter V. X SAO).....2<sup>ND</sup> DEFENDANT**

**FOSTERS AND COMPANY LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

28/02/2023 & 03/03/2023

**L. HEMED, J.**

On 18<sup>th</sup> October, 2022 the plaintiffs Peter Calist Kundy, Rogart Samuel Kaniki, Mariam Ndembo Manyanga, Eunice Andrea Ndimbo, Anunsiata Douadoua Mhakilicha and Aranyaeli Nkirwa Nnko instituted

the present suit against the defendants, Rose Alfred Mweyo, Perfect Peter Sao and Fosters and Company Ltd, claiming to be the lawful owners of the suit pieces of land which they at different times bought from the farm owned by one Valentine Kiangu. It was alleged that the plaintiffs after severally, acquiring the said plots, they accordingly at their own times and individual capabilities developed their said premises by building residential houses in which they dwell with their families up to the contemporary times.

It was alleged further that the Plaintiffs' individually continued to enjoy quiet possession of the suit property until on 02<sup>nd</sup> November 2021 when each was served with an order of **Execution No.62 of 2020** arising from **Land Case No.26 of 2010**. The service of the said Notice for execution was done by the 3<sup>rd</sup> Defendant, Fosters and Company Ltd.

The defendants, save for the 3<sup>rd</sup> defendants, disputed the claims by filing written statement of defence. The 2<sup>nd</sup> defendant, in respect of his written statement of defence filed on 25<sup>th</sup> day of November, 2022, raised a preliminary objection to *wit*.

*"That the matter is a replica of the High Court of Tanzania (Land Division) at Dar es salaam in the Land Case No. 26 of 2010, hence res judicata."*

With the directives of this, Court dated 7<sup>th</sup> day of December, 2022, it was ordered the preliminary objection to be argued by way of written submissions. The 2<sup>nd</sup> defendant was to file his submissions in chief on or before 21<sup>st</sup> day of December, 2022 and the plaintiffs ought to have filed their response by 4<sup>th</sup> day of January, 2023. The 2<sup>nd</sup> defendant was also required to make rejoinder submissions if any by 11<sup>th</sup> day of January, 2023. The parties promptly filed their submissions as per Court's directives.

In support of the objection, Mr. Idd Mussa Msawanga, learned advocate for the 2<sup>nd</sup> defendant submitted that, the 2<sup>nd</sup> defendant is sued in his capacity as the administrator of the estate of his later father, Peter V.X. SAO, who was the plaintiff in a suit that was preferred at the High Court of Tanzania (Land Division) at Dar es salaam as Land Case No. 26 of 2010 before Hon. NGWALA, J against the plaintiffs. The counsel averred that, in the said Land Case No. 26/ 2010, the then plaintiff now the 2<sup>nd</sup> defendant successfully sued the defendants now the plaintiffs for a declaration that he was the lawful owner of the suit premises located at Temboni Area, Dar es salaam and thus judgment was delivered in favour of the 2<sup>nd</sup> defendant.

He further stated that, following the said decision, the now 2<sup>nd</sup> defendant while executing the decree of the Land Case No. 26/ 2010,

the plaintiffs rise up and filed Misc. Land Application No. 422/ 2021 before this Court [A. Mgeyekwa, J] seeking for extension of time to apply to set aside *ex parte* order which was dismissed for lack of merits.

He asserted that, the plaintiffs again filed Misc. Land Application No. 652/ 2018 before this Court [T. Mwenegoha, J] seeking for investigation of claims that the suit premises ought to be executed is different from their premises in which this Court dismissed the application for wanting in legal spheres.

In response, thereto, Lt. Col. SJ NNKO, (psc) (ret), appearing for the plaintiffs contested that, the gist of 2<sup>nd</sup> defendant's objection of *res judicata* stems from Magomeni Primary Court, Civil Case No. 34 which culminated into Civil Appeal No. 167/ 1995 and later Civil Appeal No. 10 of 2000 before the Court of Appeal of Tanzania. He submitted that, the former suits leading to inception of the present suit is not between the same parties, the subject matter is not the same, the parties are not litigating under the same title (in fact they have not litigated in any title except the present one at any time, that their matter has not been heard by a competent Court and decided by it).

To fortify his contentions, he cited the case of **Felician Credo vs. Quamara Massod Battezy and Abdillah Ahamad Yusuph (HCT-SUMBAWANGA), Civil Appeal No. 10 of 2020** at page 4 and

**Rehema Salvatory Luoga vs. Shaweji Ibrahim, Christogani Masawe & Equity Bank (HCT-DSM), Land Appeal No. 114 of 2018** at page 4 (Unreported). He prayed the preliminary objection to be dismissed for lack of merits and substance.

In retort, the counsel for the 2<sup>nd</sup> defendant in summary stated that, the plaintiffs have not disputed the fact that the said previous case was determined in favour of the 2<sup>nd</sup> defendant leading to Misc. Land Application No. 422/ 2021 before Hon. A. Mgeyekwa, J and Misc. Land Application No. 652 of 2018 before Hon. T. Mwenegoha, J in respect of Execution No. 62 of 2020 which originated from Land Case No. 26/ 2010. He re-emphasized that the reply submissions of the plaintiffs have not disputed the existence of previous proceedings at this Court on the same subject matter.

He added that, this alone makes it prudent to declare the instant proceedings *res judicata* to Land Case No. 26/ 2010 as is directly and substantially the same as Land Case No. 273/ 2022, whose dispute was on the same property; otherwise, this Court may end up having double decisions on the same property.

From the parties' submissions for and against, the pertinent issue is whether the preliminary objection is meritorious or not? In the case of

**Cotwo (T) Ottu & Another vs Honourable Idd Simba Minister of Trade & Others**, [2002] TLR at 88 it was held that: -

*"A preliminary objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. examples are the jurisdiction of court, or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be demurrer. It rises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of jurisdiction".*

In Tanzania, the principle of *res judicata* is embedded in section 9 of the Civil Procedure Code [Cap 33 R.E 2019] which provides thus:

*"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 above provision prevents a party from bringing a claim once that particular claim has been subjected to a final judgment in some previous law suit. From the above cited provision, the following ingredients have to be satisfied for the matter to be ***res judicata***;

*(i) That the judicial decision was pronounced by a court of competent jurisdiction;*

*(ii) That the subject matter and the issues decided are the same or substantially the same as the issues in the subsequent suit.*

*(iii) That the judicial decision was final; and*

*(iv) That it was in respect of the same parties or parties litigating under the same title.*

Having examined ingredients (i) and (iii) in *toto* as aforesaid *vis-à-vis* para 13, 14 and 23 of the Plaint, read together with annexures LTA-1 (notice of eviction and eviction order collectively) and LTA-5 (plaint, judgment and decree collectively), it is squarely clear that Land Case No.

26 of 2010 was finalized before this Court in favour of the 2<sup>nd</sup> Defendant.

Furthermore, it is vivid that, the piece of land situated at Kimara Temboni, is the subject matter in the present suit and was the subject matter in Land Case No. 26 of 2010. This is unequivocally shown in paragraph 5 of the plaint and annexure PPS-4 attached to the written statement of defence. Lastly, the parties are the same in both, the present suit and in respect to Land Case No. 26/ 2010.

In the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women Christians Association of Tanzania, Civil Appeal No. 2 of 2010 (Unreported)** postulated what a point of law is;

*"...a point of law must be that of sufficient importance and, I would add that **it must also be apparent on the face of record**, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process".* Emphasis supplied.

From the Pleadings, especially the Plaint, it is clear that the plaintiffs instituted this matter as the way of challenging the execution of the Decree in Land Case No. 26 of 2010, which was finalized by this



same Court. The object and public policy behind the doctrine of *res judicata* is to guarantee finality of litigation and hence to protect an individual from a multiplicity of litigations. Insistently, the applicability of the doctrine is for the sake of promoting fairness in administration of justice by preventing abuse of court process.

For the reasons afore stated, this suit lacks merits and stands to be dismissed with costs for being *res judicata*. It is so ordered.

**DATED at DAR ES LAAM** this 3<sup>rd</sup> day of March 2023.



**COURT:** Ruling is delivered in the presence of Mr. Nnko Advocate of the plaintiffs and Mr. Ambrose Kwera holding brief of Mr. Idd Msawanga advocate of the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant appearing in person this 3<sup>rd</sup> day of March 2023. Right of Appeal fully explained.

