

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 808 OF 2022**

KIBERITI JEROMINI MASUMBUKO @ MASSAWE APPLICANT

VERSUS

HOLIDAY WILFRED NGONYA 1ST RESPONDENT

GIANT FINANCE LIMITED 2ND RESPONDENT

JACOB SAMSON SIMVICHE 3RD RESPONDENT

TULVIN INVESTMENT CO. LIMITED 4TH RESPONDENT

RULING

Date of Last Order: 27/2/2023

Date of Ruling: 23/3/2023

A. MSAFIRI, J.

This Application has been brought under Section 93 of the Civil Procedure Code, Cap. 33 R.E 2019 (herein the CPC). The applicant is seeking for an extension of time to file an Application to set aside ex parte Judgment and Decree out of time in the Land Case No. 83 of 2016 which was delivered by this Court on 27/4/2018.

The Application is supported by an affidavit of the applicant himself.

On the other hand the 1st respondent filed his counter affidavit upon which he raised two preliminary points of objection as follows;

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- a) That the application is untenable and bad in law for being filed in Land Division Registry.
- b) That the application is res judicata as it was already determined in Misc. Application No. 171 of 2019 dated 21/2/2021 annexed as Annexure "A".

It is trite law that once a preliminary objection have been raised, then the procedure is to dispose the same first before proceeding with the matter on merit. Hence, the schedule for hearing was set, however, with leave of the Court, the hearing of preliminary objection was conducted by way of written submissions.

The written submission by the 1st respondent was drawn and filed by advocate Thomas Joseph Massawe. In support of the preliminary objection, the counsel started with the first point of preliminary objection.

He submitted that, the applicant is seeking for an extension of time to set aside ex-parte judgment on Land Case No. 83 of 2016 of the High Court of TZ, Dar es Salaam District Registry.

He averred that the High Court Registries are established under the Judicature and Application of Laws Act (JALA) Cap 358, and each Registry is established for a certain purpose.

He argued that, each Registry was established on its own purpose and there is no transfer of cases from one Registry to another. He pointed that, the High Court DSM District Registry maintains its own Land Register. He pointed that the Land Case No. 83 of 2016 which the applicant is intending to challenge was filed and maintained in a Land Registry at DSM District

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Registry and not the HC Land Division Registry while the application at hand is filed and maintained in the register at the High Court Land Division.

The counsel for the 1st respondent argued that, entertaining the case of another registry is untenable and bad in law. He prayed for the Court to uphold the first ground of preliminary objection.

On the second ground of preliminary objection, the counsel for the 1st respondent submitted that the application is res judicata as it was properly heard and determined by this Court.

He prayed for the Court to take judicial notice of Misc. Application No. 171 of 2019 at DSM District Registry before Hon. Masabo, J whereby on 26/2/2021 the Court granted similar relief by granting extension of time which is prayed now.

The counsel submitted that, in the said Application No. 171 of 2019, the application was allowed and the applicant was granted 14 days within which to file the intended application to set aside the said judgment and decree. That, the applicant filed Misc. Civil Application No. 177 of 2021 to set aside the impugned ex-parte Judgment but the application was dismissed on 25/11/2021, hence the matter was closed.

The counsel for the 1st respondent contended that the remedy for the dismissal of the suit was to appeal to the Court of Appeal of Tanzania against the dismissal order and not to go back to seek for remedies which were already granted.

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He added that the current application falls under the principle of res judicata under Section 9 of the CPC. He prayed for the Court to uphold the second point of preliminary objection and dismiss the application at hand with costs.

The reply submissions by the applicant was drawn and filed in Court by advocate Joseph Msengezi. He submitted that, the preliminary objections raised are devoid of any merit.

On the first point of preliminary objection, the counsel for the applicant stated that, at first instance, the applicant filed Misc. Application No. 808 in High Court, Dar es Salaam District Registry through online filing system on 01/12/2022. However the office of admission in the respective Registry returned this Application and directed the applicant to file the same in High Court Land Division in which the same was refiled on 01/12/2022. Hence, he added that, the application was filed in this Court through the direction of the Admission Office of High Court Dar es Salaam Main Registry.

The counsel prayed for the Court to take judicial notice of the exhibit of admission of the Application which were attached to the submission.

In second point of preliminary objection, the counsel for the applicant replied that, the applicant was granted 14 days of extension of time within which to file an application to set aside ex-parte judgment of Land Case No. 83 of 2016 through Misc. Application No. 171 of 2019. Unfortunately, the remedy was not utilized by the applicant due to the reasons stated out in affidavit of the applicant under paragraphs 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32 and 33.

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The counsel averred that, under the current application, the application is praying for the enlargement of time for the second time to file Application to set aside ex-parte Judgment, under Section 93 of the CPC.

He contended that, the attached order of Misc. Application No. 177 of 2021 does not show where it originated from hence it does not relate with the Application at hand in any manner. He added that the intended to be challenged Land No. 83 of 2016 is tainted with illegalities which needs to be rectified by the Court.

He prayed that the two preliminary objections by the 1st respondent be dismissed with costs.

In rejoinder, the 1st respondent mostly reiterated his submissions.

Having read and considered the submissions from the rival parties, the pertinent issue is whether the preliminary objections raised by the 1st respondent are meritorious.

For the reason I will explain later, I will start with determination of the second point of preliminary objection. On this, the 1st respondent has raised a point of law that the application is res judicata as it was already determined in the Misc. Application No. 171 of 2019.

The Principle of Res Judicata is set under provisions of Section 9 of the CPC. The provision gives six mandatory prohibition to the Court to re-deter mine the matter if; one, the matter was directly and substantially in issue in the former matter; Two, the issue is between the same parties or between parties under whom or any of them claim litigating; Three, the parties have litigated under the same title; Four, the former suit was determined by the

court with competent jurisdiction; Five, there are two suits, the former suit and subsequent suit; Six, the issue has been determined conclusively.

In the current application, the 1st respondent avers that this Application is res judicata to Misc. Civil Application No. 171 of 2019 which was filed at High Court DSM District Registry. In the same, the applicant was seeking for extension of time to file an application to set aside an ex-parte judgment in Land Case No. 83 of 2016, the application was granted and the applicant given 14 days to file the sought application.

The 1st respondent requested this Court to take judicial notice of Misc. Application No. 171 of 2019 and Misc. Application No. 177 of 2021 which involves the same parties, same subject matter and same prayers, all by the current applicant.

I have read the contents of the affidavit of the applicant which supports this application at hand and I wholly agree with the submission by the counsel for the 1st respondent that this current application is res judicata.

It is in the affidavit of the applicant that, he filed Misc. Application No. 171 of 2019 seeking for extension of time to file an application to set aside ex-parte judgment and Decree of Land Case No. 83 of 2016 which was delivered by this Court. The Ruling of the said Application was delivered on 26/2/2021 in favour of the applicant who was given 14 days to file the Application to set aside the said ex-parte judgment. The applicant did not file the said Application within the time as ordered by the Court for the reasons he has explained in the affidavit.

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The applicant then managed to file another Misc. Civil Application No. 177 of 2021 seeking for an order to set aside ex-parte judgment. According to the applicant, he believed that he was still within time. In the said Misc. Civil Application No. 177 of 2021, a preliminary objection was raised by the adverse party that the application was out of time. That the applicant conceded with the preliminary objection and the application was "removed" in Court.

After the Application No. 177 of 2021 was "removed" in Court as the applicant claims, he has again knocked the doors of this Court seeking for an extension of time to set aside ex-parte judgment in Land Case No. 83 of 2016. It is my finding that the current application which is Misc. Civil Application No. 808 of 2022 is res judicata to the former application which is Misc. Application No. 171 of 2019.

The Court has taken judicial Notice of the Ruling of this Court, DSM District Registry whereby the Court granted the prayer by applicant seeking for extension of time within which to file an application to set aside ex-parte judgment in Land Case No. 83 of 2016.

The parties, and subject matter in the former application were similar to the current application. The matter was heard on merit and conclusively decided whereby the applicant was granted the sought leave. The applicant then went on to file the application to set aside the ex-parte judgment, believing that he was within the time. He filed Application No. 177 of 2021 which was dismissed for being time barred.

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Since the Application No. 171 of 2019 which is the former suit is similar to the current application, and it was determined conclusively, then applicant is barred from filing another similar application.

Furthermore, in Application No. 177 of 2021, the Court has dismissed the prayers by the applicant seeking leave to set aside the ex-parte judgment, hence the applicant is also barred from reopening the similar matter by similar prayers before the same Court.

As rightly pointed by the counsel for the 1st respondent, the remedy available in the circumstances was for the applicant to lodge an appeal to the Court of Appeal against the dismissal order by Hon. Masabo, J. in Application No. 177 of 2021 and not to file another application as he has done.

Mr. Msengezi, counsel for the applicant, in his reply submissions, he contended that the Order of Misc. Application No. 177 of 2021 does not show where it originated from and hence it does not relate with the Application at hand in any manner and it is totally distinguishable with the matter at hand.

I find this to be mere submission from the bar and does not reflect what was deposed by the applicant in his affidavit. In the affidavit, as said earlier, the applicant stated that he filed Misc. Application No. 177 of 2021, and the adverse party raised preliminary objection on time limit, he conceded and the application was "removed" in Court. The applicant did not state how the application was removed in Court.

These contents of the affidavit proves that the applicant has knowledge of the Misc. Application No. 177 of 2021 and how it ended. It is my view that Mr. Msengezi is trying to misguide the Court on this fact, and I find this to

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be uncalled for an officer of the Court. I have taken judicial notice of the Order of this Court, DSM District Registry in Misc. Civil Application No. 177 of 2021 by Hon. Masabo, J, dated 25/11/2021 where the application was dismissed with no order for costs.

The counsel for the applicant in his submission, he has argued that, the intended ex-parte judgment to be challenged of Land Case No. 83 of 2016 is tainted with illegalities which needs to be rectified.

However, having found that this application falls under the purview of the principle of res judicata, I cannot go to the issue of illegalities as I will be re-opening the matter which has been finally decided by this Court.

It has been elaborated in the numerous decisions both of this Court and the Court of Appeal that the purpose of the principle of res judicata is to see finality or end of litigation between the parties.

One of the numerous cases is the case of **Umoja Garage vs. National Bank of Commerce Holding Corporation** [2003] TLR 339 which elaborated the rationale behind the principle of res judicata being, to ensure finality in litigation and to protect parties and individuals from endless litigations.

For the above reasons, it is my view that this application is incompetent for being res judicata hence deserves dismissal.

The reason for starting with determination of the second point of preliminary objection was for the fact that it has the effect of disposing of this matter. I therefore see no need to embark on determination of the first point of preliminary objection.

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I uphold the second point of preliminary objection by the 1st respondent and proceed to dismiss the application with costs.

It is so ordered.

A. Msafiri

A. MSAFIRI

JUDGE

23/3/2023

