

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

LAND CASE NO. 67 OF 2022

**PHILIP KIMBWEREZA (Appointed Attorney of
Anup Bhikhu Jetwa) PLAINTIFF**

VERSUS

**INTERNATIONAL COMMERCIAL BANK (T) LIMITED 1ST DEFENDANT
CHAMPION AUCTION MART LIMITED 2ND DEFENDANT
YONO AUCTION MART CO. LIMITED 3RD DEFENDANT**

Date of last Order: 23/03/2023

Date of Ruling: 20/04/2023

RULING

I. ARUFANI, J

The court is called upon to determine two points of preliminary objections raised by the first defendant in the present suit which read as follows: -

- 1. That the subject matter of this suit is res judicata to Civil Case No. 40 of 2020 between Asif Ali Riasat as the plaintiff and Anup Bikhu Jetwa as well as the 1st defendant as defendants and Land Case No.19 of 2020 between Philip Kimbwereza (As appointed Attorney of Anup Bhiku Jetwa) as the plaintiff against the Defendants.*
- 2. The power of attorney attached to the plaint is not certified thus contravening Rule 6 (2) of Order III of the Civil Procedure Code, Cap 33 R.E 2019.*

When the matter came for hearing the afore quoted points of preliminary objections the plaintiff was represented by Mr. Eliya Ryoba learned advocate. On the other side Mr. Juventus Katikiro, learned advocate represented the first defendant. The hearing of the points of preliminary objections proceeded ex parte against the second and third defendants. That is because the mentioned defendants were duly served but they failed to appear in the court.

By consent of the counsel for the parties the points of preliminary objections were argued by way of written submissions. The counsel for the first defendant (hereinafter referred as the counsel for the defendant) stated in his submission that, the plaintiff is seeking for an order of injunction pending hearing and determination of the main suit which is the present Land Case No. 67 of 2022. He stated the order of injunction is sought in relation to a mortgaged property situated on Plot No. 573, Mindu Street, Upanga Area, with Certificate of Title No. 186170/5/59 within Ilala Municipality in Dar es Salaam Region (hereinafter referred as the suit property).

He went on arguing that, the order sought by the plaintiff in the present suit was sought by the plaintiff in the previous matters filed in the High Court, Dar es Salaam District Registry as Miscellaneous Civil Case

No. 122 of 2020, Civil Case No. 40 of 2020 which were finally determined by my brother Hon. Rwezile, J on 24th September, 2020 and also Land Case No. 19 of 2020 which was finally determined by Honourable Kulita, J on 8th March, 2022 by dismissing the suit from the court. He argued that, by looking into two matters already determined by the court which were centered on the same suit property it is crystal clear that the dispute over the suit property has already been adjudicated by the High Court, Dar es Salaam District Registry against the same plaintiff herein.

He argued that, section 9 of the Civil Procedure Code restricts the court of the same level to try or entertain any suit already tried and adjudicated by another court of competent jurisdiction over the same subject matter and involving the same parties. 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 the Court discussed the above referred section 9 of the Civil Procedure Code and enumerated five conditions required to be proved to establish a suit is res judicata.

He argued it is a trite law that, before court deal with anything brought before it is required to assess first if it has jurisdiction to entertain the matter before it. To support his argument, he referred the court to

the case of **The Registered Trustees of the Islamic Solidarity Center V. Jaabir Swalehe Koosa & Four Others**, HC at Moshi (unreported) where it was stated the court is duty bound to ascertain its jurisdiction before proceeding to entertain the matter before it. He based on the above provision of the law and the authorities cited to urge the court to find the suit at hand is res judicata and the court has no jurisdiction to entertain the same. Finally, he prayed the court to dismiss the suit with costs.

In his reply the counsel for the plaintiff stated the submission by the counsel for the defendant is misconceived and is out of context. He stated the defendant's counsel submission is misleading the court by stating the plaintiff is seeking for an order of injunction pending hearing and determination of the main suit which is Land Case No. 67 of 2022 pending in this court. He argued that, the counsel for the defendant has forgotten that the application for an order of temporary injunction pending hearing and determination of the current suit was disposed of last year in Miscellaneous Land Case Application No. 133 of 2022 and the application was granted.

He referred the court to the case of **Pravin Girdhar Chavda V. Yasmin Nurdin Yusufali**, Civil Appeal No. 165 of 2019 which cited with

approval the case of **Penile Lotta V. Gabriel Tanaki and Others**, [2003] TLR 312 where section 9 of the Civil Procedure Code was discussed and listed five conditions which must be proved are in co-existence for a suit to be found is res judicata. He listed the conditions stated in the above cited cases and discussed them in his submission to show how the present suit is not res judicata to the previous suits cited by the counsel for the defendant. At the end he prayed the court to dismiss the points of preliminary objection raised by the counsel for the defendant with costs and stated it has delayed determination of the current suit unnecessarily.

Having carefully considered the rival submissions from both sides the court has found the counsel for the parties have not argued anything in relation to the second point of preliminary objection which states the power of attorney attached to the plaint is not certified thus contravening Rule 6 (2) of Order III of the Civil Procedure Code. Since the counsel for the parties have not argued anything in relation to the second point of preliminary objection, the court has taken the counsel for the parties have decided to abandon the same. Therefore, the court will not deal with same in this ruling.

Back to the first point of preliminary objection, the court has found it states the subject matter of the current suit is res judicata to

Miscellaneous Civil Case No. 122 of 2020, Civil Case No. 40 of 2020 and Land Case No. 19 of 2020 filed in the High Court of Tanzania, Dar es Salaam District Registry and finally determined by the mentioned court. 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 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** (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 further found that, in order to be able to determine the present suit is res judicata against the mentioned previous suits there are five conditions which must be established are in existence in the present suit and in the mentioned previous suits. 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 plaintiff and can also be found in the case of **Yohana Dismas Nyakibari**

& Another V. Lushoto Tea Company Limited 8l 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; (Hi) 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 former suits it is required to look into the suit at hand and compare the same with the previous suits to see whether the conditions stated hereinabove for the doctrine of res judicata to be invoked in the present suit have been established. The court has found as rightly argued by the counsel for the plaintiff there is no any decision made or given in the mentioned previous suits which is annexed in any pleadings filed in the court by the parties or annexed in the submissions of the parties to enable the court to determine the conditions for

invocation of the doctrine of res judicata have been established in the present suit.

The court has also found the counsel for the defendant has argued the plaintiff is seeking for an order of injunction pending hearing and determination of the present suit which was sought and determined in the mentioned former suits. The court has found as rightly argued by the counsel for the plaintiff the counsel for the defendant is either misleading the court or has misconceived the reliefs the plaintiff is seeking from this court. The court has come to the stated finding after seeing there is nowhere in the suit at hand indicated the plaintiff is seeking for an order of injunction pending hearing and determination of the present suit.

To the contrary the court has found the order the plaintiff is seeking from this court as indicated at paragraph 5 (a) and part (i) of the relief clause contained in the plaint is an order of permanent injunction to restrain the defendants and their agents, workmen or any other person working under them from selling or disposing of the suit property anyhow. It is not an order of injunction pending hearing and determination of the present suit which to the view of this court would have been an order of temporary injunction which the counsel for the plaintiff has argued it was sought and granted in Miscellaneous Land Application No. 133 of 2022.

The court has also gone through the pleadings filed in Civil Case No. 40 of 2020 annexed in the written statement of defence of the first defendant as annexure ICB 1 and find that, as rightly argued by the counsel for the plaintiff there is no similarities between the present suit and the mentioned former suit. The court has found the parties are different because while the plaintiff in the previous suit was Asif Ali Riasat suing Anup Bikhu Jetwa and International Commercial Bank (T) Ltd (ICB), in the matter at hand the plaintiff is Philip Kimbwereza who under power of Attorney given to him by Anup Bhiku Jetwa is suing International Commercial Bank (Tanzania) Limited, Champion Auction Mart Limited and Yono Auction Mart.

Even if for the sake of argument, it will be said the second and third defendants are privy to the first defendant in the present matter but the matter in issue in the previous mentioned suit is not directly and substantially in issue in the present suit. The court has arrived to the stated finding after seeing that, as rightly argued by the counsel for the plaintiff the claims of the plaintiff in the former suit was for immediate release of sixty (60) motor vehicle registration cards and all necessary motor vehicles documents or payment of 475,595 USD plus interest, general damages and the costs of the suit.

The stated claims are quite different from the claims the plaintiff is seeking from the present suit which are an order of permanent injunction to restrain the defendants and their agents or any other person from selling and or disposing of the plaintiff's suit property plus other various claims which were not claimed in the former suit. That being the position of the matter the court has found the principle of res judicata cannot be invoked in the present suit because as stated in the case 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 for the principle of res judicata to stand must co-exist and they are not in co-existence in the mentioned two suits.

The above stated findings have moved the court to come to the settled view that, the point of preliminary objection raised by the first defendant and argued by the counsel for the parties has not been established to the extent of being sustained. Consequently, the two points of preliminary objections raised by the first defendant are hereby overruled for being devoid of merit and the costs to be within the suit. It is so ordered.

Dated at Dar es Salaam this 20th day of April, 2023




I. Arufani

JUDGE

20/04/2023

Court:

Ruling delivered today 20th day of April, 2023 in the presence of Mr. Eliya Ryoba, learned advocate for the plaintiff and in the presence of Mr. Kelvin Ngeleja, learned advocate for the first defendant and in the absence of the second and third defendants. Right of appeal to the Court of Appeal is fully explained.




I. Arufani

JUDGE

20/04/2023