

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE NO. 177 OF 2022

ANDREW ANTHONY SINDABAHA ..... PLAINTIFF

VERSUS

AKIBA COMMERCIAL BANK ..... DEFENDANT

RULING

*Date of last Order: 27.04.2023*

*Date of Ruling: 05.05.2023*

**A.Z. MGEYEKWA, J**

On 19<sup>TH</sup> July, 2022 Andrew Anthony Sindabaha, the Plaintiff herein, instituted this suit against tAkiba Commercial Bank, the Defendant seeking seven reliefs as follows:-

- i. A declaration that the Plaintiff to pay the Defendant TSZ. 310,000,000/= as outstanding balance and the amount demanded by the Defendant is contrary to the judgment and decree as the interest increase was dully caused by the Defendant's illegal act of auctioning the mortgaged property illegally.

- ii. The Defendant to pay general damage to the Plaintiff at the tune of 500,000,000/= as mental anguish and sleepless nights suffered by the Plaintiff due to an unlawful act intended to be done by the Defendant which denies the right of peaceful enjoyment of the rights over the plot in dispute and loss of investment opportunity.
- iii. That this Honourable court be pleased to declare that the sale intended to be done by the Defendant is illegal and void ab initio since the Plaintiff is able to pay the disputed property to remain as a security.
- iv. Perpetual injunction against the Defendant, his workmen, and his agents from registered and the Title No. 89175 Plot 115, Block A Tegeta Dar es Salaam.
- v. Costs of this suit to be borne by the Defendant.
- vi. Any other reliefs this Honourable Court deems fit and just to grant.

The Defendant filed a Written Submission Defence and also raised one point of Preliminary Objection as follows:-

*That this case is res judicata.*

When the matter came up for orders on 27<sup>th</sup> April 2023, the applicant had the legal service of Ms. Regina Herman, learned counsel, and the Defendant had the legal service of Ms. Janeth Njombe, learned Advocate.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the appeal. That

is the practice of the Court founded upon prudence which we could not overlook.

Submitting in support of the first limb of the objection, Ms. Janeth submitted that the instant suit is *res judicata*. She added that the matter in dispute was adjudicated in Land Case No. 56 of 2017. To support her submission she referred this Court to annexure F1-2 to the Plaint, Ms. Janeth contended that the doctrine of *res judicata* is enshrined under section 9 of the Civil Procedure Code, Cap.33 [R.E 2019] in its broadness it directs that a matter that has been fully adjudicated by a competent court and against the same parties should not then be again adjudicated for.

Ms. Janeth stated that the doctrine is broadly discussed in the case of **Zuberi Paul Msangi v Mary Machui**, Civil Appeal No. 316 of 2019 whereas the Court of Appeal of Tanzania held that the doctrine of *res judicata* is for two reasons; there must be an end of the lawsuit and no man should be vexed twice for the same cause. She added that the Court of Appeal quoted with approval the case of **Paneli Lotta v Gabriel Tanaki & Others** [2003] TLR 312 in the first prerequisite, the matter was substantially an issue in the previous court and the same is an issue in the current court. Ms. Janeth continued to submit that in Land Case No. 56 of 2017, the matter in issue was the sale of the property with CT 89175

Plot No. 1157 Block 'A' Tegeta Area that was mortgaged to the Defendants by the Plaintiff, the guarantor.

Ms. Janeth continued to submit that looking at paragraph 3 of the Plaintiff the same property is bought by the Plaintiff with an issue that surrounds the auction. In that circumstance, Ms. Janeth submitted that the right to auction was granted in Land Case No. 56 of 2017 hence the same cannot again be examined at this premise suit.

As to the second prerequisite, the learned counsel for the Defendant contended that the same parties are the same, in Land Case No. 56 of 2017, Andrew Anthony Sindabaa was the Plaintiff and he is the same Plaintiff in the instant suit and the 1<sup>st</sup> Defendant was Akiba Commercial Bank, in her view, the second prerequisite has been met.

On the third condition, the learned counsel for the Defendant argued that the parties are litigating at the same title; the Plaintiff in Land Case No. 56 of 2017 litigated the suit as a guarantor and owner of the mortgaged properties and the 1<sup>st</sup> Defendant therein appearing as the lender. She went on to submit that the Plaintiff suit in the instant case is suing in his capacity as a guarantor and owner of the properties that were mortgaged to the Defendant. In her view, the third prerequisite is met.

Submitting on the fourth 4<sup>th</sup> condition, the competence of the court that tried the suit, she subscribed that the High Court - Land Division adjudicated Land Case No. 56 of 2017 and it had jurisdiction to try the case and the matter again is before the same court with the same concern on the auction of the suit premises. In her view, the 4<sup>th</sup> prerequisite has been met.

On the fifth prerequisite, the matter was heard and finally decided. The learned counsel for the Defendant asserted that evidence from the judgment attached with the Plaint shows that the matter was determined to its finality and this Court nullified the auction for procedural reasons and directed the Bank to conduct another auction. She valiantly argued that surprisingly the Plaintiff is choosing to submit the same dispute before the same Court to stop the auction of the same property. In her view, the fifth prerequisite is established.

On the strength of the above submission, the learned counsel for the Defendant contended that all five prerequisites had been met, hence she urged this Court to see fit to dismiss the current suit with costs for being *res judicata* to Land Case No, 56 of 2017.

Responding, Ms. Regina contended that the preliminary objection is not a pure point of law. Fortifying her submission she cited the case of **Moto Matiko Mabanga v Ophir Energy PLC & 6 others**, Civil Appeal No. 119

of 2021, the Court insisted on the nature of PO by quoting the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributor Ltd** [1996] TLR 699, the Court of Appeal of Tanzania insisted that the preliminary objection must be on a pure point of law and if argued may dispose of the suit. Ms. Regina contended that the objection requires evidence to establish the counsel's allegations. She also cited the case of **Cotwo (T) Ortu Union & another v Hon. Iddi Simba Minister of Industries and Trade and Others** TLR [2002].

Reverting to the objection raised by Ms. Janeth submitted that the essence of *res judicata* is provided under section 9 of the Civil Procedure Code Cap.33; there must be a suit between the same parties; she stated that going through the Plaint, one will see it is a suit against the Plaintiff v Akiba Commercial Bank. She went on to assert that to prove the same one had to go to Land Case No. 56 of 2017. Ms. Regina argued that the Defendants were Akiba Commercial Bank, Harvest Tanzania Habrahim, and Hamisi.

Concerning the matter in issue must be direct to the previous suit; to enable the court to prove if it is a different case. She stated that in Plaint they are praying for declaratory order and the same requires evidence thus the same does not qualify to be an objection. The learned counsel for the Plaintiff continued to argue that the counsel for the Defendant has

only mentioned one Defendant and refused to mention other parties. She distinguished the cited case of **Zuberi** (supra) and stated that in the cited case, there is nowhere showing the holding to justify her objection. Ms. Regina forcefully argued that in the matter at hand, the same requires proof. She added that in Land Case No. 56 of 2017, the Plaintiff and Defendant were disputing on illegal sale that led to the sale of the property to a lower price, and in the instant suit, they are praying for a declaratory relief which is not the same to the former case. She stressed that they do not dispute the auction process.

Submitting on the 3<sup>rd</sup> condition; the parties are litigating at the same title. Ms. Regina argued that the Plaintiff is not litigation on auction, sale, or ownership but he is requesting a declaratory relief as provided for under section 7 (2) of the Civil Procedure Code Cap.33, the Court is bound to do so.

The learned counsel for the Plaintiff further submitted that in the Land Case No. 56 of 2017, the cause of action was nullification of sale under the Land Act S.127 and Auctioneers Act in which the Defendants defaulted, therefore, it was never determined on declaratory relief. The court nullified the sale after seeing that the procedure of auction was not met.

On the strength of the above submission, Ms. Regina insisted that the objection raised requires evidence to prove the said facts. She urged this Court to dismiss the objection with costs.

In her rejoinder, Ms. Janeth reiterated her submission in chief, she stated that the objection is a pure point of law as it emanates from the provision of section 9 of the Civil Procedure Code Cap.33 [R.E 2019]. She argued that the Court does not require to determine the since Land Case No. 56 of 2017 determined the same case in dispute.

Ms. Janeth continued to stress that the parties are the same in both cases. She noted that some parties are not joined in the present suit, however, that does not defeat the fact that the Defendant is brought before this court under the claims that they should be stopped from auctioning this property. Hence the suit is still *res judicata* in Land Case No. 56 of 2017. She refuted that the Plaintiff is only seeking a declaratory order as a cause of action, however, looking at paragraph 3 it is clearly pleaded that the Plaintiff seeks to restrain the Defendant from selling the property which is the same property which was in dispute in the previous suit.

The learned counsel for the Defendant noted that on page 4 of the Plaint, the Plaintiff prays for a declaratory order but the same is not presented as a cause of action, instead what is pleaded is to restrain the Defendant from the suit property. She referred this Court to reliefs whereas the



Plaintiff included perpetual injunction from selling the property and declaration that the sale is illegal, all of them were decided in Land Case No. 56 of 2017 and they present no difference in the matter at hand.

The learned counsel for the Defendant continued to submit that Ms. Regina has cited paragraph 8 of the Plaint that they seeking a declaration that the money taken by the bank is illegal, if that is the case the proper action was not to bring another case instead he could file an Application for review. She added that the Plaintiff could rephrase and pray for declaratory order only without including the matters of auction. However, what is sought in the suit is the declaration of matters that have been decided that the guarantor is liable to pay the loan for what he guaranteed. Ending, Ms. Janeth urged this Court to dismiss the suit with costs.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserved. I should state at the outset that the main issue for determination is *whether Land Case No.177 of 2022 is res judicata*.

The issue which I am called upon to resolve in this ruling is whether the preliminary objection raised by the Defendant is meritorious. I have carefully summarized the submissions made by learned counsels for the Plaintiff and Defendant. Before I address the main issue, I find it necessary to consider the validity of the preliminary objection since the

Plaintiff's counsel has contended that the point of objection does not disclose the point of law.

In view of that, the Plaintiff's counsel contended that the said objection does not disclose a point of law. The nature and scope of a "preliminary issue" is cogently defined in the statement of Law J.A., in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*** [1969] EA 696. The Eastern African Court had this to say:-

***"A preliminary objection consists of 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."*** [Emphasis added].

Considering the *ratio decidendi* in the above-cited authority, I conclude, that the objection falls squarely within the scope of a preliminary objection. The same arises by clear indication from the pleadings, it does not require evidence. Therefore, I find Ms. Regina's contention implausible and unmeritorious, I do not go along with it. I choose to find that the objection is a pure point of law.

As rightly argued by both learned counsels the doctrine of *res judicata* is provided in section 9 of the Civil Procedure Code Cap.33 [R.E 2002]. For ease of reference, I reproduce the same hereunder:-

*"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 under whom they or any of them claim to litigate 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 object of *res judicata* is to bar the multiplicity of suits and guarantee finality to litigation. It makes a conclusive final judgment between the same parties on the same issue by a Court of competent jurisdiction in the subject matter of the suit. In the case of **Peniel Lotta v Gabriel Tanaki & Another**, Civil Appeal No. 61 of 1999 the Court of Appeal set out five conditions of *res judicata* arising from the scheme of section 9 which when coexistent, bars a subsequent suit. The conditions 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 previous suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally settled; in the former suit.

Applying the above principles of *res judicata* in the matter at hand, I have opted to start with the second principle whether the parties in the former suit, Land Case No 56 of 2017, and the present suit are similar. The records reveal that in Land Case No. 56 of 2017, the Plaintiff is Andrew Anthony Sindabaha and Akiba Commercial Bank, Harvest Tanzania Ltd, Abraham Rumesael Merishani and Gharib Seif Khamis were the Defendant. In the instant Land Case No. 177 of 2022, the parties are Andrew Anthony Sindabaha v Akiba Commercial Bank PLC.

In my considered view, the parties who were involved in all cases are the same even if the other Defendants were not joined in the matter at hand the same does not change the fact that the parties are the same. The Plaintiff in the previous suit sued four Defendants and Akiba Commercial Bank was among them. Therefore, it is my considered observation that as long as Akiba Commercial Bank was a party in Land Case No.56 of 2017 and a party in the instant lawsuit. Therefore the same amounts to constructive *res judicata*.

As to the first principle, whether the matter is directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. The record reveals that the subject matter in all proceedings is the same. The disputes involves the mortgaged properties with CT No. 93457 Plot No. 1 Block G Mapinga and CT No. 89175 Plot

No. 115, Block 'A' Tegeta at Dar es Salaam. Whereas, in Land Case No.56 of 2017, the Plaintiff prayed among other things to nullify the sale of the suit property and in the case at hand, the Plaintiff is praying for this Court to declare the Plaintiff to pay the Defendant Tshs. 310,000,000/= as outstanding balance and to declare that the intended sale is illegal and *void ab initio*.

Therefore, I am in accord with Ms. Janeth that the Plaintiff has raised the same relief; to nullify the intended sale save for the first prayer of declaring that the Plaintiff be ordered to pay the Defendant Tshs. 310,000.000/= which in my view was supposed to be brought as a separate suit and the same be filed in a proper court. I am saying so because the first relief is not a land matter. Therefore, the matters or issues are the same save for the first relief which is not a pure land matter.

As to the fourth principle, the Court which decided the previous suit must have been competent to try the subsequent suit; the High Court, Land Division was a competent court that decided the Land Case No. 56 of 2017.

With respect to the fifth principle, the matter in issue must have been heard and finally settled. The record reveals that the matter in Land Case No. 56 of 2017 was finally determined whereas this Court nullified the sale and stated that the Defendant is still in debt to the 1<sup>st</sup> Defendant.

Therefore, I am in accord with the learned counsel for the Defendant that the previous matter was determined to its finality.

The learned counsel for the Plaintiff is fully aware that the suit at hand is meant to challenge the suit's landed property which was decreed by this Court in Land Case No. 56 of 2017. Thus, the Plaintiff's futile attempt to challenge the sale is improper because the Judgment in respect to the disputed land is that of *rem* and not *persona*, hence, constructively *res judicata* under the circumstances. The Plaintiff was required to follow appropriate avenues to challenge the court's decree or file a proper suit.

Having said so, I fully subscribe to the learned counsel for the respondents that the instant Land Case is constructive *res judicata* and this court is *functus officio* to determine the matter at hand. Guided by the above principles I find merit in the Defendant's counsel's preliminary objection, and I hereby dismiss the suit with costs. Leave is granted to the Plaintiff to refile a proper suit in a competent court.

Order accordingly.

DATED at Dar es Salaam this 5<sup>th</sup> May 2023.



  
A.Z.MGEYEKWA

**JUDGE**

05.05.2023

Ruling delivered on 5<sup>th</sup> May 2023 in the presence of Ms. Deokadia Jones, learned counsel for the Plaintiff and Ms. Janeth Njombe, learned counsel for the Defendant.



  
A.Z.MGEYEKWA

**JUDGE**

05.05.2023