

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 284 OF 2022

KILAMIA DAVID MLANGA @ DAVID KILAMIA MLANGA

@ DAVID KILAMIA MAREALLE @

FRANK LIONEL MAREALLE PLAINTIFF

VERSUS

GULAMHUSSEIN REMTULA JIVRAJ 1ST DEFENDANT

MOHAMED GULAMHUSSEIN

REMTULA VIJRAJ..... 2ND DEFENDANT

**ALNUR ALARAKHIA HOODA (The holder of Power of Attorney of
NURDIN GULAMHUSSEIN**

REMTULA JIVRAJ 3RD DEFENDANT

AMIRALI GULAMHUSSEIN

REMTULA JIVRAJ 4TH DEFENDANT

MOHAMED GULAMHUSSEIN

REMTULA VIJRAJ 5TH DEFENDANT

RULING

27th March, 2023 & 29th May, 2023

L. HEMED, J

The Plaintiff in this matter lodged the present case, praying for declaration that he is the lawful owner of the landed property described as Plot No.223/154 Flur II Aggrey Street, Dar es Salaam and comprised

in Certificate of Title No.7094. He also seeks for permanent injunction, barring the Defendants from interfering with the Plaintiff's ownership right of the suit property.

The 3rd defendant, apart from disputing the plaintiff's claims vide his written statement, he raised a preliminary objection on the point that:-

***" the suit is incompetent in law for the same is res
judicata to the following cases: -***

a. Land Case No.257 of 2008 which was dismissed for want of prosecution on 4th day of August, 2014.

b. Land Case No.10 of 2013 which was determined on merit on 27th day of April, 2018..."

The preliminary objection was argued by way of written submissions, where the plaintiff was represented by Mr. Peter Kibatata, learned advocate and the third respondent was represented by Mr. Laurent Ntanga, learned advocate.

In his submissions in chief, the counsel for the 3rd defendant

started by referring the court to section 9 of the Civil Procedure Code (CAP 33 R.E 22) which prohibit re instituting suits determined to finality. He submitted that the plaintiff in this suit was the plaintiff in Land Case No.257 of 2008 which was dismissed for want of prosecution on 4th day of August, 2014. According to Mr.Ntanga, parties in the afore mentioned suit and the present suit are the same and the same subject matter (Plot No.223/154, Flur II Aggrey Street, Dar es Salaam with Certificate of Tittle No.7094).

He further stated that, the fact that, the former suit was dismissed for want of prosecution on 4th day of August, 2014, the plaintiff is precluded from filing another suit as the only remedy was to apply for restoration of the former suit. He referred to Order IX Rule 6(1) of Civil Procedure Code (CAP 33 R.E 2019). He stated that the dismissal order, is treated as *Res Judicata* to the present suit.

Mr. Ntanga asserted in regard to Land Case No. 10 of 2013, that, the said case was concluded on 27th day of April, 2018 when the judgement was pronounced before Muruke, J. on the same subject matter. He was of the view that land case No.10 of 2013 acts as *Res Judicata* to this matter. He prayed that this matter be dismissed.

In his reply, the learned counsel for the plaintiff submitted that, the advocate for the 3rd defendant did not annex his written statement

of defence or written submission judgment, ruling or order showing that Land Case No. 257 of 2008 was dismissed. He was of the view that the annexed copies of pleadings, do not prove that the case was dismissed for want of prosecution. To fortify his submissions, he cited the case of **Hamza Byarushengo vs Mwanga Hakika Microfinance Bank Limited**, Land Case No. 45 of 2019, page 11.

Regarding Land Case No. 10 of 2013, the counsel for plaintiff submitted that, the 3rd defendant has failed to show that any of defendants were parties in Land Case No. 10 of 2013, which was between **Lalan Enterprises Limited vs Kilamia David Mlang'a**. He stated that, *Res Judicata* cannot arise if the foregoing parties did not partake, and the reliefs sought therein did not involve them. He submitted that the names of the plaintiff in the present suit are **KILAMIA DAVID MLANGA @ DAVID KILAMIA MLANGA @ DAVID KILAMIA MAREALLE @ FRANK LIONEL MAREALLE**, while in the judgement by Hon. Muruke, J, dated 27th April, 2018, in Land Case No.10 of 2013, the names of the defendant were **KILAMIA DAVID MLAN'GA**, a complete different name from the plaintiff in the present suit.

It was argued that, the decision in **LALANI ENTERPRISES LIMITED** is clearly *per in curium* as it went beyond the limit of the

framed issues which were (i) Whether the defendant is entitled to claim rent from the plaintiff and (ii) What reliefs are the parties entitled to. He stated that, the issue of ownership did not constitute one of the framed issues for determination by the court, and it was clear and obvious slip of the pen that cannot bind this court as *Res Judicata*. To buttress on his submissions, he cited the decision in **Wegesa Joseph M. Nyamaisa vs. Chacha Muhongo**, Civil Appeal No.161 of 2016, at page 9, 10, 11 and 12, and **The Registered Trustees of Arusha Muslim Union vs. The Registered Trustees of National Muslim Council of Tanzania alias BAKWATA**, Civil Appeal No. 300 of 2017 at pages 11,12, 13 and 14.

It was asserted further that, the 3rd defendant failed to establish that a successful plea of *Res Judicata* would arise only if the whole of the subject matter, and not merely one or some of the issues were subject of litigation in any former proceedings. To sum up, the counsel for the plaintiff referred the case of **East African Development Bank vs. Blueline Enterprises Limited**, Civil Appeal No. 101 of 2008, where the Court held that, *Res Judicata* must be looked at the context of the facts of each individual case. He prayed that the objection be overruled with costs.

In rejoinder submissions, the counsel for the 3rd defendant

reiterated his submissions in chief and stated that, they annexed the copy of Complaint and Written Statement of Defence of Land Case No. 257 of 2008, as the dismissal order was not availed to them. He further submitted that, since the counsel for the plaintiff admits on the case to have been filed by their client, it is their duty to tell the court the outcome of the Land Case No.257 of 2008.

Regarding the subject matter of the suit property, the Counsel for the 3rd Defendant submitted that, in Land Case No. 257 of 2008, the subject matter was Plot No. 223/154, Aggrey Street, Dar es Salaam, with Certificate of Title No. 7094 and in the present case the Plaintiff claims over the same Plot No. 223/154, Flur II, Aggrey Street, Dar es Salaam, with Certificate of Title No.7094. So, the same subject matter is claimed in both cases with the same certificate of title. As to Land Case No. 10 of 2013, Mr. Ntanga stated that, in its judgement, the defendants herein have been mentioned to be the owners of the title at page 3 of the Judgment.

Regarding the difference of the names of the plaintiff, in the three cases, it was stated that in all cases the advocate who represented or representing the plaintiff is the same. The subject matter is the same. The learned counsel for the 3rd Defendant finalized his rejoinder submissions by praying that Land Case No.284 of 2022 be dismissed for

lack of merits as the same is *Res Judicata* to the land case No. 257 of 2008 and Land Case No. 10 of 2013.

Having carefully considered the rival submissions from the counsel for the parties, the point to be determined by the Court is whether the present suit is *Res Judicata* to Land Case No. 257 of 2008 and Land Case No. 10 of 2013.

The Doctrine of *Res Judicata* prohibits a court of law from entertaining a matter that has already been decided by a competent court as between parties regarding the same subject matter. The rationale is to avoid endless and multiple litigation on the same subject matter. In our jurisdiction, the doctrine is provided for under section 9 of the Civil Procedure Code (CAP 33 R.E 2019), it 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 decide by such court."

In determining as to whether this suit is *resjudicata* to Land Case No.257 of 2008, I undertook judicial notice by calling the records of the said case to assess if the same was similar to the instant case. I realized that in the said Land Case which was instituted in this same Court, the plaintiff herein was the Plaintiff in the former case. In the said Land Case, he was praying for declaration that he is the lawful owner of the property situated at Plot No. 223/154, Aggrey Street, City Centre in Dar es Salaam. In this suit the plaintiff is also praying for declaration that he is the lawful owner of the landed property described as Plot No.223/154 Flur II Aggrey Street, Dar es Salaam and comprised in Certificate of Tittle No.7094. Going through the pleadings in Land Case No. 257 of 2008 and the one at hand (Land Case No.284 of 2022), I found that the plaintiff in both cases is the same and the subject matter is the same. In both cases the Plaintiff was/is seeking to be declared owner of the suit landed property.

From the record of Land Case No. 257 of 2008, it is clear that the same was dismissed for non – appearance before Hon. J.S. Mugeta, J in the year 2014. The plaintiff herein never applied to restore it as

provided under Order IX Rule 6(1) of Civil Procedure Code, [CAP 33 R.E 2019]. Failure to restore Land Case No.257 of 2008 precludes the Plaintiff herein from refiling a fresh suit over the same subject matter and similar claims as the dismissal order has the effect of barring subsequent similar proceedings.

I have also gone through the Judgment of this Court (Hon. Mruke, J.) in Land Case No.10 of 2013. In the said case parties were the **Lalani Enterprises Limited** (plaintiff) and **KILAMIA DAVID MLANGA** (the defendant). The suit premises was the same, Plot No.223/154 Flur 11 Aggrey Street Dar es Salaam, comprised on Certificate of Title number 7094. In that case one of the issues was whether the defendant (the plaintiff herein) was entitled to claim rent from the plaintiff. In determining the said issue the Court found that the plaintiff herein, (who was the defendant in that case), not the owner of the suit property and hence not entitled to claim rent.

It is my considered view that since the court had declared the Plaintiff herein **NOT OWNER** of Plot No.223/154 Flur 11 Aggrey Street Dar es Salaam, comprised on Certificate of Title number 7094 (the suit property), this Court is *functus officio*. It cannot sit to redetermine the question of ownership as regard the Plaintiff herein. The plaintiff is

precluded from re-instituting fresh suit seeking to be declared owner of the same property.

To this end and based on what I have demonstrated, the preliminary objection by the 3rd defendant is hereby upheld. I do hereby dismiss the entire suit with costs. It is ordered so.

DATED at DAR ES SALAAM this 29th day of May 2022.



L. Hemed
L. HEMED

JUDGE

COURT: Ruling is delivered this 29th May 2023 in the presence of **Mr.**

Alphonse Nachipyangu advocate for the Plaintiff also holding brief of

Mr. Laurent Mtanga for the 3rd Defendant. Right of Appeal explained.



L. Hemed
L. HEMED

JUDGE