

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 285 OF 2022

MOHAMED JAMAAN HADI.....PLAINTIFF

VERSUS

RAHMA SAID JAMIL.....DEFENDANT

RULING

05/04/2023 & 28/04/2023

L. HEMED, J.

Parties to this suit happened to be married couples. They are now divorced. On 27th day of October 2022, the Plaintiff herein **MOHAMED JAMAAN HADI** lodged the instant suit against the defendant, **RAHMA SAID JAMII**. In this suit, the Plaintiff is claiming for a declaration that the Defendant has breached an agreement reached between them concerning the return of 25% ownership of property known as Plot No.9 Block 21 at the Conner of Omar Londo/Nyamwezi Streets at Kariakoo.

The background pertaining to this matter is that on 8th day of December 2010 the plaintiff and the Defendant entered into an agreement of distribution of ownership of the Property under the

condition that the joint ownership of property was due to love and affection. The title of the suit land bears names of plaintiff and defendant as equal joint owners, each holding 25% of shares of ownership. It was alleged that the 25% given to the defendant was on the condition that the defendant should not demand divorce. It was agreed that if she does, she will lose the 25% of the shares of ownership of the property.

On 26th day of February 2020, the defendant filed a petition for divorce and Ilala District Court at Kinyerezi and on 28th June 2021 the same was granted. They both appealed against the said decision to the High Court, one Stop Judicial Centre at Temeke where the decision of the District Court was upheld. In the decision of the High Court in respect of Misc. Civil Appeal No. 276 of 2021, Hon. I.C. Mugeta, J delivered on 11th July 2022, confirmed the order for divorce and proceeded to divide the suit property equally to the parties.

No one appealed against the said decision, however, the plaintiff opted to file the present suit praying for the following reliefs: -

"a. THAT, this Honourable Court declare that the Defendant had breached the agreement dated 8th day of December 2010;

b. THAT, due to the defendant's breach of the Agreement then the Honourable Court order the removal of the Defendants name from owning the Property;

c. THAT, this Honourable Court to order the Defendant to vacate the premises of Property and not to own any party of the property;

d. That the Costs of this suit is borne by Defendant.

e....."

The Defendant disputed all the claims by filing the Written Statement of Defence. On the 13th March 2023, when the matter came for final pretrial conference, the Court noted the existence of the Decree of the High Court in Misc. Civil Appeal No.276 of 2021 in which the suit premise was divided to parties.

The learned counsel were called to address the Court on the effect of the said Decree to the present case. They were to state whether this Court is clothed with jurisdiction to deal with the property already divided by Court. Both parties addressed the Court by way of written submissions which were timely filed. The plaintiff had enlisted the legal service of Mr. Capt. Ibrahim Mbiu Bendera, learned advocate while the defendant was duly represented by Mr. Good Otto Mgimba, learned advocate.

The defendant was given the right to begin. Mr. Mgimba on behalf of the defendant submitted that, this Court has no jurisdiction to entertain the matter, because it is a *res judicata* under section 9 of the Civil Procedure Code [Cap 33 R.E 2019]. To fortify his proposition, he cited the case of **Maimuna Alfani Salehe & Others Vs. Chilwa Lubawa Kiliaki**, Land Case No. 235 of 2021, (HCT-LAND-DIVISION-DSM), (Unreported) and **Paniel Lotha Vs. Gabriel Tanaki & Others** [2003] TLR 312.

In resistance, Capt. Bendera contended that, the present case does not intend to cause any multiplicity of the suit or abuse of the Court process, rather to enforce parties' agreement which led the plaintiff to institute a new case concerning land ownership after the conclusion of divorce proceedings. He maintained that, there is no effect that can be caused by the Decree in Misc. Civil Appeal No. 276 of 2021 to Land Case No. 285 of 2023 as in the former concerned with matrimonial property while in the present suit is on breach of contract on the ownership of the said property.

He stated that, where parties have freely entered into binding agreements, neither Court nor parties to the agreement should interpolate anything or interfere with the terms and conditions therein,

even where the agreement were made by the lay people. To back up his statement, he referred the case of **Phillipo Joseph Lukonde Vs. Faraji Ally Said**, Civil Appeal No. 74 of 2019, (CAT-DODOMA), (Unreported).

Having gone through the rival submissions the central issues for determination is whether the present suit is *res judicata* to Misc. Civil Appeal No. 276 of 2021. In our jurisdiction, the doctrine of *res judicata* is embedded in section 9 of the Civil Procedure Code [Cap 33 R.E 2019]. It provides as follows:

"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".

In the light of the above provision, I had to examine the decision in Misc. Civil Appeal No. 276 of 2021 [Hon. I.C. Mugeta, J] and compare with the reliefs sought in the present case to establish if the matter at hand is *res judicata*. The subject matter in Misc. Civil Appeal No. 276 of

2021 was property described as plot No.9 block 21, Somali/Nyamwezi Street, Kariakoo, Dar es Salaam. In that case, the Court divided the 50% shares in the property equally between the parties.


In the present suit, the suit property is the same, that is plot No.9 block 21, Somali/Nyamwezi Street, Kariakoo, Dar es Salaam. In this suit the Plaintiff is claiming the 25% of shares given to the defendant. He wants this Court to order removal of the Defendants name from owning the property and to order her vacate from the suit premises.

The question that arises is whether, this Court, having divided the suit property equally to the parties herein in Misc. Civil Appeal No.276 of 2021, it has power to grant the reliefs sought in the present case. The answer is straight forward that, having given the 25% of shares of ownership of the suit property to the defendant, this same Court cannot remove the defendant's name from owning the property nor can it order her to vacate from the suit property. In short, the Court is *functus officio* to grant the reliefs sought. I am holding so because once a matter is finally concluded by the Court, that Court cannot re-open or alter its decision and any challenge to its decision must be taken to a higher Court by way of appeal or revision.

In the event, I sustain the position that this Court has no jurisdiction to entertain the matter at hand as the Court is *functus officio*. I do hereby dismiss the entire suit without costs. It is so ordered.

DATED at DAR ES SALAAM this 28th day of April, 2023.




L. HEMED
JUDGE

COURT: Ruling is delivered this 28th day of April, 2023 in the presence of advocate Nuru Jamal for the plaintiff and advocate Ella Tupa for the defendant. Right of appeal fully explained.




L. HEMED
JUDGE