

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

LAND CASE NO. 56 OF 2023

INDUSTRIAL PROJECT AND

TECHNICAL SERVICES LIMITED.....PLAINTIFF

VERSUS

BARREL PETROL ENERGY CO. LTD.....1ST DEFENDANT

THE COMMISSIONER FOR LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

Date of Last Order: 07/09/2023

Date of Ruling: 05/10/2023

RULING

I. ARUFANI, J

This ruling is in respect of the preliminary objections raised by the second and third defendants in the present suit as follows:

- 1. This suit is bad in law and untenable for being res judicata.*
- 2. The suit is bad in law and untenable for being res sub judice.*

With leave of the court the objections were argued by way of written submissions. The submissions on behalf of the second and third defendants were drawn and filed in the court by Mr. Mathew Fuko, learned State Attorney. On the other side, the plaintiff's submission was drawn and filed in the court by Mr. Jonathan Mbuga, learned advocate.

In support of the objections, the counsel for the second and third defendants started his submission with the definition of the term preliminary objection as laid down in the landmark case of **Mukisa**

Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 1 696 which states an objection is not raised if it is not a pure point of law which does not require to be ascertained by evidence and such objection when raised disposes of the suit.

He argued in relation to the first point of preliminary objection that the suit filed in the court by the plaintiff is *res judicata*. He stated the object of the stated doctrine of *res judicata* as stated in the case of **Pravin Girdhar Chavda V. Yasmin Nurdin Yusufail**, Civil Appeal No. 165 of 2019, CAT at DSM (unreported) is to bar multiplicity of suit and guarantee finality to litigation. He stated the doctrine of *res judicata* is provided under section 9 of the Civil Procedure Code CAP 33 R.E 2019 which provides for the conditions to be looked at when determining a matter is *res judicata* and the stated conditions are as follows: -

1. *There must be judicial decision which was pronounced by the court with competent jurisdiction;*
2. *The subject matter and the issues decided are the same or substantially the same as the issues in the subsequent suit;*
3. *That the judicial decision was final;*
4. *That it was in respect of the same parties litigating under the same title.*

He said the matter at hand is *res judicata* as it was determined by this court of competent jurisdiction in Land Case No. 282 of 2016

between **Sabri Mbaraka Salim V. The Commissioner for Lands & 3 Others** (Hon. Mgaya, J). He said according to the plaint filed in the instant suit the plaintiff is praying for the court to declare that the purported process of re-surveying Plot No. 108 Vijibweni, Kigamboni, Dar es Salaam (the **suit land**) was done in total violation of procedures and principle of natural justice therefore null and void.

He submitted that this issue was determined in Land Case No. 282 of 2016 in which the court ordered subdivision of the suit land. He said they are aware that neither the plaintiff nor the 3rd defendant they were parties in Land Case No. 282 of 2016, but the parties in the said case and in the present suit are litigating on the same subject matter. He pointed out that the plaintiff is litigating in respect of the same subject matter which in essence may give two decisions of the same court in respect of the same subject matter. For that matter he prayed for the court to dismiss the suit for being *res judicata*.

As regards the second point of preliminary objection the counsel for the second and third defendants submitted that the suit is untenable for being *res sub judice* as it has been filed in contravention of section 8 of the CPC. He said there is a pending application for revision before the Court of Appeal arising from Land Case No. 282 of 2016 which in essence

involves the same subject matter as in the present suit therefore this court has no jurisdiction to deal with the matter.

He relied on the case of **Chalinze Cement Company Limited V. Fair Competition Commission**, Misc. Civil Cause No. 5 of 2023 which held the rationale behind the doctrine of *res sub judice* is to confine the parties in one litigation and so obviating from contradictory verdicts in respect of the same subject matter. He observed that since the matter is before the Court of Appeal it would cause improper administration of justice if the High Court would give their decision on the same matter. He concluded by praying for the suit to be dismissed with costs as it is filed in contravention of sections 8 and 9 of the CPC.

In his reply the counsel for the plaintiff submitted the objections raised by the second and third defendants are misconceived as the same lacks merit both in law and fact. He said in relation to the doctrine of *res judicata* found in section 9 of the CPC that five conditions have to be met and they must co-exist for the doctrine of *res judicata* to apply in a matter. He said in the present suit the stated conditions do not co-exist.

First, he said, the three orders granted in the previous suit do not have the effect of either deleting the suit land making it not to exist. He said the prayer in this present suit is the re-allocation of the remaining portion of the plot and not otherwise. He further said the facts of this

present case do not tally with the conditions of *res judicata* in that the set of facts in the previous suit are different from the present suit.

He also pointed out that even if the facts were the same but it was not hit by the doctrine of *res judicata* as was stated in the case of **Praxeda Rutahangwa V. Richard Malipula & Another**, Land Case No. 53 of 2022 HC Land Division at DSM (unreported) which quoted the case of **Registered Trustees of Chama cha Mapinduzi V. Mohamed Ibrahim and Sons & Another**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported). He also quoted **Mulla** in his book **The Code of Civil Procedure** which states that the second suit is not barred where the cause of action now sued upon was not in existence at the time of the earlier suit. He concluded that the cause of action in the previous suit is different from the case under consideration. He said the reliefs are different and that the title deed was issued after the decision of the previous suit.

As for the second condition that the parties must be the same, the counsel for the plaintiff said this has also not been satisfied. He said the plaintiff and the first defendant were not parties in the previous suit and the other two persons in the previous suit are not parties in the present suit. He relied on the case of **Masumbuko Kwolesy Mtabazi V. Dotto Salum Chande Mbega**, Civil Appeal No. 44 of 2013, CAT at

DSM (unreported) and **Jacqueline Jonathan Mkonyi & another V. Gausal Properties Limited**, Civil Appeal No. 311 of 2020 CAT at DSM (unreported) where the Court of Appeal stated that for *res judicata* to stand the parties must be the same or litigating under the same title.

As for the last condition that the matter in issue must have been heard and finally decided in the former suit, it was his opinion that the previous suit was not determined on merit but rather the decision was obtained on a technicality after the defendants failed to file their defence. He thus said the former suit was not finally determined and prayed the objection be dismissed.

As for the second objection, the counsel for the plaintiff said most of the conditions dealt with in the doctrine of *res judicata* are also applicable in the doctrine of *res sub judice*. He said the Court of Appeal has been invited to exercise its revisionary power over the proceedings which granted the decree holder ownership of the plaintiff's suit land while in the present case the relief sought is declaratory order that an act of allocating the first defendant the land within the suit land was not done in accordance with the law. He said no conflicting order will be issued on the same property.

He submitted the success of the revision proceedings in the Court of Appeal, if any, cannot delete the title deed issued to the first defendant

herein rather the title will remain over the plaintiff's plot which is the subject of the pending suit. He said even if it is assumed that this suit is *res sub judice* to the Court of Appeal proceedings, the remedy is not to dismiss the pending suit but rather to stay these proceedings pending determination of the revision before the Court of Appeal. He said it is also difficult for this court to examine the revision pending in the Court of Appeal as all proceedings are not before this court and the court cannot rely on words from the bar.

He argued that as a matter of practice an order for stay is prayed for through application by chamber summons and affidavit so that the court can take an account of evidence from both sides. He said the counsel for the defendants wants the court to act on mere allegations which is not right. He thus prayed for the objections to be dismissed with costs.

In his rejoinder, the counsel for the second and third defendants reiterated what he submitted in his submission in chief. He emphasized in relation to the doctrine of *res sub judice* that, if this court will give its decision on the suit land while there is a pending application on the same suit land in the Court of Appeal it would cause improper administration of justice as there will be contradictory decisions. As for the doctrine of *res judicata* he explained that, the plaintiff's first prayer is attacking an

order which was granted by this court in Land Case No. 282 of 2016 in respect of the suit land. He said as far as the present suit is concerned the court is *functus officio*. He said in the case of **Praxeda Rutahangwa** (supra) there is a difference as the land in the former and present suit were different. He said the suit offends the law and the only remedy available is dismissal with costs.

Having keenly considered the rival submissions from the counsel for the parties, the court has found the issue for determination in this matter is whether the objections raised in the instant case have merit. The court will start with the second objection which states the suit is *res sub judice*. The court has found section 8 of the CPC governs the doctrine of *res sub judice*, and provides as follows: -

"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed."

In view of the above quoted provision of the law, for a matter to be *res sub judice*, there must be two pending suits between the same parties claiming under the same title in the courts of competent jurisdiction. There is no dispute that there was Land Case No. 282 of

2016 which was duly determined by this court. There is also no dispute that there is an application for revision pending before the Court of Appeal which has not been determined by the Court of Appeal. It is also not in dispute that the Land Case No. 282 of 2016, the application for revision of the decision made by this court in the above referred case pending in the Court of Appeal and the present case all are in respect of the suit land herein namely Plot No. 108 Vijibweni, Kigamboni, Dar es Salaam.

The argument by the plaintiff is that in the present case the relief sought is declaratory order that the act of allocating the first defendant a plot within the suit land was not done in accordance with the law. He submitted no conflicting orders would be issued on the same property and further that the decision of the revision proceedings in the Court of Appeal, cannot affect the title deed issued to the first defendant herein.

Having critically looked into the circumstances of the matter at hand and the application for revision stated is pending in the Court of Appeal, the court has found there are two matters pending in two different courts with competent jurisdiction to entertain the issue in dispute which is arising from the same subject matter. The court has found that, although some of the parties in the matter before this court are different from the parties in the application for revision pending

before the Court of Appeal but the subject matter in both courts is the same and the decisions which will be rendered by these courts may differ and create confusion in the matter if not conflicting each other.

The court has come to the above view after seeing the revision which is pending before the Court of Appeal is challenging the decision of this court made in Land Case No. 282 of 2016 which among the orders made in the said case was for the suit property namely Plot No. 108 Vijibweni Industrial Area of Kigamboni, Dar es Salaam to be sub divided and the certificate of title to be issued to the plaintiff in the said suit who was Sabri Mbaraka Salim. The stated division appears to have caused the suit land to be resurveyed and the plaintiff in the present suit is urging the court to declare the stated resurvey of the mentioned land was done in total violation of the procedures and principle of natural justice hence null and void.

To the view of this court there is a great possibility of the decision which will be made by this court in relation to the stated relief and the decision which will be made by the Court of Appeal in the application for revision pending there to be in conflict. To the understanding of this court the gist of section 8 of the CPC is intended to curb such situations to avoid any conflicting decision from being made by different courts on the same subject matter.

As pointed out hereinabove, the existence of the application for revision at the Court of Appeal which has not been denied by the plaintiff (see paragraph 4 of the second and third defendant's Reply to the Written Statement of Defense and the submissions), signifies that, the application for revision based on the judgment in Land Case No. 282 of 2016 is still pending and the outcome may be conflicting and cause confusion among the parties.

The separation of causes of action as argued by counsel for the plaintiff is not comprehensible as the question before the Court of Appeal is to revise the decision of the High Court in Land Case No. 282 of 2016 which is on ownership and subdivision of the suit land. The court has found the plaintiff wants the court in the present suit to deal with the issue of ownership of part of the suit land. These two issues are intertwined, and this court cannot deal with only part of the suit land while there are questions before the Court of Appeal in respect of the whole suit land. In that regard, this court has found this suit is *res sub judice* to the application for revision pending before the Court of Appeal.

The court has found the counsel for the plaintiff suggested the present proceedings be stayed if it will be found the present suit is *res sub judice*. The court has failed to accept his suggestion after seeing it would not serve the purpose to leave this suit in the register of this court

indefinitely. That is because the decision which will be made by the Court of Appeal may raise different issues on the suit land which may assist the parties to know how to deal with their dispute

The above finding caused the court to come to the conclusion that there is no need of continuing to deal with the first point of preliminary objection as the second preliminary objection is enough to dispose of the matter at hand. In the premises the preliminary objections raised by the second and third defendants are hereby sustained and the plaintiff's suit is accordingly struck out for being *res sub judice* and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 05th day of October, 2023



I. Arufani

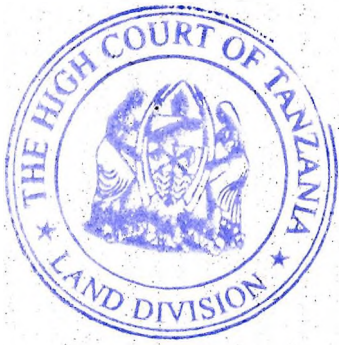
JUDGE

05/10/2023

Court:

Ruling delivered today 05th day of October, 2023 in the presence of Mr. Alfred Rweyemamu, learned advocate for the plaintiff and in the presence of Mr. Charles Lugaiya, learned advocate holding brief for Mr. Sosten Mbedule, learned advocate for the first defendant and in the presence of Mr. Stanley Mahenge, learned State Attorney for the second

and third defendants. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani
JUDGE
05/10/2023