

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 304 OF 2023

MEHBOOB YUSUF OSMAN.....PLAINTIFF

VERSUS

ABDULLATIF MOHAMED HAMIS [As Personal Legal Representative of MOHAMED KHAMIS ABDALLAH, The deceased] 1ST DEFENDANT

FATNA MOHAMED [As Personal legal representative of MOHAMED KHAMIS ABDALLAH, The deceased] 2ND DEFENDANT

FOSTERS AND COMPANY LIMITED 3RD DEFENDANT

RULING

Date of Last order 04/10/2023

Date of the Ruling 19/10/2023

A. MSAFIRI, J.

This is a ruling pertaining to the preliminary objection raised by the 1st defendant to the effect that this suit is *res judicata*.

Before indulging in determination of the raised objection, the brief background of the matter is apposite. The facts according to the pleadings are that, the plaintiff claims that he is the bonafide purchaser of the suit property described as Plot No. 9 Block 'A' located at Aggrey Street, Kariakoo, Ilala Municipality. That in the year 2006, the 2nd defendant in the capacity as the administratrix of the estate of the late Mohamed



Khamis Abdallah, upon the consent of all available beneficiaries by then, sold the suit property to the plaintiff and the latter paid the agreed consideration of the suit property. That, since the year 2006, the plaintiff have been in occupation and full control of the suit property and he is not aware of the nullification of the sale agreement.

The plaintiff claimed that sometimes in August 2023, the 1st defendant has given instructions to the 3rd defendant who has illegally issued a seven days demand notice to the plaintiff along with the tenants on the suit property either to pay unquantified rental charges or be evicted from the suit property. Following that the plaintiff has instituted this suit claiming among other reliefs for this court's declaratory order that he is the lawful owner of the suit property and that the defendants are the trespassers.

It is the rule of law and practice that once a preliminary objection has been raised, it has to be heard and determined first before continuing with other proceedings on merit. Hence the hearing of the preliminary objection raised by the 1st defendant was heard orally. I should point out that this Land Case No 304 of 2023 which is the main suit, was filed in this Court along with Misc. Application No. 577 of 2023 whereby the applicant/ plaintiff was seeking for order of temporary injunction against the respondents on the suit property pending the hearing of the main suit.

Alls

In the said Application, the 1st respondent who is also the 1st defendant in the current suit, also raised a preliminary objection on point of law that; the application was not maintainable in law as the main case Land Case No. 304 of 2023 is *res judicata*. Since the similar objection of *res judicata* has been raised in both Land Case No. 302 of 2023 and Misc. Application No.577 of 2023, I have consolidated them and shall determine them together.

Mr. Victor Ntalula and Ms Mary Pancras, learned advocates were appearing for the 1st defendant/1st respondent. Mr Victor was the first to submit and he stated that the application/suit is *res judicata* as it contravenes the provisions of Section 9 of the Civil Procedure Code, Cap 33, R.E 2019.(herein the CPC). He submitted that this matter was instituted for the first time in this Court under Land Case No. 122 of 208 at High Court, Land Division. That the matter was dismissed for want of prosecution. That the parties in that case and the subject matter are similar to this present case.

Mr Ntalula submitted further that another case on the matter was instituted as Land Case No. 384 of 2020, and was filed in High Court Land Division. That, the parties and the subject matter was the same as this present matter, and that it was dismissed with costs. *Alle.*

That the applicant/plaintiff has also instituted similar matter before the District and Housing Tribunal of Ilala in Application No. 220 of 2023 where it was dismissed. He submitted that there is another Application which is pending before the Court of Appeal which is Civil Appeal No. 363 of 2021 and it is an appeal against this court's decisions in Land Application No. 384 of 2020 and Land Case No. 122 of 2018, and that the parties and subject matter are same as this current matter.

Mr Ntalula was of the view that since this matter was already dismissed by this Court and there is a pending appeal before the Court of Appeal against those decisions, then this matter is incompetent before the Court and it ought to be dismissed in its entirety with costs.

To cement his points, he cited the case of **Registered Trustees of CCM vs. Mohamed Ibrahim Versi & Sons**, Civil Appeal No. 16 of 2008, CAT at Zanzibar (unreported). And the case of **Rhodice Simon Moshi vs. NIC Bank & 3 others**, Land Case No. 52 of 2017, HC at Arusha (Unreported).

In reply, Mr Alex Balomi, learned advocate with Mr Egbert Milanzi, learned advocate appeared for the plaintiff/applicant. Mr Balomi argued vehemently that the preliminary objection by the 1st respondent/ 1st defendant is misconceived and lacks merit. He submitted that basing on the principle established under Section 9 of the CPC, the counsel for the

Alle

1st respondent/ 1st defendant has not categorically stated if the judicial decisions were pronounced by the court of competent jurisdiction.

Mr Balomi argued that the pending appeal is premature as there is no decision of the Court of Appeal on the subject matter. That, the decision by the District Tribunal at Ilala was not from the competent court as the Tribunal had no jurisdiction to entertain and determine that matter whose subject matter was valued over TZS 400 Million.

He argued further that the decision of this Court by Hon. Manyanda,J was a mere ruling for want of prosecution and the matter was not finally concluded on merit and therefore, the applicant/plaintiff was not barred from instituting another suit.

Mr Balomi stated that, the subject matter on all those matters are not substantially the same as in the current suit/application.

On the issue of the same parties, it was Mr Balomi's views that the parties are not the same in those cases and the present case. That the parties are different in all the cases.

He stressed that, in terms of Section 9 of the CPC, there are four major ingredients which must be met cumulatively for the principle of *res judicata* to apply. He contended that the counsel for the 1st respondent/ 1st defendant has not satisfied the said ingredients cumulatively and that

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all the cited cases are distinguishable from the case at hand. He prayed that the raised preliminary objection should be dismissed for lack of merit.

On rejoinder, Mr Ntalula mostly reiterated his submissions in chief and added that this Court cannot disregard an appeal pending before the Court of Appeal since any decision made by it on the said appeal will conflict with the decision of this Court as the pending appeal and this decision are on the same subject matter. He reiterated his prayers.

Having gone through the submissions by rival parties along with the referred authorities, the pertinent issue before me is whether this current matter is *res judicata* as per the provisions of Section 9 of the CPC.

As earlier said, the doctrine of *res judicata* is embedded in Section 9 of the CPC which 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 the 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"

Alle.

In the case of **Registered Trustees of CCM vs. Mohamed Ibrahim Versi & Sons (supra)** which was referred to me by the counsel for the 1st respondent/1st defendant, the Court of Appeal made analysis on the provisions of Section 9 of the CPC and stated the conditions which must be fulfilled for the principle of *res judicata* to apply. The Court of Appeal set the conditions necessary for the plea of *res judicata* to successfully operate, as follows,

- i). *The former suit must have been between the same litigating parties or between parties under whom they or any of them claim;*
- ii). *The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;*
- iii). *The party in the subsequent suit must have litigated under the same title in the former suit;*
- iv). *The matter must have been heard and finally decided;*
- v). *That the former suit must have been decided by a court of competent jurisdiction.*

In determination of this objection I will have to look at the said former suits as per the claims of the counsel for the 1st defendant and see whether they are similar with this subsequent suit.

Atts.

The Court has been supplied with the two decisions of this Court which have been claimed to be similar to the present matter. There was the Land Case No. 122 of 2018 where the plaintiff was Mehboob Yusuf Osman who is also the plaintiff in the current case. The defendants were Fatna Mohamed as legal representative of Mohamed Khamis Abdallah, as 1st defendant and Abdullatif Mohamed Hamis as 2nd defendant. These two are currently the 1st defendant and 2nd defendant respectively. The subject matter is the same as of the current case i.e. the suit property. The former case was dismissed by Hon. Manyanda, J for want of prosecution on 23/03/2020.

Another decision of this Court was by Hon. Maghimbi, J in Misc. Land Application No. 384 of 2020. Parties were Mehboob Yusuph Osman, who was the applicant, and who is now the plaintiff/ applicant in the current suit. The respondents were Fatuma Mohamed as legal representative of Mohamed Khamis Abdallah, as 1st respondent and Abdullatif Mohamed Hamis as 2nd respondent. In the said Application, the applicant was seeking to set aside the dismissal order in Land Case No. 122 of 2018 by Hon. Manyanda, J hence it was on the same subject matter which was the origin of the dispute in Land Case No. 122 of 2018. The Application was heard inter-partes and dismissed with costs. Aggrieved by the decision, the applicant/plaintiff have instituted Civil Appeal No. 363 of

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2021 before the Court of Appeal challenging the decision of Hon Maghimbi, J.

Having read the two decisions of this Court as analysed herein above, it is my finding that all the ingredients of Section 9 of the CPC have been met cumulatively.

On the first ingredient, I find that the former suits are between the same litigating parties or under privies claiming under them. It was the argument of Mr Balomi that the parties are different such that in the former suits there was no the 3rd defendant, Forsters and Company Limited as she appears now in the subsequent suit. And that even the 1st defendant in the subsequent suit appears as personal legal representative of the late Mohamed Khamis Abdallah, which is different from the former suit where the 1st defendant appeared in the individual capacity.

However it is my view that the 3rd defendant has been added to the suit only because he was acting under the instructions of the 1st defendant hence the 1st and 3rd defendants cannot be separated. The argument that the 1st defendant appeared in individual capacity in the former suit also cannot stand as the 1st defendant as individual and the 1st defendant as the legal representative of his late father are the persons who have common interest on the subject matter which is the suit property hence they cannot be stated to be completely different persons. I find the

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situation of the parties in the former suits and this subsequent suit to fall under the condition that; *the former suit must have been between the same litigating parties or between parties under whom they or any of them claim.*

On the second ingredient, I also find that it has been met as all along the subject matter is the same on all the cases instituted by the plaintiff/ applicant in the former suits and subsequent suit. The subject matter which is the centre of the dispute is the suit property described as Plot No. 9 Block 'A' located at Aggrey Street, Kariakoo, Ilala Municipality. This is the subject matter which was directly and substantially in issue in the former cases particularly in Land Case No 122 of 2018 before this Court. This goes along with the third ingredient whereby I find the parties on the former suit and the subsequent suit to be litigating on the same Title which is the ownership of the suit property.

On the fourth ingredient, it is my view that the decisions of the former suits are final and conclusive whereby the first Land Case No 122 of 2018 was dismissed by this Court for want of prosecution. The plaintiff filed the Misc. Application No. 384 of 2020 seeking to set aside the dismissal order in Land Case No 122 of 2018. After hearing, the Court dismissed the Application. I find that in the former suit the matter was finally concluded when Hon. Maghimbi,J dismissed the Application. This was final to the

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extent that the applicant/ plaintiff has filed an appeal to the Court of Appeal challenging the said decision and the fact that there is a pending appeal to the Court of Appeal was not disputed by the plaintiff/applicant.

On the fifth ingredient, there is no any doubt on the competency of this Court when it sat to hear and determine the former cases, hence I find this ingredient is also fulfilled.

To sum up, it is my findings that this subsequent suit is *res judicata* to the above said former suits, and the ingredients necessary to establish the principle of *res judicata* have been met cumulatively.

Before I conclude this matter, I will direct myself to the undisputed fact that there is a pending before the Court of Appeal, a Civil Appeal No. 363 of 2021 between the plaintiff as appellant, and the 1st and 2nd defendants as the respondents. It is on the same subject matter and the appellant seeks to challenge the decision of this Court in Land Case No.384 of 2020 where this Court dismissed the application to set aside its dismissal order.

It is the principle of law and procedure that once an appeal has been instituted before the Court of Appeal on the same subject matter, then this Court ceases to have jurisdiction on the matter until the Court of Appeal has given its decision on the subject matter. The purpose is to avoid the conflicting decisions on the same subject matter. The Civil

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Appeal No. 363 of 2021 is challenging the decision of this Court to dismiss the prayers of setting aside the dismissal order. Hence whatever decision of the Court of Appeal will directly affect the current suit. It is my firm finding that this suit cannot stand while there is still the said pending appeal before the Court of Appeal.

For the foregoing reasons, I sustain the raised preliminary objection and proceed to dismiss the Land Case No.304 of 2023 and the Misc. Application No. 577 of 2023 which originate from the said Land Case. The plaintiff to bear the costs of the suit.

It is so ordered.



A.MSAFIRI
JUDGE
19/10/2023



THE HIGH COURT OF TANZANIA
LAND DIVISION