

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

MISC. LAND APPLICATION No. 413 OF 2023

RAMADHANI ATHUMANI PAZI.....1ST APPLICANT

SHABANI MOHAMMED MCHORA.....2ND APPLICANT

ALLY ABDALLAH KAWANDA.....3RD APPLICANT

VERSUS

DR. SHARIFF MOHAMED ABDALLAH

HASSHIM SAGGAF.....1ST RESPONDENT

ABDALLAH HASHIM SAGGAF.....2ND RESPONDENT

RULING

11th October, 2023 & 15th November, 2023

L. HEMED, J.

The matter at hand has been brought under Order 1 Rule 8 of the Civil Procedure Code, [Cap.33 RE 2019]. The applicants herein are seeking for leave to file a representative suit against the respondents. The application has been supported by the affidavit deposed by one **Ramadhan Athuman Pazi.**

The respondents challenged the application *vide* the counter affidavit of **Abdallah Hashim Saggaf.** The counsel for the respondents also raised



the preliminary objection on point of law against the application to the effect that:-

"a. THAT, the present Miscellaneous Land Application No.413 of 2023 is res judicata in respect of Miscellaneous Land Application No. 331 of 2020 making the application bad in law in contravention of express provision of section 9 of the Civil Procedure Code [Cap 33 RE 2019].

b. THAT, the affidavit in support of the application is incurably defective for having affirmed by an unauthorized person and which contains the false information, hearsay contrary to the laws on affidavit in this jurisdiction.

c. THAT, the verification clause is incurably defective for failure to disclose source of information contrary to the laws."

The preliminary objection was argued by way of written submissions.

Mr. Ferdinand Makore, advocate, represented the respondents while the applicants enjoyed the legal service of **Mr. Innocent Sama**, advocate from Wasira & Associates Advocates. Both parties filed their submissions promptly as directed by the court.



To begin with the 1st limb of objection, the counsel for the respondents asserted that the instant matter was once preferred before this court through Miscellaneous Land Application No.331 of 2020. The matter was for the same relief which is for leave to file representative suit. It was argued by Mr. Makore that the previous application just like the one at hand had three applicants representing 215 numerous people, the instant matter has 216 numerous people only with addition of one person.

It was stated by Mr. Makore that the previous application was heard and finally determined by this court (Hon. Dr. Mango, J.) where the orders sought were granted and the applicants were to file the intended suit within 21 days. In the view of the learned advocate, this application is *res judicata* in respect of Miscellaneous Land Application No. 331 of 2020 contrary to section 9 of the Civil Procedure Code, [Cap 33 R.E 2019]. To cement his argument, he cited the decision of this Court in **Lukonge Gambunala Mwanagani v AZANIA Bank Limited & Two others**, Land Case No. 335 of 2022 and **Kilamia David Mlanga @ David Kilamia Mlanga @ David Kilamia Marealle @ Frank Lionel Marealle v. Gulamhussein Remtula Jivraj Mohamed Gullahussein & 4 others**, Land Case No. 284 of 2022.



He further asserted that, although the present application is brought under new set of applicants, it is just a technic invented by the applicants only to mislead the court. He insisted that since the cause of action is the same, the reliefs are the same and the title under litigation is also the same and numerous people who are claiming this right are also the same, the matter is *res judicata*. He relied on the decision of the Court of Appeal in **Ester Ignas Luambano vs Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014.

In reply thereto, the counsel for the applicants stated that section 9 of the Civil Procedure Code, [Cap.33 RE 2019] comes into play only where there are two cases trying to resolve a dispute in which the parties are the same and the issues substantially the same. The matter should also be fully adjudicated upon in the previous matter. He contended that section 9 of the CPC applies in suits only and not in applications like the one at hand.

The counsel for the applicants argued that, for the principal of *res judicata* to apply, the previous matter must have been determined on merits between the same parties who must be heard. He relied on the



decision of the Court in **Salehe Bin Kombo vs. Administration General** (1957) E.A 191.

It was added by the learned counsel that this matter is not *res judicata* to Misc. Land Application No. 331 of 2020 because parties are quite different. He stated that in the previous Application the applicants were Abdallah Nassoro Kalunga & 2 others vs Abdallah Saggaf, Francis Shayo, Willison Emmanuel Malova, Nicodemus Gogomoka Ally Shabani and Flora Dominick Shumbusho. In the instant application the applicants are Ramadhani Athumani Pazi, Shabani Mohammed Mchora and Ally Abdallah Kawanda vs Dr. Shariff Mohammed Abdallah Hashim Saggaf and Abdallah Hashim Saggaf. It was the view of the counsel for the applicants that, since parties are not the same, then the doctrine of *res judicata* cannot apply.

In his rejoinder submissions, Mr. Makore reiterated his submissions in chief. He further clarified the word 'suit' to include applications by citing the decision of the Court of Appeal of Tanzania in **Tunu Mwapachu & 3 others vs National Development Corporation & Another**, Civil Appeal No. 155 of 2018.



Having gone through the submissions made by the learned counsel, it is pertinent to determine whether the 1st limb of preliminary objection has merits. The point so raised by the counsel for the respondent is such that the matter at hand is *res judicata* to Misc. Land Application No.331 of 2020 in which leave to file representative suit was granted.

I think, before going deeper to discuss the preliminary objection it is apt to answer the question as to whether applications do fall within the meaning of '**a suit**' for section 9 of the Civil Procedure Code, [Cap 33 RE 2019] to apply. To me, the answer to the aforesaid question is crucial because in reply submissions, the counsel for the applicants asserted that section 9 of the CPC applies only to suits and not to applications like the one at hand. In the first place, I sought refuge to law dictionaries to find the meaning of the word 'suit'.

The Oxford Dictionary of Law, 15th Edition, defines the word thus:-

*"**suit** n. A court claim. The term is commonly used for any court proceedings although originally it denoted a suit in equity as opposed to an action at law."* The Black's Law Dictionary, 8th Edition; defines the word suit



as follows:- " **suit.** *Any proceeding by a party or parties against another in a court of law.*"

From the two law dictionaries, the word suit includes any proceeding instituted by a party in a court of law. Therefore, the word suit includes applications like the one at hand. This was echoed in **Tunu Mwapachu & 3 others vs National Development Corporation & Another**, Civil Appeal No.155 of 2018 where it was observed thus:-

"The term suit is a very comprehensive one and is said to apply to any proceeding in a court of justice by which an individual pursues a remedy which the law affords him."

From the above observation of the Court of Appeal of Tanzania, it is obvious that the word suit includes the application and thus section 9 of the Civil Procedure Code, [Cap 33 RE 2019] is applicable.

Let me turn to assess if the application at hand is *res judicata*. In Tanzania, the doctrine is embodied in section 9 of the Civil Procedure Code (supra) 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 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." (Emphasis added).

The above cited provision, raises the following cardinal conditions for the doctrine of *res judicata* to apply:-

- (i) That the judicial decision in the previous matter must have been pronounced by a competent court;
- (ii) That the subject matter and the issues decided should be substantially the same;
- (iii) That the decision made in the previous case was final; and
- (iv) Parties must be the same.



It should be noted that in Misc. Land Application No.331 of 2020 and in the instant application, the relief sought was and is for leave to present a representative suit. Therefore, the prayers in the previous suit and in the one at hand are the same and the subject matter for the intended suit is still the same, that is, the land located at Madabala Area at Mbwawa Ward, Kibaha District in Coast Region.

In the previous Application (Misc. Land Application No.331 of 2020), the 215 persons authorized Abdallah Nassor Kalunga, Stanford Kinuma Kashakali and Pili Mkufunzi to apply for leave to institute a representative suit on behalf of those 215 persons. As aforesaid, they applied *vide* Misc. Land Application No. 331 of 2020. In deed, the Application was granted on 30th day of April 2021 by Hon. Z.D. Mango, J. The applicants were to effect Notification within 21 days after the date of extraction of the order.

Despite the orders of the court in Misc. Land Application No.331 of 2020, for the suit to be lodged, nor representative suit was instituted within the time specified in the Order. Nevertheless, the said 215 plus one persons reconvened another meeting on 03rd October 2023 and appointed Ramadhani Athumani Pazi, Shabani Mohamed Mchora and Ally Abdallah



Kawanda, to file **this** another Application for leave to lodge Representative suit over the same suit land located at Madabala Area at Mbwawa Ward, Kibaha District in Coast Region.

From the record, it is undisputable that the suit premises are the same and the parties herein together with 216 persons are seeking for leave to institute a representative suit just as in the previous Misc. Land Application No.331 of 2020. I am aware that for the doctrine of *res judicata* to apply, parties must be the same as in the previous suit/matter.

In the instant Application, it appears that the applicants are quite different from the previous Application. However, in application for leave to present a representative suit, parties must be looked at a wider range to include even those who authorized the others to apply for leave to represent them. I have examined Annexure RSA-1 to the affidavit in support of the instant Application and Annexure MM-C1 to the Affidavit that supported Misc. Land Application No. 331/2020 and found in both applications, the authorizing persons are the same.

In the meeting that was convened on 26th April 2020 they appointed

ABDALLAH NASSORO KALUNGA, STANFORD KINUMA KASHAKALI



and **PILI MKUFUNZI** who after being nominated they successfully, *vide* Misc. Land Application No.331 of 2020, applied for leave to present the representative suit. Surprisingly, instead of filing the said representative suit within the prescribed time, they went to sleep until on 3rd October, 2022 when they reconvened another meeting this time nominating **RAMADHAN ATHMANI PAZI, SHABAN MOHAMED MCHORA** and **ALLY ABDALLAH KAWANDA** to institute another application for leave to present a representative suit. Following such second meeting, the instant application was preferred. The question that arises is whether it was justifiable for the said 215 persons to reinstitute another application for representative suit instead of abiding to the court orders in Misc. Land Application No.331 of 2020.

From the foregoing, though the instant Application has elements of the doctrine of *res judicata*, I am of the firm view that the application at hand is also in abuse of court process. I am holding so because, according to Oxford Dictionary of Law, 15th Edition, abuse of court process is "...misusing civil court process against another party for a purposes different than the proceedings intended purposes." A party is said to be in abuse of court process where he improperly uses the judicial process to the



irritation and annoyance of his opponent, and the efficient and effectual administration of justice.

I have also managed to visit the Black's Law Dictionary, 6th Edition, Continental Edition it defines the word thus-

"Everything which is contrary to good order established by usage that is complete departure from reasonable use...is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."

Abuse of court process was also defined in the Nigerian case of **Amaefule & Others vs The State** (1998) 4 SCNJ 69 at page 87, where Oputa J.Sc stated thus:-

" A term generally applied to a proceeding which is wanting in bonafides and is frivolous, vexatious and oppressive...improper use of the legal process".

Abuse of court process was also explained in a Kenyan case of **Graham Rioba Sagwe & 2others vs Fina Bank Limited & 2 others**, Petition No.82 of 2016 thus:-



"The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents."

In the present case, it is unequivocally clear that the applicants and their nominators are in abuse of the court process of because in the first place, they were granted *vide* Misc. Land Application No.331 of 2020. Instead of complying with the court orders made therefrom, they opted to nominate other persons to institute another application. Indeed, this is an abuse of court process.

In the final analysis, I find merits in the first limb of the preliminary objection. The fact that the first limb suffices to dispose of the application, I find no reason to proceed canvassing the other limb for doing so will be meaningful for academic reasons only. In the upshot, I proceed to dismiss the entire application with costs.



DATED at **DAR ES SALAAM** this 15th day of November, 2023.

