IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 272 OF 2022

JOAN TATU MAYENGA.....1ST PLAINTIFF

IBRAHIMU MAJEBELE MAYENGA.....2ND PLAINTIFF

VERSUS

AZANIA BANK .....1ST DEFENDANT

MARK ACTIONEERS & COURT

BROKER COMPANY LTD.....2ND DEFENDANT

EXPARTE RULING.

I. ARUFANI, J

The plaintiffs filed in this court the instant suit against the defendants to challenge the move of the defendants to sale the house built on land held under Certificate of Title No. 86951, located on Plot No. 2077, Block D, Changanyikeni Area within Kinondoni Municipality in Dar es Salaam City (hereinafter referred as the suit property). The mentioned suit property was mortgaged as a collateral used to secure loan facilities advanced to the second plaintiff by the first defendant.

After the second plaintiff failed to repay the loan facilities advanced to him, the first defendant exercised its legal right of selling the suit

property to settle the outstanding debt they are claiming from the second plaintiff which is now being challenged in the matter at hand. Upon the defendants being served with the plaint and the summons to file their written statement of defence in the court, the first defendant filed in the court its written statement of defence which comprised a notice of preliminary objection on point of law which states that: -

> *"This suit is res judicata to the Application No. 47 of 2018 which was settled by the parties and finally determined in the District Land and Housing Tribunal for Kinondoni at Mwananyamala."*

When the matter came for hearing the raised point of preliminary objection the plaintiffs were represented by Mr. Alex Balomi, learned advocate. The first defendant was represented by Ms. Upendo Mbaga, learned advocate and the second defendant was absent. The counsel for the parties prayed and allowed to argue the preliminary objection by way of written submissions and they were given time frame for filing their written submissions in the court.

The counsel for the first defendant complied with the order of the court and filed the first defendant' submission in the court on the time fixed by the court. There is no reply to the first defendant's submission which was filed in the court by the counsel for the plaintiff and neither the

plaintiff in person or her advocate enter appearance in the court to state why they failed to file their reply to the submission of the first defendant. The stated situation caused the court to find itself compelled to decide to proceed to dispose of the point of preliminary objection raised by the first defendant by basing on the submission filed in the court by the counsel for the first defendant alone.

The counsel for the first defendant stated in his submission that, the matter before the court is res judicata to the Application No. 47 of 2018 which was settled by agreement entered by the parties and recorded by Kinondoni District Land and Housing Tribunal (henceforth the tribunal). He referred the court to section 9 of the Civil Procedure Code, Cap 33, R.E 2019 and stated it enshrine the doctrine of res judicata. He referred the court to the case of **Peniel Lotta V. Gabriel Tanaki & Others,** [2003] TLR 312 which set out the five conditions required to be established to prove a case is res judicata and showed how the stated conditions have been established in the present case.

He also referred the court to the case of **Pravin Girdhar Chavda V. Yasmin Nurdin Yusufali,** Civil Appeal No. 165 of 2019 (unreported) where the Court of Appeal followed the words stated in the case of **Haystead V. Commissioner of Taxation,** [1926] A.C AC 155 where it

was stated that, parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result. If this were permitted, litigation would have no end except when legal ingenuity is exhausted.

He argued that, the first plaintiff is the wife of the second plaintiff and the second plaintiff mortgaged the landed property to secure the loan facility he obtained from the first defendant. He argued that, the stated loan facility has never been repaid until today and all the time the plaintiffs have been instituting cases in court to restrain the first defendant and its agent from recovering their loan facility. He concluded his submission by stating the suit is res judicata and prayed the court to dismiss the suit with costs.

I have given due consideration the arguments fronted to the court by the counsel for the first defendant and find the main issue for determination in the matter at hand is whether the point of law raised by the first defendant that the suit at hand is res judicata to Land Application No. 47 of 2018 of the tribunal is meritorious. The court has found as rightly argued by the counsel for the first defendant the doctrine of res judicata

is provided under section 9 of the Civil Procedure Code which states 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."*

The court has found the object of the cited doctrine of res judicata is to bar the parties to go to court on the same issue which has already been determined to its finality by a competent court. The stated object can be seeing in the case of **Peniel Lotta** (supra) where it was held that: -

> *"The object of the doctrine of res judicata is to bar multiplicity of suit and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit."*

It is an established position of the law that, in order to say a suit is res judicata to a former suit there are conditions which must be established are in co-existence in the current suit when compared with the previous suit. Those conditions can be derived from section 9 of the

Civil Procedure Code quoted hereinabove which were well summarized in the case of **Peniel Lotta** (supra). The stated conditions which the counsel for the first defendant has listed in his submission can also be found in the case of **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited & Two Others,** Civil Appeal No. 2008, CAT at Tanga (unreported) where it was stated by the Court of Appeal that: -

> *"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These are; (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit and (v) the matter in issue must have been heard and finally decided in the former suit."*

While being guided by the foregoing stated principle of the law the court has found that, in order to be able to determine whether the present suit is res judicata or not it is required to look into the current suit and compare the same with the former suit which the counsel for the first defendant has argued it was conclusively settled by the tribunal.

Starting with the first condition relating to the issues involved in the former application determined by the tribunal and the issues involved in the suit before the court, the counsel for the first defendant argued that, the matter before the court as averred at paragraph 6 of the plaint is directly and substantially the same with the issues pleaded at paragraph 5 (c) of the former application. After going through the mentioned paragraph 6 of the plaint and paragraph 5 (c) of the Application No. 47 of 2018 which its copy is annexed in the written statement of defence of the first defendant, the court has found it is not true that the issues raised in the former application are directly and substantially the same as the issues involved in the suit at hand.

The court has arrived to the stated finding after seeing the main issue in the former application was centred on restraining the first defendant from exercising its power as a mortgagee to appoint a receiver manager or an auctioneer of selling the suit property basing on various grounds stated in the application. The stated issue is different from the issue before the court as the plaintiffs are challenging sale of the suit property.

The plaintiffs in the present suit are challenging the legality of the settlement agreement entered by the parties in the former application

basing on various grounds. There is also an issue of lack of spousal consent in the agreement entered by the second plaintiff and the first defendant for consolidating the loans advanced to the second plaintiff in the present suit which was not an issue in the former application. Under the stated circumstances it cannot be said the first condition of the issue involved in the former application is directly and substantially the same with the issue in the current suit has not been established by the counsel for the first defendant.

Coming to the second condition relating to the parties involved in the former suit and the parties involved in the current suit the court has found the counsel for the first defendant argued that, the parties in the current suit and the parties in the former application are the same. After going through the plaint filed in this court by the plaintiffs and the copy of the record of the former applicant annexed in the written statement of defence of the first defendant the court has found there are some parties who are parties in the current suit but they were not parties in the former application.

The court has found that while the parties in the former application were **Ibrahim Majebele Mayenga** as a plaintiff versus **Azania Bank Limited** as a defendant, the parties in the suit at hand are **Joan**

Mayenga and **Ibrahim Majebele Mayenga** as plaintiffs versus **Azania Bank Limited** and **Mark Auctioneers** and **Court Brokers Company Limited** as defendants. From the foregoing observation it is crystal clear that, Joan Mayenga and Mark Auctioneers and Court Brokers Company Limited who are parties in the present suit were not parties in the former suit.

The court has found that, even if it will be said the first plaintiff is privy to the second plaintiff because the first plaintiff is the wife of the second plaintiff and the second defendant is the agent appointed by the first defendant to sale the mortgaged property to settle the debt of loan advanced to the second plaintiff, but as stated in the first condition for the invocation of the doctrine of res judicata to apply the issues in the former application are not directly and substantially the same as the issues involved in the current suit. Under that circumstances it cannot be said the suit before the court is res judicata to the former application.

Even though it might have been said the parties in both matters are litigating under the same title as required by the third condition and the tribunal which dealt with the former application was competent to decide the matter as required by the fourth condition for the doctrine of res judicata to stand but the court has found it cannot be said with certainty

that matter was heard and finally decided by the tribunal. The court has arrived to the stated finding after seeing that, although there is a copy of the deed of settlement annexed in the written statement of defence of the first defendant which shows the stated settlement agreement was filed in the tribunal but there is no any evidence in the record of the matter showing the stated settlement agreement was accepted and recorded by the tribunal as the decision reached by the parties as provided under Order XXIII Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019.

Even if the stated settlement agreement was accepted and recorded by the tribunal as the decision made by the parties in their dispute but the court has found that, as the former suit ended with a settlement agreement entered by the parties, the doctrine of res judicata cannot be invoked in the present suit because parties' settlement agreement or compromise is not a decision of the court. It is rather an acceptance by the court of something to which the parties have agree to. In other words the court has not decided anything in the matter determined by the parties' agreement or compromise. The stated position of the law was stated by **C. K. Takwani on Civil Procedure Code,** 7th Edition, P. 378 as follows: -

"A compromise decree is not a decision of the court. It is acceptance by the court of something to which the parties had agreed. A compromise merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the court is implicit in it. Hence a compromise decree cannot operate as res judicata."

The above stated finding makes the court to come to the settled finding that, it is not only that the former application was not heard and finally determined by the tribunal as it was terminated by the settlement agreement entered by the parties but also some of the conditions required to be established for the doctrine of res judicata to stand have not been established in the matter as required by the law. That being the position of the matter the court has found that, the point of preliminary objection raised by the first defendant that the suit at hand is res judicata cannot be sustained as it has not been substantiated to the standard required by the law.

Although there is no submission filed in the court by the plaintiff or his counsel to reply to the submission of the counsel for the first defendant but the court has found the point of preliminary objection raised by the first defendant cannot be upheld as it is devoid of merit. Consequently,

the point of preliminary objection raised by the first defendant is hereby overruled with no order as to costs. It is so ordered.

Dated at Dar es Salaam this 15th day of June, 2023

I. Arufani
JUDGE
15/06/2023

Court: Ex Parte Ruling delivered today 15th day of June, 2023 in the presence of Mr. Mbagati Nyarigo, learned advocate for the first defendant and in the absence of the rest of the parties. Right of appeal to the Court of Appeal is fully explained.

I. ARUFANI
JUDGE
15/06/2023