

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 300 OF 2022

WITNESS RHOBIE ELIA PLAINTIFF

VERSUS

KHAMIS ABDALLAH MDUMA 1ST DEFENDANT

PETER DAUDI MHALA 2ND DEFENDANT

ELIA MUHARAGI 3RD DEFENDANT

RULING

Date of last Order: 24.02.2023

Date of Ruling: 28.02.2023

A.Z. MGEYEKWA, J.

At the centre of controversy between the Plaintiff and three Defendants.

The Plaintiff claims against the Defendants jointly and severally seeking eight reliefs as follows:-

- a) *Declaratory order that the defendant's sale agreement is null and void in the eyes of the law.*

- b) *An order for the 1st defendant to return the disputed land back to the plaintiff's hands as the lawful owner.*
- c) *An order for the 1st defendant to pay the plaintiff specific damage to the tune of Tshs. 320,000,000/- (three hundred and twenty million shillings) as compensation for the demolition of the plaintiff's house.*
- d) *An order for the payment of interest at the court rate of 12% on the claimed amount from the date of judgment till the date of full payment.*
- e) *Cost to be met by the defendants.*
- f) *Any other relief this court deems fit to grant.*

The application has encountered formidable opposition from the 1st Defendant, on 13th December, 2022, the 1st Defendant's counsel raised a Notice of Preliminary Objection on the ground that:

1. *The suit is bad in law and seriously unmaintainable under the law for being inoperative under Res Judicata creed hence contravenes the legal provision of section 9 of the **Civil Procedure Code**, Cap 33 (R.E. 2019), hence, that this suit be dismissed with costs.*

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the

practice of the Court founded upon prudence which I could not overlook. See the case of **Salmin Ali Jaffar v Fatma Tangawizi Ngura & Another**, Civil Appeal No. 299 of 2019.

When the matter was called for hearing preliminary objection on 9th February, 2023, Mr. Bukaza learned counsel, featured for the appellant, whilst Mr. Chali Juma, learned advocate, had her services enlisted by the 1st Defendant. The Court ordered the matter be disposed of by way of written submissions. Both parties complied with the court order.

In support of the objection, the learned counsel for the 1st Defendant at the outset argued that this suit is *res judicata* since the same suit involving the same subject matter had been heard and determined to its finality at the District Land and Housing Tribunal for Ilala at Mwalimu House in Land Application No.34 of 2018 delivered on 4th September, 2020 before Hon. J.M. Bigambo Chairperson. It was learned counsel's contention that, the 1st Defendant lodged a suit against the 3rd Defendant claiming ownership of the suit property in issue, whereas, Plaintiff was declared the lawful owner of the suit property.

The learned counsel for the 1st Defendant continued to submit that the Plaintiff in this suit is the 3rd Defendant's wife, hence she was aware of the case at DLHT, but that the Plaintiff and the 3rd Defendant have colluded to bring this case before this court litigating over the same subject matter

similar to what was litigated in the former case in Land Application No. 34 of 2020 before the DLHT. Therefore, it was learned counsel's contention that, this suit is *res judicata* thus, this court has jurisdiction to entertain the same.

In response, the learned counsel for the Plaintiff, was very brief, he contended that this suit is not *res judicata* because the Plaintiff was not a party in the Land Application No.34 of 2020. He went on to argue that the 3rd Defendant was forced to sign the sale agreement and the same was used to transfer the suit property to the 1st Defendant. He stated that the Plaintiff was not aware of all the processes of transferring their matrimonial property to the 1st Defendant neither consented to the said transfer of the suit property to the 1st Defendant.

I have carefully gone through the respective submissions of both learned counsels at length and given them the due respect as deserved. I should state at the outset that the main issue for determination is *whether the objections raised are meritorious*.

The Court of Appeal set out five conditions of *res judicata* in the case of **Paniel Lotta v Gabriel Tanaki & Others** [2003] TLR 312 the same arises from the scheme of section 9 of the Civil Procedure Code Cap.33 [R.E 2002] which when coexistent, bars a subsequent suit as follows:-

- 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 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.*

The rationale of the Doctrine of *Res Judicata* is found in expression of the two Latin maxims;

- (i) *“interest rei publicae ut sit finis litium”*, which means; the interest of the public requires that there must be an end to litigation; and
- (ii) *“Nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa,”* which means; no man should be twice sued upon one and the same set of facts if there has been a final decision of a competent court.

As to the first and third principles of *res judicata*, whether the matter is directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. And the party in the subsequent suit must have litigated under the same title in the former suit.

I have to say that the learned counsel for the 1st Defendant has tried to convince this Court that the instant case is unmaintainable and bad in law for being brought unprocedural under constructive *res judicata*.

On his side, the Plaintiff's counsel contended that the matter is not *res judicate* without disputing that the subject matter in the previous case and instant suit are the same. The records show that there was a Land Application No.34 of 2018 at the DLHT for Ilala whereas Khamis Abdallah, the 1st Defendant lodged a suit against Elia Daud Muharagi, the subject matter was located at Kivule 'A' Kitunda measuring 90 meters x 180 meters. The Plaintiff in the instant suit under paragraph 6 of his Plaint is claiming that she is the co-owner of the suit landed property together with the 3rd Defendant as a matrimonial property located at Magore (A) Kivule. To substantiate her claims she attached a Sale Agreement the same shows that the subject matter in the matter at hand is a piece of land measuring 90 meters x 180 meters located at Kivule 'A' Kitunda. Looking at the subject matter it is definitely the same subject matter which is involved in the case at hand. Therefore, it is well noted that the subject matter is the same which was litigated in the previous case.

It is worth noting that the dismissal of the suit has the effect of barring subsequent proceedings on the same cause of action, and the same subject matter even where the parties are different. The matter becomes

constructively *res judicata*. Therefore, the Plaintiff is barred from instituting a case involving the same subject matter.

Next for consideration is the second principle; the former suit must have been between the same parties or privies claiming under them. I have gone through the Application No. 34 of 2018, before the DLHT, and found that the parties were *Khamis Abdallah, the 1st Defendant v Elia Daud Muharagi*. In the instant Land Case No.300 of 2022, the parties are Witness Rhobi Elia v DiaKhamis Abdallah Mduma, Peter Daudi Mhala, and Elia Muharagi.

The Plaintiff was not a party to the previous case and in the case at hand, the Plaintiff has included two other Defendants, however, reading the records it is revealed that all Defendants are involved in the claims related to the same subject matter a piece of land measuring 90 meters x 180 meters located at Kivule 'A' Kitundu. And the previous case was determined by the DLHT to its finality. Therefore, it is my considered view that the instant suit is a subset of the Doctrine of *Res Judicata*. In other words, the suit is constructive *res judicata*, a suit that sets to bar any claims being raised in a later proceeding if the claim on the same subject matter ought to have been raised and decided earlier.

With respect to the fourth principle, the Court which decided the previous suit must have been competent to try the subsequent suit; the DLHT High Court, Land Division in Application No, 34 of 2018 was a competent tribunal

to try the case and the was finally determined on merit whereas the 1st Defendant was declared the winner of the suit land. Therefore this condition is met.

Having said so, I hold that this application is constructive *res judicata* and this court is *functus officio* to determine the instant suit. Guided by the above principles I find merit in the preliminary objection raised by the 1st Defendant's counsel.

The above finding sufficiently disposes of the suit. I, therefore proceed to dismiss the suit with costs.

Order accordingly.

DATED at Dar es Salaam this 28th February, 2023.

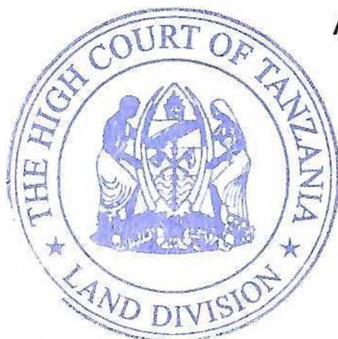



A.Z.MGEYEKWA

JUDGE

28.02.2023

Ruling delivered on 28th February, 2023 via audio teleconference whereas Mr. Bakuza, counsel for the Plaintiff and Mr. Chale Juma, counsel for 1st Defendant were remotely present.




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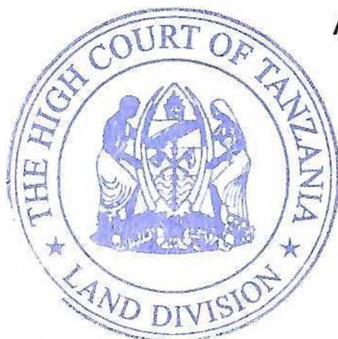



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