

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 249 OF 2023

JULIUS RAPHAEL NGEKELA PLAINTIFF

VERSUS

SAFINA HOLDINGS CO. LIMITED 1ST DEFENDANT

AMANA BANK LIMITED 2ND DEFENANT

Date of last order: 14/11/2023

Date of ruling: 09/02/2024

RULING

I. ARUFANI, J

The plaintiff filed in this court the suit at hand claiming for various reliefs against the defendants. He is claiming for a declaration that he is the lawful owner of the land described as Plots Nos. 2185 and 2186 Block "D" Mbezi Area, Kinondoni District, Dar es Salaam Region (hereinafter referred as the suit premises) and the first defendant be declared is a trespasser to the suit premises. He is also claiming for permanent injunction against the first defendant from trespassing the suit premises, general damages of TZS 150,000,000/= for loss of land, payment of interest of 25% from the payment he made to the second defendant for purchasing the suit premises which has not been handed over to him by the second defendant and costs of the suit.

After the defendants being served with the plaint the counsel for the first defendant filed in the court a notice of preliminary objection containing the points of law which read as follows: -

- 1. The suit by the plaintiff is res judicata to land case No. 24 of 2020 between the 1st defendant versus the 2nd defendant and the plaintiff and 4 other parties as co – defendants, the subject matter being the ownership of the same landed property, to wit Plot No. 2186, Block "D", Certificate of Title No. 115397, Mbezi Area Kinondoni, Dar Es Salaam in respect of which orders were made by Hon. Maghimbi J, dated 22nd May 2023.*
- 2. The suit by the plaintiff is res sub judice to Land case No. 24 of 2020 and the resultant appeal to the Court of Appeal of Tanzania between the 1st defendant versus the 2nd defendant and the plaintiff and 4 other parties as co- defendants, the subject matter being ownership of the same landed property, to wit Plot No. 2186, Block "D" Certificate of Title No. 115397, Mbezi Area, Kinondoni, Dar es Salaam in respect of which orders were made by Hon. Maghimbi J dated 22nd May, 2023, and in respect of which a notice of appeal has been filed and thus appeal formally lodged and pending.*

When the matter came for hearing the raised points of preliminary objections, the plaintiff was represented by Mr. Tumaini Mgonja, learned advocate and while the first defendant was represented by Ms. Grace Ndera, learned advocate and the second defendant was represented by

Mr. Haji Soma, learned advocate. The counsel for the parties prayed and allowed to argue the raised points of preliminary objections by way of written submissions.

In arguing the raised points of preliminary objections, the counsel for the first defendant gave a brief background of the matter by stating that, the suit premises was also a subject matter in Land Case No. 24 of 2020. She stated on 22nd May, 2023 the court struck out the mentioned land case for want of board resolution and thereafter the first defendant filed in the court a notice of appeal to the Court of Appeal against the stated ruling and order of the court.

The counsel for the first defendant started with the second preliminary objection which states the suit is res sub judice and stated that, the first defendant has initiated an appeal to the Court of Appeal as substantiated by various documents annexed in their written statement of defence as annexures TAL-1 and TAL-2. She argued that, despite the institution of the stated appeal the plaintiff has instituted the instant suit in the court claiming for among other things a declaration that she is the lawful owner of the suit premises, a remedy which was also a subject matter in Land Case No. 24 of 2023 which is now pending before the Court of Appeal for determination and the parties are substantially the

same. She argued that, the above stated background of the matter shows the instant suit is *res sub judice*.

She argued that, the term *res sub judice* is a common law principle and a Latin Maxim connoting *a matter under judgment*. She argued the stated principle bars a discussion before a court of law with competent jurisdiction or commenting on a matter which is pending before a court of law. She submitted that, the stated principle is embraced under section 8 of the Civil Procedure Code, Cap 33 R.E 2019 and quoted the cited provision in her submission. She argued the the cited provision of the law requires a subsequent suit involving the same parties and the same subject matter as a previous suit that is still pending in court to be stayed or dismissed.

She stated the doctrine of *res sub judice* was purposely laid down to prevent multiplicity of suit, inconsistency, conflicting judgment and to ensure judicial efficiency. She stated any matter arising out of the same parties and same cause of action would necessarily imply a contempt of court. He cited in his submission the case of **Avodia Antipas Swai V. Asha Ahmed Jama**, Misc. Land Application No. 7 of 2023, HC at Dodoma (unreported) where the conditions for operation of the doctrine of *res sub judice* provided under section 8 of the Civil Procedure Code which is in

par materia to section 10 of the Indian Code of Civil Procedure were discussed and summarized into five conditions.

She argued that, upon testing the conditions for the doctrine of *res sub judice* discussed in the above case in the present suit they have found all of them have been met. She stated there are two matters emanating from the same subject matter, the said two matters are being challenged by substantially the same parties in two different courts, and the cause of action in both matters originates from the same subject matter.

She cited in her submission the case of **In Ex Parte Bread Manufacturers Ltd; re Truth and Sportsman Ltd and Another** \yS3T\SR (NSW) where it was stated it is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all manner of prejudice. She argued that, if the instant suit will proceed and the appeal instituted in the Court of Appeal is allowed and the former suit restored before the court there is a great danger of risking judicial efficiency, causing inconsistency and conflicting decision, while considering that suits must come to an end.

She argued in relation to the first preliminary objection which states the suit is *res judicata* that, after Land Case No. 24 of 2020 being struck

out by this court and appeal being preferred by the first defendant, the instant suit is *res judicata* to the mentioned case. She stated that, the parties have litigated on matter whose cause of action and parties are the same as the instant suit and currently pending appeal before the Court of Appeal.

She cited in her submission the case of **Kamunye & Others V. The Pioneer General Assurance Society Ltd**, (1971) EA 263 where the test for application of the principal of *res judicata* were discussed. She submitted that, as Land Case No. 24 of 2020 has been adjudicated upon and an appeal has been preferred, then it bars parties in the said suit to institute other multiple proceedings basing on the same subject matter and among the same parties. She based on the above submission to pray the court to dismiss the plaintiff's suit for being both *res judicata* and *res sub judice*.

In his reply the counsel for the plaintiff gave a definition of the term *res judicata* as defined in the **Black's Law Dictionary**, 8th Edition at page 4088 and quoted section 9 of the Civil Procedure Code which provides for the principle of *res judicate* and listed five elements of *res judicata* to be as follows; (a) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue

in the former suit (b) the parties in the former suit must have been between the same parties or privies claiming under them (c) the parties have litigated under the same title in the former suit (d) the court which decided the former suit is competent to try the subsequent suit (e) the matter in issue must have been heard and finally decided in the former suit.

The counsel for the plaintiff stated the first element of the principle of *res judicata* has been met in the present suit because the cause of action in the previous suit was a claim of ownership over the suit premises which it is still the subject matter in the present suit. He stated the second element has not been met as parties in the former suit are not the same parties in the present suit. He stated the parties in the former suit were the first defendant in the present suit as a plaintiff and he was suing the second defendant in the present suit together with five others including the plaintiff herein as the second defendant. He stated that shows the parties are not the same in the former suit and in the present suit.

He went on stating that, the third element has not been met as the parties are not litigating under the same title as the first defendant in the present suit was the plaintiff and the plaintiff in the present suit was the second defendant sued together with other five defendants. As for the

fourth element he stated it has been met as the court had jurisdiction to determine the previous suit. With regards to the last element the counsel for the plaintiff stated the former suit was not determined to its finality as it was just ended up on technicality.

He referred the court to the case of **Athanas T. Masinde t/a Abeti Primary School V. National Bank of Commerce**, Commercial case No. 34 of 2016 where it was stated the doctrine of *res judicata* applies on a suit or issue between the last litigation, which has been finally decided upon. He submitted that, as the former suit was not heard and determined on merit it is wrong to treat the present suit as *res judicata* to the former suit and prayed the court to dismiss the first preliminary objection.

He argued in relation to the second preliminary objection which states the suit is *res sub judice* that, the same is predicted on the legal policy that is intended to limit a plaintiff to a single lawsuit, avoiding possibility of two contradicting decisions from the same court on the same issue. He stated there are five essential conditions for the doctrine of *res sub judice* to be put in operation which are as follow; (1) there must be two suits, one previously instituted and the other subsequently instituted, (2) issue in both suits must be directly and substantially the same, (3) the pending suit must involve the same parties, (4) courts in which the matters are

pending must be competent to grant the relief sought and (5) the parties should be litigating under the same title.

He stated while in the previous suit the issue was on the validity of the sale of the suit premises purportedly owned by the first defendant, the issue in the present suit is on declaration that the first defendant is a trespasser to the plaintiff's land. He stated while the previous suit involved five parties being sued by the first defendant, the current suit is between the plaintiff who has sued only two parties. He stated that shows the present suit does not involve the same parties. He contended the plaintiff has never been made aware of the existence of the appeal alleged is pending in court which is substantially the same to the suit at hand.

He referred the court to rules 84 (1) and 90 (1) of the Court of Appeal Rules, 2009 which requires the notice of appeal and the copy of the letter written to the Registrar of the High Court to request for the copies of the proceedings, ruling and order to be served to the respondent and time for lodging an appeal in the court. He also referred the court to the case of **Issa Omari Mapesa V. Jumanne Sebarua**, Civil Application No. 189/91 of 2021 (unreported) where it was stated inter alia that, failure to comply with the requirement provided in the above cited provisions of the law renders the appeal lodged incompetent. He based on the position of

the law stated in the above quoted provision of the law and the case law cited to invite the court to dismiss the preliminary objection raised by the counsel by the first defendant in its entirety with costs.

In his rejoinder the counsel for the first defendant reiterated her submission in chief and in addition to that she stated in relation to the second preliminary objection that, the submission by the counsel for the plaintiff that the two matters emanate from two distinct cause of action is misconceived and misleading as the decision on nullification of the alleged sale in the former suit will automatically impact the ownership status on the suit premises in both cases.

As for the contention that the plaintiff has never been made aware of the existence of the appeal pending before the Court of Appeal is a contention requiring evidence to prove the same. She stated as it an issue requiring evidence to prove the same, then as held in the case of **Mukisa Biscuit Manufacturing Company Ltd, V. West End Distributors Ltd**, [1969] EA 696 it cannot be entertained and disposed in this preliminary stage of the matter. As for the requirements provided under the Court of Appeal Rules, she stated the alleged defects are matters that can only be determined by the Court of Appeal hence the stated argument is lacking legal foundation. She stated on the same reason the case of

Issa Mapesa (supra) is distinguishable to the present suit as it goes beyond what is before the court and reiterated the prayer she made in her submission in chief.

After considering the submissions advanced to the court by the counsel for the parties the court has found the issue to determine in the matter at hand is whether the points of preliminary objection raised by the counsel for the first defendant against the plaintiff's suit have merits and they deserve to be upheld. In determine the stated issue I will start with the first point of preliminary objection which states the plaintiff's suit is *res judicata*.

The court has found the the object of the doctrine of *res judicata* which is enacted under section 9 of the Civil Procedure Code is to bar the parties to come back to the court on the same issue which has already been determined to its finality by a court of competent jurisdiction. The stated object can be seeing in the case of **Peniel Lotta V. Gabriel Tanaki & two others** [2003] TLR 312 where it was held that:

"The object of the doctrine of res judicata is to bar the multiplicity of suit and guarantee finality to litigation. It makes a 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".

In order to be able to determine the present suit is *res judicata* against the mentioned previous suits there are five conditions which must be established are in existence in the present suit and in the former suits. Those conditions can be derived from section 9 of the Civil Procedure Code which were well summarized in the cases of **Peniel Lotta** (supra) and **Yohana Dismas Nyakibari & Another V. Lushoto Tea Company Limited & Two Others**, Civil Appeal No. 2008, CAT at Tanga (unreported) where it was stated 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"

The court has found it was also stated in the cases of **Hamza Byarushengo V. Mwanga Hakika Microfinance Bank Limited**, Land Case No. 45 of 2019, HC Land Division at DSM, (unreported) and **Peniel Lotta** (supra) that, in order for the doctrine of *res judicata* to bar a subsequent suit to be heard in court, all the stated five conditions must

be proved are in co-existence in both suits to justify application of the doctrine of *res judicata* in a case.

While being guided by the afore stated principle of the law the court has found that, in order to be able to determine whether the present suit is *res judicata* to the former suits it is required to look into the suit at hand and compare the same with the previous suits to see whether the stated conditions have been established in the present suit. The court has found the decision of the former suit is not annexed in any of the pleadings filed in the court by the parties. To the view of the court the stated decision is a necessary document to enable the court to determine whether the conditions set for the doctrine of *res judicata* to come into play have been established in the present suit or not.

However, the court has found the counsel for the first defendant has stated in her submission and without being disputed by the counsel for the plaintiff that the former suit was struck out by the court for want of a Board Resolution. That being how the matter which was before the court in the former suit was determined it is crystal clear that, the said suit was not heard and finally decided on merit as required by the fifth condition of the principle of *res judicata* to operate in the present suit but it was determined in technicality. If the former suit was not determined

on merit but on technicality, the principle of *res judicate* cannot be invoked to bar the instant suit instituted in the court by the plaintiff.

The stated position of the law can be seen in the book titled **Civil Procedure with Limitation Act**, 1963 by C. K. Takwani, 7th Edition at page 110 where the position of the law stated in the Indian cases of **Sheodan Singh V. Daryao Kunwar**, AIR 1966 SC 1332 at p 1336 and **Shivashankar Prasad V. Baikunth Nath**, (1969) 1 SCC 718 at p 721 were quoted and the author of the cited book stated as follows: -

"In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits. Thus, if the former suit was dismissed by a court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or misjoinder of parties, or on ground that the former suit properly framed, or that it was premature, or that there was technical defect, the decision not being on merit, would not operate as res judicata in a subsequent suit."

In the guidance of the wording of the position of the law stated in the above quoted excerpt the court has found as the former suit was not determined on merit but on technicality that there was no Board Resolution authorizing institution of the former suit it cannot be said the present suit is *res judicata* because the conditions for the stated principle to operate to bar the present suit have not been met cumulatively as

required by the law. In the premises the court has the first preliminary objection cannot be sustained.

Coming to the second point of preliminary objection which states the plaintiff's suit is *res sub judice* the court has found that, as rightly argued by the counsel for the first defendant and supported by the counsel for the plaintiff, it is a principle of law which prohibits court to proceed with trial of a suit which the issue in dispute in a subsequently instituted suit is the same as the issue in a former suit where the parties are the same or any of them is litigating under the same title and the court where the former suit is pending has jurisdiction to grant the relief claimed in the subsequently instituted suit.

The stated principle of the law, as rightly stated by the counsel for the first defendant is common law principle and a Latin Maxim which means "*matter is before a court*" or "*matter is under a judge or under a judgment*". The object of the stated principle of *res sub judice* as stated at page 66 of the book titled **Civil Procedure with Limitation Act**, cited hereinabove is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief.

Although the above referred book is talking of courts of concurrent jurisdiction but to the view of this court the stated principle is equally applicable in a situation where there is an appeal pending in the higher court and the issue intended to be determined in the said appeal is directly and substantially the same as the issue in the suit filed in the court by the same parties or parties litigating under the same title. The stated principle of the law is provided under section 8 of the Civil Procedure Code, Cap 33 R.E 2019 which states 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."

The conditions required to be established for the principle of *res sub judice* to stand were stated by C. K. Takwani in the book I have cited hereinabove. When the Author of the cited book was discussing about applicability of section 10 of the Indian Code of Civil Procedure which is in *pari materia* with section 8 of the Tanzanian Civil Procedure Code quoted hereinabove, he listed the conditions required for establishing a suit is *res sub judice* at page 67 of the cited book to be as follows: -

- (i) *There must be two suits, one previously instituted and the other subsequently instituted.*
- (ii) *The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.*
- (iii) *Both the suits must be between the same parties or their representative.*
- (iv) *The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court.*
- (v) *The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.*
- (vi) *Such parties must be litigating under the same title in both the suit."*

The above quoted conditions are similar to the conditions summarized in the case of **Avodia Antipas Swai** (supra) cited to the court by the counsel for the first defendant. While being guided by the position of the law stated hereinabove the court has found the pleadings and the submissions filed in the court by the counsel for the parties shows there is no dispute that the first defendant filed in this court Land Case No. 24 of 2020 against the plaintiff and the second defendant together with four others who are not parties in the present suit and as stated earlier in this ruling the stated suit was struck out for want of Board Resolution to institute the same in the court.

Although it is not disputed that the stated suit was struck out from the court but the counsel for the first defendant has argued the first defendant was aggrieved by the decision of the court and she has initiated an appeal to the court of appeal by filing a notice of appeal and other documents for initiating appeal to the Court of Appeal as evidenced by annexures TAL-1 and TAL-2 to the written statement of defence of the first defendant. Since there is an appeal pending in the Court of Appeal emanating from the suit which was struck out it is crystal clear that there are two suits pending in courts.

The dispute is whether the present suit is *res sub judice* to the former suit instituted in the court by the first defendant which is now pending in the Court of Appeal. The court has found while the counsel for the first defendant is arguing the instant suit is *res sub judice* to the mentioned cases, the counsel for the plaintiff argued it is not as the conditions for operation of the principal of *res sub judice* in the instant suit have not been met.

The court has found the counsel for the plaintiff is not disputing there was Land Case No. 24 of 2020 which was instituted in the court by the first defendant against him and five other defendants but is contending the plaintiff was not made aware of the appeal filed in the

court by the first defendant as she was not served with notice of appeal and other documents required Rules 84 (1) and 90 (1) of the Court of Appeal Rules to be served to her as a respondent of the stated appeal.

The court has been of the view that, even if it is true that the plaintiff in the present suit was not served with the stated documents but that cannot be a ground of saying there is no appeal pending in the Court of Appeal. To the view of this court there is an appeal pending in the Court of Appeal initiated by the first defendant in the present suit which is emanating from the suit where the plaintiff and the defendants in the present suit were parties. The court has found the argument that the plaintiff was not served with the documents required by law is an issue to be considered and determined by the Court of Appeal and not this court.

The counsel for the plaintiff argued further that, the present suit is not *res sub judice* because the parties in the former suit and the parties in the present suit are not litigating under the same title. He stated while the plaintiff in the former suit was the first defendant in the present suit, the plaintiff in the present suit was a defendant in the former suit. The court has found that, although it is true that the plaintiff in the present suit was a defendant in the former suit and not plaintiff but that does not mean he can institute the suit in the court to claim for ownership of the

suit premises which was in dispute between him and the first defendant in the former suit, which is also a subject matter in the appeal pending in the Court of Appeal.

The court has come to the stated finding after seeing the law does not say it is only the plaintiff who is barred to institute a subsequent suit while the former suit, he instituted in court is still pending in court but it bars all persons who are parties in a former suit or their privies in the former suit. Since the plaintiff in the present suit is a defendant in the former suit, he is barred by the principle of *res sub judice* to institute another the suit in the court to claim to be declared lawful owner of the land which is in dispute in the former suit which is pending determination of the court.

As stated earlier in this judgment, although the former suit is pending in the Court of Appeal and not in this court but the principle of *res sub judice* bars trial of a matter which is pending in any other court with competent jurisdiction to determine the relief suit in the subsequent suit. As stated earlier in this ruling the first defendant was challenging sale of the suit premises in the former suit and the plaintiff in the present suit is praying to be declared lawful owner of the same suit premises.

The court has found that, as rightly argued by the counsel for the first defendant, if the court will proceed with trial of the instant suit there is a possibility of rendering a decision which will be in conflict with the final decision which will be rendered in the appeal pending in the Court of Appeal or in the Land Case No. 24 of 2020 if it will be ordered by the Court of Appeal to proceed on merit. The court has found the counsel for the plaintiff has stated there is no possibility of having two conflicting decisions in the two cases because the issues in the two cases are different. He stated while the issue in the former suit was on the validity of the sale of the suit premises, the issue in the suit at hand is on declaration that the plaintiff is the lawful owner of the suit premises and the first defendant is a trespasser to the stated land.

The court has found that, if the first defendant was challenging sale of the suit premises in the former suit and the stated issue has not been heard and finally determined by the court as it is pending determination of the appeal filed in the Court of Appeal by the first defendant, it cannot be said there is no possibility of having two conflicting decisions in the said two cases. The court has come to the stated finding after seeing the claim of ownership of the suit premises in the present suit by the plaintiff

and what is being challenged by the first defendant in the appeal pending in the Court of Appeal is directly and substantially the same issue.

Having been satisfied there are two suits pending in two different courts, one being the present matter and the second being the appeal pending in the Court of Appeal, that the matter in issue in the said appeal is directly and substantially the same as the issue in the present suit, that the two matters involves the same parties, that both courts have jurisdiction to determine the matter pending before the court and the parties are litigating under the same title, the court has found all the conditions required for the doctrine of *res sub judice* to operate have been fulfilled in the present suit.

Although the law requires where it has been found a suit is *res sub judice* the subsequent suit is supposed to be stayed but the court has found that, as the decision which will be made in the appeal pending in the Court of Appeal will also determine the right the plaintiff is claiming in the present suit the court has found there is no need of staying the instant suit in the court. To the contrary the court has found the appropriate order to make in this matter is to strike out the same and leave the parties to await the decision of the appeal pending in the Court of Appeal so that

after determination of the said appeal they can decide which appropriate step to take.

In the premises the court has found the second preliminary objection raised in the matter by the counsel for the first defendant that the instant suit is res sub judice to the Land Case No. 24 of 2020 instituted in this court and an appeal pending in the Court of Appeal is meritorious and it is hereby upheld. The plaintiff's suit is accordingly struck out for being instituted in the court before final determination of the stated former matter and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 9th day of February, 2024.



Court:


I. Arufani
Judge
09/02/2024

Ruling delivered today 9th day of February, 2024 in the presence of Mr. Tumaini Mgonja, learned advocate for the plaintiff and in the absence of the defendants. Right of appeal to the Court of Appeal is fully explained.




I. Arufani
Judge
09/02/2024