

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY**

AT MOROGORO

COMMERCIAL CASE NO. 26022 OF 2023

**CAROLINE GABRIEL LOIBANGUTI (Administratrix of
the Estate of the Late Gabriel Wavi Ole Lobainguti) PLAINTIFF**

VERSUS

**ALOYCE KITAMBI (Administrator of the Estate
of the Late Joseph Kitambi) DEFENDANT**

RULING

26/03/2024 & 24/04/2024

KINYAKA, J.:

In the present suit, the plaintiff, the legal representative of the late Gabriel Wavi Ole Loibanguti, sued the defendant, the legal representative of the late Joseph Kitambi, for payment of the sum of TZS 139,200,000 being the unpaid principal amount together with interest computed from 4th March 2019. It was alleged by the plaintiff in the Complaint that the late Gabriel Wavi Ole Loibanguti extended loan amounting to TZS 120,000,000 to Joseph Kitambi *vide* the loan agreement entered between the parties on 4th April 2017 which the late Joseph Kitambi failed to repay in full.

The plaintiff prayed for an order of the Court that the defendant breached the terms of the loan agreement for his failure to repay the loan; an order for payment of TZS 139,200,000 being unpaid amount; an order for interest at the commercial rate of 24% from the date the amount was due to the date of judgement; and costs of the suit.

In his written statement of defence, the defendant repudiated the plaintiff's claims and raised a preliminary objection on a point of law that the suit is incompetent for contravening the provision of Order IX Rule 6(1) of the Civil Procedure Code, Cap. 33 R.E. 2019, hereinafter, "the CPC".

On 23rd March 2024 when the matter came for necessary orders, Mr. George Masudi, learned advocate appeared for the defendant. He also held brief for Mr. Jackson Liwewa, learned advocate for the plaintiff. Mr. Masudi prayed for disposition of the preliminary objection on a point of law by written submissions. I granted the prayer and ordered the defendant to file his submissions in chief by 2nd April 2024, the plaintiff's reply submissions by 9th April 2024 and the defendant's rejoinder if any, by 15th April 2024.

Before commencing his submission, the learned counsel for the plaintiff prayed for the court to ignore the provision of Order IX Rule 6 (1) of the Civil

Procedure Cap. 33 R.E. 2019, hereinafter, "the CPC" in which the preliminary point of objection was predicated, and substitute it with section 9 of the CPC. In support of the new ground of objection, Mr. Masudi contended that the plaintiff's Civil Case No. 8 of 2023 lodged before the District Court of Morogoro at Morogoro was dismissed on 6th November 2023 for lack of pecuniary jurisdiction of the District Court. He contended further that the plaintiff's present suit is barred by section 9 of the CPC for being *res judicata* upon being dismissed by the District Court. He argued that the plaintiff ought to have applied before the District Court to substitute the order of dismissal to that of striking out of the suit for him to lodge a fresh suit before this Court. He relied on the High Court decision in the case of **Joseph Nyamukama v. Gaudensia Kiazilege, Land Appeal No. 73 of 2021** (unreported) which cited with approval the decision in the case of **Ngoni-Matengo Cooperative Marketing Union Ltd v. Ali Mohamed Osman [1995] E.A. 577** where it was held that a dismissal implies that a competent appeal suit has been disposed of and striking out implies that there was no proper suit capable of being disposed of. He prayed for the suit to be struck out.

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In his reply, Mr. Liwewa informed the Court that the plaintiff's submissions though uploaded in the system on 2nd April 2024, it was paid for and so properly filed on 3rd April 2024, one day after 2nd April 2024 ordered by the Court. He blamed the defendant for his failure to comply with court's orders which is tantamount to non-appearance with consequence that the defendant failed to appear and prosecute his preliminary objection. He relied on the decisions in the case **Daud Godluck Sollo v. Dar es Salaam Institute of Technology Saccos Ltd, Misc. Application No. 197 of 2022** [2022 TZHCLD 930 (9 September 2022)] and **National Microfinance Bank PLC v. Alpha Mgimba and Minjingu and Ampo Fertilizer Ltd, Misc. Civil Application No. 12 of 2017**.

Mr. Liwewa relied on the decisions in the cases of **John Chuwa v. Antony Ciza [1992] TLR 233; Msasani Peninsula Hotels Limited and 6 Others v. Barclays Bank Tanzania Limited & 2 Others, Civil Application No. 192 of 2006; Adamson Makondaya and Another v. Angelika Kokutona Wagwa (the Administratrix of the estate of the late Stephen Angelo Rumanyika, Misc. Land Appeal No. 521 of 2018; and Muganda Michael v. Simon Liduckey, Misc. Civil Application No. 2 of 2023 [2023 TZHC 19960 (21 July 2023)]** to

buttress his argument that a document is lodged when the prescribed fee for lodging the same is duly paid. He submitted that though Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules G.N. No. 148 of 2018, hereinafter, "the Electronic Filing Rules" provides that a document is considered to have been filed if it is submitted through the electronic filing system, but it did not do away with the requirement of payment of prescribed fees for filing documents in court. He urged the Court to ignore and strike out the submissions due to plaintiff's non-compliance of the order for filing submissions.

In addition, Mr. Liwewa attacked the defendant for raising new ground of objection contrary to the order of the Court and without obtaining leave of the Court. He argued in respect of the new preliminary objection that the same is misconceived as section 9 of the CPC bars institution of a fresh suit if similar suit with same parties and subject matter was previously heard and determined by a competent forum with jurisdiction to entertain the same. He submitted that Civil Case No. 8 of 2023 was not heard by the District Court but was dismissed for want of pecuniary jurisdiction. The learned counsel relied on the decisions in the cases of **Attorney General v. Dickson Paulo Sanga, Civil Appeal No. 175 of 2020** [2020 TZCA 371

(5 August 2020)]; **Peniel Lotta Gabriel and Others [2003] TLR 312; Moa General Trading Co. Limited v. Chrisak Farms and Others, Land Case No. 92 of 2020** [2021 TZHC LandD 212 (31 May 2021)] to bolster his position that the present suit is competent before the Court as the District Court dismissed the previous suit for lack of pecuniary jurisdiction to entertain the same. He prayed for dismissal of the preliminary objection with costs.

Having thoroughly examined the records of this appeal, my reading of the pleadings and the written submissions of both parties lead me to determine at the onset, whether it was appropriate for the defendant to raise a new ground of objection without leave of the Court.

In his written submissions, the defendant's counsel informed the Court that in the notice of preliminary objection featured in the defendant's written statement of defence lodged in this court on 15th February 2024, there was a slip of the pen in citing Order IX Rule 6(1) of the CPC instead of section 9 of the CPC. Mr. Masudi further informed the Court that the preliminary objection should *read 'the plaintiff's suit is incompetent for contravening the provision of section 9 of the Civil Procedure Code Cap. 33 R.E. 2019'*, instead

of 'the plaintiff's suit is incompetent for contravening the provision of Order IX Rule 6(1) of the Civil Procedure Code Cap. 44 R.E. 2019'.

Unhesitatingly, I do not accept the invitation by the learned Counsel for the defendant for this Court to ignore his flaw in citing Order IX Rule 6(1) of the CPC instead of section 9 of the CPC on a reason that the same was a slip of the pen. My observation are based on two reasons. The first reason being that before I allowed the parties to file their respective submissions, I deliberated with the learned Counsel for the defendant on the strength of the point of objection predicated under Order IX Rule 6(1) of the CPC, in the circumstance of the dismissal of the previous suit by the District Court for want of pecuniary jurisdiction in Civil Case No. 8 of 2023. I intimated my disinclination to proceed determining the ground of objection which in my profound view had no legal substance. However, the learned Counsel for the defendant insisted to proceed arguing the point of law as raised.

In the circumstance, I do not find his citation of Order IX Rule 6(1) of the CPC a slip of a pen. The second reason is that Order IX Rule 6(1) and section 9 of the CPC carries different legal positions. While Order IX Rule 6(1) of the CPC bars lodging of fresh suit upon dismissal of the same for nonappearance of the plaintiff, section 8 on *res judicata* bars subsequent suits if similar suit

between same parties and on same subject matter is determined by a court with competent jurisdiction.

Notably, the two provisions are distinct and apply in distinct scenarios. It would have been different if there was an error or omission in citing a numerical number of an order, rule, sub rule or paragraph of the law. Under the circumstance, I hold that the defendant's citation of Order IX Rule 6(1) of the CPC instead of Section 9 of the CPC is fatal and intentional, and does not amount to a slip of the pen. It follows that the defendant has raised a new ground of objection without first obtaining leave of the Court and without issuing notice to the Court and the plaintiff of the preliminary objection on the point of law. This is contrary to the principle that parties are bound by their own pleadings.

Emphasizing on the said principle, the Court of Appeal in the case of **Barclays Bank T Ltd. v. Jacob Muro, Civil Appeal No. 357 of 2019** (unreported) on page 11, made reference to a passage in an article by Sir. Jack I.H. Jacob titled "The Present Importance of Pleadings", first published in Current Legal Problems (1960) on page 174, where the author made the following observations;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

From the above holding, it is my firm conclusion that defendant's learned counsel was limited to submit on the point of objection he raised in the defendant's written statement of defense. That said and done, the objection

being contrary to the point of objection the subject of determination by the Court, the ground and the submissions thereof, are redundant.

I have also found from the system that the defendant uploaded his written submissions on 2nd April 2024 but paid fees for filing the submissions on 3rd April 2024, one day after the expiry of the time for filing the same. The plaintiff lodged and paid for her submissions on 8th April 2024 within time. The defendant who was ordered to file his rejoinder submissions, if any, opted not to file the same.

Rule 21(1) of the Electronic Filing Rules provides that a document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless a specific time is set by the court or it is rejected. However, it is noted in practice that a document is normally uploaded through the electronic Case Management System and admitted before payment of the prescribed fees. The requirement that a document is considered to have been filed when prescribed fee are paid as held in the case of **John Chuwa** (supra) not been changed. In **John Chuwa** (supra), the Court of Appeal held that the date of filing is the date of payment of fees and not that of receipt of relevant

document at the registry. In **Adamson Makondya & Another** (supra), the High Court held:-

"It is a cardinal principle that, as long as court fees are paid, the date of the court stamp indicating as to when it was presented for filing may conveniently be taken as the date of filing. However, that is not the case if that date is earlier than the date of payment of court fees, then the date of payment of court fees has to be taken as the date of filing. A matter may be taken to have been properly filed in court only after court fees are paid. The date of presentation of the application for filing cannot be treated as the date of filing the appeal because the court of appeal has held from time to time that, it is the date of payment of filing fees and not of lodging a document which amount to the date of filing an action"

If filing of a document is taken to be complete when the document is uploaded and admitted in the system, and not upon filing fees, the courts will determine suits without parties' paying the requisite fees for filing documents. It means that once a party uploads a document and the same is admitted and shown in the system, a party may decide to pay fees after some days even after the prescribed time of filing of the same, or decide not to pay fees at all, as the document is deemed to have been properly filed upon being admitted through the system. I do not think that was the purpose

of Rule 21 (1) of the Electronic Filing Rules. In holding as above, I am fortified by the decision in the case of **Unta Export v. Customs (1970) E.A. 648** where the court held that:-

*"I have not been able to put my hand on a decision covering this point, but I have in mind a decision, I myself gave following a decision on this very point by Ainley C.J. **I have no doubt whatsoever that, both as a matter of practice and also as a matter of law documents cannot validly be filed in the Civil registry until fees have either been paid or provided for by a general deposit from the filing Advocate from which authority has been given to deduct court fees.** It is admitted that, there was no such general deposit in this case. The mere entry in the column of a registry or note by a clerk on the back of a letter certainly cannot override the omission to pay or provide for the necessary fees at the time of the alleged filing. I rule that the plaint was filed out of time, having not been properly filed until fees paid on 16/09/1968. I No document is properly filed until the fees have been paid"* [Emphasis added]

I agree with Mr. Liwewa and the cited cases of **Msasani Peninsula Hotels Limited and 6 Others** (supra); and **Muganda Michael** (supra) that Rule 21(1) of the Electronic Filing Rules did not do away with the requirement of parties' payment of prescribed filing fees before a document is properly filed

in court. As the exchequer receipt in electronic Case Management System indicate that the fee for the defendant's written submissions were paid on 3rd April 2024, the actual date of filing the written submissions, I hold that the defendant's written submissions were lodged out of time ordered by the Court.

As to the consequence of the omission, I have borrowed a leaf of wisdom from the decision of the Court of Appeal in the case of **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal 41 of 2014 (Reported)** where on page 2 through to 3 it was instructively held:-

*"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case- see: **National Insurance Corporation of (T) Ltd & another v. Shengena Limited**, Civil Application No. 20 of 2007 and **Patson Matonya v. The Registrar Industrial Court of Tanzania & another**, Civil Application No. 90 of 2011 (both unreported)"*

From the two omission deliberated above, it is clear that the defendant failed to prosecute his preliminary objection on a point law. With that being

said, I do not find the essence of determining the merit of any of the defendant's grounds in support of the preliminary objection raised by the defendant.

However, even if I was to determine the point of law, I would have agreed with Mr. Liwewa, learned counsel for the plaintiff that the ground of objection improperly raised by the defendant was misplaced and contrary to the dictates of section 9 of the CPC. In my understanding of the law, the suit that was dismissed by the District Court for lack of pecuniary jurisdiction is not *res judicata* before this Court as the District Court was not a competent court to determine the dispute.

Further, the dispute was not determined by the District Court. There are numerous authorities to that effect, one being the decision of this Court in the case of **George Nusra Frisby Vs Keen Feeders Limited, Land Case Appeal No 54 of 2019** (unreported). In that case, the respondent's complaint was that the appellant's application filed in the District land and Housing Tribunal registered as Application No. 123 of 2017 was a *res judicata* since the same was determined in its finality for it was dismissed by the Court of Resident Magistrate for want of jurisdiction. In resolving as to whether the dismissal order grounded on the lack of jurisdiction precluded

the appellant from instituting the dispute to the competent tribunal, this Court on page 8 of the judgment observed as follows:-

"In our instant matter, it goes without saying that, the matter was decided only on the issue of jurisdiction, the decision which did not certainly determine the merit of the case because the RM's court, on the face of the parties' pleadings, clearly lacked jurisdiction. Thus, the doctrine of "res-judicata" as predicted under section 9 of CPC, in my decided opinion, would not apply since the RM's court was not a competent court nor did it finally determine the suit before it except that it received the parties' testimonies."

In view of the above observations, the defendant's preliminary objection as to the incompetency of the present suit is dismissed with costs. The hearing of the suit shall proceed on merit.

It is so ordered.

DATED at MOROGORO this 24th day of April 2024.


H. A. KINYAKA

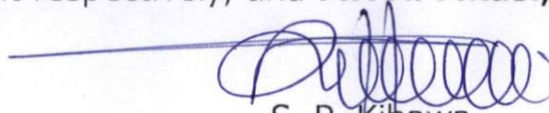
JUDGE

24/04/2024



Court:

Ruling composed by the trial Judge is hereby delivered in the Virtual presence of **Mr. J. Liwewa** and **J. Manyama, Advocate** for the plaintiff and Respondent respectively, and **Mr. A. Mkasi, Court Clerk**.


S. P. Kihawa

Deputy Registrar

24/04/2024

