

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO.137 OF 2023

SAID HAMAD LUGUMI..... PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA.....1ST DEFENDANT

DANIEL ALPHONCE MSHANA.....2ND DEFENDANT

GLOBAL WEB LIMITED.....3RD DEFENDANT

Date of Last order 28/08/2023

Date of the Ruling 07/09/2023

RULING

A. MSAFIRI, J.

The plaintiff herein SAID HAMAD LUGUMI instituted the suit against the defendants namely therein above. The dispute is over the ownership of Plot No. 703, Block 'F' with CT No. 55461 Msasani Village, Kinondoni Municipality, Dar es Salaam (herein referred as suit property).

The defendants filed their written statements of defence. Along with it the 1st defendant raised preliminary objections on points of law to the effect that:-

a) The suit is constructively res judicata because an earlier suit which was preferred by Gabriel Machumu Munasa on behalf of the plaintiff and against the 1st and 2nd defendants herein (Civil Case No.170 of 2015) was

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dismissed for want of prosecution by this same Court (Hon.De Mello,J as she then was) on 6th April, 2021.

b) To the extent that the plaintiff's suit is based on the alleged breach of the implied agreement entered with the 1st defendant the breach of which occurred in 2015 then the suit is hopelessly time barred.

c) The suit is barred in law by the provision of Order IX Rule 6 (1) of the Civil Procedure Code [Cap 33 RE 2019].

On 07/08/2023, this Court ordered the preliminary objection to be disposed of by way of written submissions. The order was complied with by parties whereby the submissions in chief and rejoinder to support the raised preliminary objections were drawn and filed by Mr. Gaspar Nyika and Ms Samah Salah learned counsels and reply submission was filed by Mr. Nehemiah Geofrey Nkoko learned counsel.

In determining the preliminary objection, I shall start with the determination of the first point of objection which states that the suit is constructively *res judicata*.


In support of this point of objection, Mr Nyika and Ms Salah submitted that the suit is bad in law for being *res judicata*. That, the current plaintiff had earlier preferred another suit which is Civil Case No. 170 of 2015. That the said former suit was instituted by one Gabriel Munasa on behalf of the plaintiff and it was against the current 1st and 2nd

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defendants. That the suit was decided by High Court of Tanzania, Dar es Salaam District Registry before Hon. De Mello, J (as she then was) by which it was dismissed for want of prosecution on 6th April 2021.

To support their submission, they cited Section 9 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) which establish the principle of *res judicata* which bars courts from trying any suit or issue in which the matter directly and substantially in issue in current suit had been directly and substantially in issue in a former suit.

In support of their points, the counsels cited the case of **Gerald Chuchuba vs. Rector, Itaga Seminary** [2002] TLR 213 and **Karshe vs. Uganda Transport Company** [1967] E.A 774 which analysed the essential elements of the principle of *res judicata*. They contended that the subject matter in this present suit is the same as it was in the former suit Civil Case No. 170 of 2015. They prayed that this suit be dismissed with costs.

In reply thereto, Mr. Nehemiah Nkoko contended that, the suit is not *res judicata* as the present case is different from Civil Case No. 170 of 2015. That in the two suits, plaintiff is the same whereas the defendants are different. In the former suit the defendants were two namely Commercial Bank of Africa and Abdiel Alphonse Mshana while in the present suit the defendants are three namely Commercial Bank of Africa, 

Abdiel Alphonse Mshana and Global Web Ltd. He argued that this means the parties are different although the claims are almost the same and the Order issued by the High Court in the former was not final and the case was not finally determined. Lastly, he prayed for the Court to overrule the preliminary objection.

In rejoinder, the counsels for the defendants reiterated what was submitted earlier on. They added that the suit is barred by the principle of *res judicata* against the 1st and 2nd defendants. They argued that if the plaintiff wanted to sue the 3rd defendant, he could not join the 1st and 2nd defendants. He prayed the Court to uphold the preliminary objection.

Having heard the submissions of both parties, the issue for determination and consideration is whether this suit is *res judicata*? The doctrine of *res judicata* is embedded in Section 9 of the CPC 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 the 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"

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From the foregoing, the following elements have to be satisfied which are; -

- i. That the judicial decision was pronounced by a court of competent jurisdiction,*
- ii. That the subject matter and the issues decided are the same or substantially the same as the issues in the subsequent suit,*
- iii. That the judicial decision was final;*
- iv. That it was in respect of the same parties or parties litigating under the same title.*

Upon examining the aforesaid principle in line with paragraphs 21,22,23,24, and 25 of the Plaint together with annexures SL-12 to the same, it is clear that Land Case No. 170 of 2015 is similar to this present suit. The same was dismissed for want of prosecution before Hon. De Mello, J on 6th April 2021 and now the plaintiff have filed this Court which is subsequent to the former case.

Mr Nkoko have argued in the submission that the suit was not dismissed for want of prosecution nor were the parties heard and determined on merits, but it was dismissed after the plaintiff was condemned for not filing an amended plaint.

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However, it is my finding that, failure to file an amended plaint is as good as failure to prosecute ones' case as it is the plaint which makes a suit. Furthermore, the order of this Court in Case No. 170 of 2015 was final and the remedy for the plaintiff was not to institute a fresh suit but to seek to set aside the dismissal order.

This was also observed in the case of **East African Development Bank vs Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 in which the Court held that:-

*"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. **The Appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court.**"(emphasis added)*

Also the subject matter in the suit property Plot No. 703, Block 'F' with CT No. 55461 Msasani Village, Kinondoni Municipality, Dar es Salaam is similar to that in Land Case No. 170 of 2015 as evidenced at paragraphs 5 and 7 of the Plaint and this was not disputed by the counsel for the plaintiff.

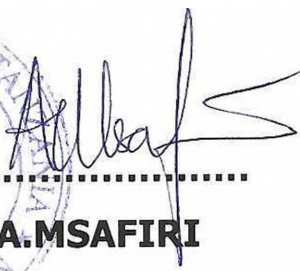
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Finally, the parties are the same both in this suit and in relation to Land Case No. 170 of 2015 who again are litigating under the same title but in the present suit the plaintiff added the 3rd defendant. In that regard I am at one with the arguments by the counsels for the 1st defendants that, this matter is purely *res judicata*. Therefore, the facts pleaded in the plaint suffice to constitute a point of *res judicata* on the face of record to warrant disposal of the matter at hand as was stated in **Lyamuya Construction Company Ltd vs Board of registered Trustees of Young Women's Christians Association of Tanzania**, Civil Appeal No. 2 of 2010(Unreported).

That said and done, I hold that this suit is *res judicata* and this Court is *functus officio* to determine it. Therefore, since this preliminary objection suffices to dispose the suit, to discuss the other points of preliminary objections will be doing an academic exercise.

I sustain the preliminary objection that the present suit is *res judicata* to Land Case No. 170 of 2015. Consequently, it is hereby dismissed with costs.

It is so ordered.


A.MSAFIRI
JUDGE

07/9/2023