IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND APPEAL CASE NO. 11 OF 2020

(Appeal from the decision of the District Land and Housing Tribunal of Mtwara at Mtwara in Land Application No. 86 of 2019)

SAIDI JUMA BAKARI.....1st APPELLANT

MOHAMED SELEMANI KATINDI.....2ND APPELLANT

VERSUS

TPB BANK PLC.....1ST RESPONDENT

TULVIN INVESTMENT CO. LTD.....2ND RESPONDENT

KAIFA SIJALI MUSSA.....3RD RESPOONDENT

JUDGMENT

9 Feb. & 11 March, 2021

DYANSOBERA, J.:

This is an appeal against the decision of the District Land and Housing Tribunal for Mtwara at Mtwara delivered on 25th June, 2020. The brief

background of the matter is as follows. The 1st appellant is the owner of the suit land situated at Mmingano Area - Magomeni, registered as Plot No. 395 Block G, Mtwara Municipality estimated to be valued at Tshs. 25,000,000/=. On 4th March, 2014, the said suit property was mortgaged to the 1st respondent on a loan of Tshs. 5, 000,000/= secured by the 2nd appellant. It seems, the 2nd appellant failed to honour the loan agreement and the 1st respondent exercised her mortgage right by publicly auctioning the suit land and selling it to the 3rd respondent. Mwajuma Bakari, the wife of the 1st appellant, unsuccessfully sought to object the auctioning of the suit land in Land Application No. 17 of 2015. That suit was dismissed with costs on 23rd September, 2016. It is not clear if there was any attempt to refer the dismissal of the said suit to higher authority but the record shows that on 16th December, 2019, the appellants filed before the same Tribunal Land Application No. 86 of 2019, the subject of this appeal, disputing the auction of the suit land. The 1st respondent and Harvest Tanzania Ltd, then 2nd respondent, raised a preliminary objection against the application on the ground that it was *res judicata* in that there was already a judgment and decree rendered by the same Tribunal on 23rd September, 2016 in Land Application No.17 of 2015 in respect of the same suit land. On 25th day of June, 2020, the Tribunal sustained the preliminary objection and dismissed the impugned suit with costs. In sustaining the preliminary objection, the learned Tribunal Chairman, H.I. Lukeha, inter alia observed at p. 4 of the typed ruling thus:

> 'Since, the decision was entered regarding the same subject matter (the suit premises) in land application No. 17 of 2015 thus, applicants were barred from filing the current application to litigate over the very same subject matter (Plot No. 395 Block G at Magomeni area in Mtwara Municipality) whose decision had been

rendered and no appeal was filed against the said decision in the High Court of Tanzania'.

The appellants herein were aggrieved by the said decision hence this appeal. According to the petition of appeal filed on 15th July, 2020, two grounds have been raised, namely:-

1. That the trial Chairman erred in law and in fact by mis-application for a principal (sic) of res judicata while the application No. 17 of 2015 and Application No. 86 of 2019 are two different causes of action and parties

2. By sustained the preliminary objection on point of law and dismissed Application No. 86 of 2019 the Honourable Tribunal denied the applicants rights to prosecute his case.

This appeal was vehemently resisted by the respondents. At the hearing, Mr. Epathro Mwego, learned counsel advocated for the 1st and 2nd respondents whereas the two appellants and the 3rd respondent 'paddled their own canoes'. The appeal was, upon the consent of the parties, disposed of by way of written submissions.

Supporting the appeal, the appellants, in arguing the first ground of appeal, submitted that there was mis-application on part of the Chairman of the principle of *res judicata*;a ground which was based on the blatant disregard of the clear provisions of section 9 of the Civil Procedure Code [Cap. 33 R.E.2019]. Although the appellants admitted that both suits arose out of a loan agreement entered into between the parties and the applicant in the former suit based her claim that she had not consented to the loan advanced to the 4th respondent, they, however, argued that the matter in issue was not the same. The appellants

explained that in Land Application No. 17 of 2015 the issue was whether the applicant did not consent the disputed house to be made a security in the loan facility advanced to the 4th respondent guaranteed by the 3rd respondent, in Land Application No. 86 of 2019 the 2nd applicant established that he continued the payment of the outstanding balance to the tune of four million shilling.

The appellants further argued that in both suits, parties were different. With respect to the subject matter, the appellants contended that it could not have well been ascertained without looking into evidence of the cases involved to see whether the conditions under section 9 of the Code were satisfied. According to the appellants, this could not be resolved at the stage of preliminary objection. The appellants buttressed their arguments by citing the cases of **The Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Limited**, Civil Appeal No. 105 of 2011 and **Mukisa Buiscuits Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) EA, 696 on the authority that an objection whose disposal requires proving or disproving of facts or evidence ceased to be a preliminary point of law. The other case relied on was **Karata Ernest and Others v. Attorney General,** Civil Revision No. 10 of 2010 where it was held that where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection.

In the second ground of appeal , the appellants argued that by entertaining the preliminary objection, the Tribunal denied them the opportunity of prosecuting their case in that they were not given a chance of calling witnesses, produce documents and cross examine the witnesses.

Responding to the appellants' submission, the respondents maintained that the pleadings in both applications show that the subject matter was one and the same. Further that both the pleadings and submissions indicated that the appellants admit the existence of the Application No. 17 of 2015 involving the appellants and the 1st respondent as the respondents on one hand and the spouse of the 1st appellant on the other. It was further submitted on part of the respondents that both suits aimed at challenging sale of the suit property on the ground that it was wrongful or unlawful.

As to the absence of evidence, the respondents replied that the facts and circumstances did not require to resort to evidence as everything was patent and nothing was disputed. The respondents explained that the subject matter in both suits was Plot No. 395 block G at Magomeni area within Mtwara Municipality and that since the facts were not disputed, they should be taken to have admitted and therefore, requiring to further evidence to resolve the preliminary objection. The case of **Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Limited** was, in the circumstances, distinguishable, the respondents contended.

Insisting on the subject matter being the same, the respondents stressed that the doctrine of *res judicata* was rightly applied and that the only remedy availed to the appellants to challenge the decision in the former suit was to appeal and not file a fresh suit as they did. Reliance was placed on the cases of **Jesca Deus v. Fatma Maghimbi and Another**, Land Case No. 197 of 2014 and **Umoja Garage v. NBC Holdings Corporation** [2003] TLR 339.

With respect to the case of **Karata Ernest**, the respondents argued that the case was cited in a wrong and misleading way. The appellants invited this court to dismiss the appeal with costs.

In their rejoinder, the appellants re-iterated almost what they had submitted in chief concluding that the subsequent suit had to be heard instead of ending at a preliminary stage on a point of law.

I have considered the competing arguments of the parties with deserving concern. As far as the first ground of appeal is concerned, the issue is whether the suit before the District Land and Housing Tribunal was *res judicata*.

Res judicata, expressed in a Latin maxim *'Ex captio res judicata'* translates to mean 'one suit and one decision is enough for any single dispute' is based on the need of giving finality to judicial decision. In **Black's Law Dictionary** (Ninth) Edition *res judicata* is defined as follows:

"An affirmative defence barring the same parties from litigating a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and that could have been raised but was not raised in the first suit."

As rightly pointed out by the learned Chairman, section 9 of the Civil Procedure Code [Cap. 33 R.E.2002] is undoubtedly applicable in the situation before the Tribunal where the issue of res judicata resurfaces. It is provided under that section 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 title in a court of competent jurisdiction to try such subsequent*

suit or the suit in which such issue has been subsequently raised and suit has been heard and finally decided by such court."

According to the law, there are five essential requirements that have to be proved in order to establish the doctrine of re-judicata. These requirements are summarized in **Mulla The Code of Civil Procedure 16th Edition Vol. 1** at page 173 as follows:-

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue (actually or constructively) in the former suit
2. The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
3. The parties aforesaid must have litigated under the same title in the former suit.
4. The court which decided the former suit must have been a court competent to try it
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

These principles were reiterated by this court in the case of **Unyangala Enterprises Ltd versus Tanzania Breweries Ltd and National Bank of Commerce (1997) Ltd**: Civil Case No. 306 of 2000 and confirmed by the Court of Appeal in Civil Appeal No. 91 of 2014 between **Ester Ignas Luambano versus Adriano Gedam Kipalile**. In that case, the Court of Appeal was interpreting the provisions of section 6 (1) of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar which is in pari materia with section 9 of the Civil Procedure Code [Cap.33 R.E. 2002]. Likewise, the Court of Appeal the case of **Kamunye and others v The Pioneer General Assurance Society Limited**

(1971) EA 263 enunciated the principle of res judicata where it stated thus:- *"The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon.* If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time – ***Greenhalgh Mallard,*** *(1947) 2 ALL ER 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply-* ***Jadva Karsan Harnam Singh Bhogal*** *(1953), 20 EACA 74."*

The issue for determination is whether the tests stipulated above were met before the lower Tribunal to qualify the application of the doctrine of *res judicata.*

As far as the first condition is concerned, that is *the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit,* the matter must be directly related to the suit in that it must not be collateral or incidental to the issue. In the present case, the record is clear that the matter directly and substantially in issue in the subsequent suit was illegal sale of the suit property while the matter directly and substantially in issue in the former suit was illegal mortgage in which the then applicant Mwajuma Bakari was asserting to have not consented to the mortgage of the suit property. So, the matters in issue in both suits were not directly and substantially the same.

The second condition is that *the former suit must have been a suit between the same parties or between parties under whom they or any of them claim.* As far as the present matter is concerned, the record is clear that the former suit was not a suit between the parties or between parties under whom they or any of them claimed. The parties to the suits were not those whose names appeared on the records of the suits at the time of the decision. In the former suit, the parties were: Mwajuma Bakari being the Applicant against TPB, Harvest Tanzania Ltd, Said Juma Bakari and Mohamed S. Katindi, being, respectively, the 1st, 2nd, 3rd and 4th respondents whereas in the subsequent suit, parties were: Said Juma Bakari and Mohamed Selemani Katindi as the 1st and 2nd applicants, in that order, against TPB Bank PLC, Tulvin Investment Co. Ltd and Kaifa Sijali Mussa being the 1st, 2nd and 3rd respondents, respectively.

Regarding the condition that *the parties aforesaid must have litigated under the same title in the former suit,* there is no doubt that in the present matter, the applicant in the former suit was not litigating the same title and in the same capacity as were the two applicants in the subsequent suit. While in the first suit the applicant Mwajuma Bakari was litigating as the spouse of the 3rd respondent, in the subsequent suit, the 1st applicant Saidi Juma Bakari was litigating as the guarantor of the loan while the 2nd applicant Mohamed Selemani Katindi litigated as the borrower of the loan.

With respect to the condition that the *matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit,* it is on record that that the matter directly and substantially in issue in the subsequent suit which is the legality or otherwise of the sale transaction was not heard and finally determined in the first suit as the first suit was in respect of illegality or otherwise of the mortgage of the suit house.

Having discussed the conditions for the application of the doctrine of res judicata as provided for by the law and situation that presented itself in the matter on hand, I am satisfied that a mere decision on the same subject matter and in the absence of an appeal against it could not render the subsequent suit res judicata. The Honourable Chairman of the trial Tribunal was duty bound to satisfy himself, before sustaining the respondents' preliminary objection, that the conditions stipulated under section 9 of the Civil Procedure Code [Cap.33 R.E.2019] were met. His failure to abide by the dictates of the law rendered the decision illegal. Since this first ground of appeal sufficiently disposes of the whole appeal, I see no ground of discussing the second ground of appeal.

For those reasons, I allow the appeal.

Consequently, I quash the decision of the Tribunal entered on 25th June, 2020 in Land Application No. 86 of 2019 and order the matter to be heard on merits.

Costs shall be in the main cause.

W.P. Dyansobera

Judge

11.3.2021

This judgment is delivered under my hand and the seal of this Court on this 11th day of March, 2021 in the presence of both appellants as well as the 3rd respondent and in the presence of Mr. Mwanja Kiranya, representing the 1st and 2nd respondents.

W.P. Dyansobera

Judge