IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., MWAMPASHI, J.A. And FELESHI, J.A.)

CIVIL APPEAL NO. 43 OF 2022

FUTURE CENTURY LTD ..... APPELLANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY

OF HOME AFFAIRS..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

TANZANIA ELECTRIC SUPPLY COMPANY LTD..... 4TH RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar Es Salaam)

(Mgonya, J.)

dated the 28th day of May, 2021

in

Civil Case No. 5 of 2018

JUDGMENT OF THE COURT

14th & 21st February, 2025

MWAMPASHI, J.A.:

This appeal is against the decision of the High Court of Tanzania at Dar es Salaam (the High Court) dated 28.05.2021, in which the appellant's suit against the respondent, that is, Civil Case No. 5 of 2018, was dismissed with costs on the ground that it was *res judicata*.

In Civil Case No. 5 of 2018, before the High Court, the appellant sued the respondents claiming against them jointly and severally for payment of Tshs. 596,070,982.00 being the value of electrical equipment, materials and tools allegedly unlawfully seized from the appellant by the 1st respondent. It was the appellant's case that, in July, 2006, the 1st respondent seized and detained the appellant's electrical equipment, materials and tools from the appellant's yard at Mikocheni on account that the same had been illegally obtained from the 4th respondent. The said seized goods were handed over by the 1st respondent to the 4th respondent for safekeeping. In connection to that case, one of the appellant's directors was arrested and investigations on the case by the 1st respondent ensued.

In the course of the police investigations, the appellant filed High Court Commercial Case No. 72 of 2006 against the 4th respondent seeking for a declaration that it was the lawful owner of the seized goods in question and also for an order that the same be released and handed over back to it. The suit was, however, dismissed with costs on 21.08.2007 on the ground that the appellant had failed to prove its case. The High Court held that the appellant could not be declared the owner of the seized goods in question while the police investigations to establish the ownership of the same was underway. On appeal to this Court in Civil

Appeal No. 102 of 2008 filed by the appellant, the High Court decision was upheld.

In 2011, after about five years from the date the said goods in question were seized and upon the completion of the investigations by the 1st respondent, it was found that the evidence to prove that the seized goods in question were illegally obtained by the appellant was wanting. In that regard, the 4th respondent was directed by the 1st respondent to handover the said seized goods back to the appellant. However, at the handover exercise, in January 2012, it was found that most of the seized goods allegedly valued at Tshs. 596,070,982.00, were missing. This prompted the appellant to institute High Court Civil Case No. 187 of 2012 against the respondents praying for an order for restoration of the missing goods or in the alternative, for payment of Tshs. 596,070,982.00 being the value of the missing goods in question. However, the High Court dismissed the suit on 14.11.2016 after sustaining a preliminary objection raised by the respondents on the point that the suit was untenable and bad in law for want of notice of intention to sue the Government.

It was after the dismissal of the High Court Civil Case No. 187 of 2012 when the appellant went back to the High Court by instituting Civil Case No. 5 of 2018, the subject of the instant appeal. Again, the suit was greeted by a preliminary objection from the respondents on a point that

it was *res judicata* to High Court Commercial Case No. 72 of 2006 and Civil Case No. 187 of 2012. In its ruling dated 28.05.2021, the High Court sustained the objection. It was found by the High Court that the matter in issue in Civil Case No. 5 of 2018 had been heard and finally decided in High Court Commercial Case No. 72 of 2006 and Civil Case No. 187 of 2012. The appellant's suit, that is, Civil Case No. 5 of 2018, was thus, dismissed with costs for being *res judicata*, hence the instant appeal.

According to the memorandum of appeal, two grounds have been raised in support of the appeal. However, having examined the record of appeal particularly the High Court impugned decision, we are of the considered view that, essentially, the two raised grounds of appeal boil to one complaint which is to the effect that the High Court erred in law and fact in holding that Civil Case No. 5 of 2018 was *res judicata* to High Court Commercial Case No. 72 of 2006 and Civil Case No. 187 of 2012.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Daniel Haule Ngudungi, learned advocate, whereas, the respondents had the services of Ms. Hosana Mgeni and Mr. Mkumbo Elias Mkoma, both learned Senior State Attorneys who were assisted by Mr. Nixon Tenges, learned State Attorney. It is noteworthy that, in compliance with rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the counsel for the parties had earlier on

filed their written submissions for and against the appeal, which they sought to be taken by the Court to form part of their respective oral submissions.

It was submitted by Mr. Ngudungi that the High Court erred in holding that Civil Case No. 5 of 2018 is *res judicata* because the doctrine was, under the circumstances of the case, not applicable. He argued that Civil Case No. 5 of 2018 and Commercial Case No 72 of 2006 evolved from different causes of action. It was submitted that, while in Commercial Case No. 72 of 2006 the appellant sought for a declaration that the appellant is the lawful owner of the seized goods which were allegedly in the 4th respondent's unlawful possession, in Civil Case No. 5 of 2018, the claim was for payment of Tshs. 596,070,982.00 being the value of the alleged missing goods. Citing the case of **Peniel Lotta v. Gabriel Tamaki and Others** [2003] T.L.R. 312, in which the Court discussed the applicability of the doctrine of *res judicata* as provided under section 9 of the Civil Procedure Code, CAP. 33 R.E. 2019 (the CPC), Mr. Ngudungi argued that the doctrine of *res judicata* was wrongly invoked by the High Court because the matters in issue in the two cases were not directly and substantially the same. He also referred us to the decision of the Court in **The Registered Trustees of Chama Cha Mapinduzi v. Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No. 16 of 2008

(unreported), where it was held that the fact that the property involved is one and the same does not necessarily render the causes of action identical or convert the matters directly and substantially in issue in the two suits to be the same. Mr. Ngudungi insisted that for the doctrine of *res judicata* to apply the relevant five pre-conditions must be cumulatively established.

Regarding Commercial Case No 72 of 2006 and Civil Case No. 187 of 2012, it was argued by Mr. Ngudungi that, in both cases the respective matters in issue were not heard and finally decided by the High Court. He pointed out that, in Commercial Case No. 72 of 2006, the High Court refrained from determining the matter in issue, that is, the ownership of the seized goods in question, because the issue was still under police investigation, the position which was upheld by the Court in Civil Appeal No. 102 of 2008. Similarly, in Civil Case No. 187 of 2012, the claim for Tshs. 596,070,982.00 being the value of the missing goods, was not determined in its merit because the suit was found to be incompetent for want of prior notice of intention to sue the Government. It was further contended by Mr. Ngudungi that, as the suit was incompetent the order for the dismissal of the same cannot operate as *res judicata.* He argued that, in the first place, the High Court ought to have struck out the suit rather than dismissing it. To support this position, Mr. Ngudungi relied on

the decisions in **Marketing Union Ltd v. Almohamed Osman** [1959] EA. 577 and **Simon Josephat v. Dar es Salaam Water and Sewerage Corporation** (Civil Appeal No. 441 of 2021) [2024] TZCA 1095 (13 November 2024; TanzLII).

Based on the above submissions, Mr. Ngudungi urged us to allow the appeal with costs and make an order for the suit be heard on merit by the High Court.

In response, it was submitted by Ms. Mgeni that, the High Court rightly held that Civil Case No. 5 of 2018 was *res judicata*. She argued that Commercial Case No 72 of 2006 which was for a declaration that the appellant is the lawful owner of the seized goods in question, was heard and decided on merit. She further contended that the suit was dismissed with costs because the appellant failed to prove its claim that it was the lawful owner of the seized goods in question, the decision which was upheld by this Court. It was also argued that, after the completion of the police investigation, instead of filing Civil Case No. 5 of 2018, the appellant ought to have applied for review of the High Court decision in Commercial Case No. 72 of 2006.

Regarding Civil Case No. 187 of 2012, it was submitted for the respondents that, as the suit was dismissed with costs and no appeal was preferred then, Civil Case No. 5 of 2018, which was for payment of Tshs.

596,070,982.00 being the value of the alleged missing seized goods just as it was in Civil Case No. 187 of 2012, was *res judicata*. It was further contended that the appellant cannot be heard complaining, at this stage, that the High Court erred in dismissing the suit instead of striking it out while no appeal was preferred against the said dismissal. To buttress the above argument, the Court was referred to its earlier decision in **Zanzibar Telecom Co. Ltd v. Haidary Y. Rashid t/a Narasisa Enterprises**, Civil Appeal No. 2 of 2009 (unreported), where it was stated that, when a matter, whether on a question of fact or a position of law has been decided between two parties in one suit or proceedings, and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceedings between the same parties to canvass the matter again.

Ms. Mgeni concluded by contending that all the pre-conditions for the application of the doctrine of *res judicata* were established and further that the High Court did not err in dismissing Civil Case No. 5 of 2018 with costs for being *res judicata*. She thus prayed for the dismissal of the appeal with costs.

In his brief rejoinder, Mr. Ngudungi insisted that, in Commercial Case No. 72 of 2006 the High Court did not determine the issue of

ownership of the seized goods in question for the reason that the matter was still under police investigations, the reasoning which was upheld by the Court on appeal. He also reiterated his earlier position that causes of action in High Court Commercial Case No. 72 of 2006 and Civil Case No 5 of 2018 were quite different and further that in Civil Case No. 187 of 2012 which was found to be incompetent, the matter in issue was not decided on merit. He thus urged us to allow the appeal with costs because the High Court erred in holding that Civil Case No 5 of 2018 is *res judicata* to Commercial Case No. 72 of 2006 and Civil Case No 187 of 2012.

From the above submissions for and against the appeal, the issue for our determination is simply whether Civil Case No 5 of 2018 was *res judicata* to High Court Commercial Case No. 72 of 2006 and Civil Case No 187 of 2012. However, before tackling the above posed issue, we should firstly restate that, the doctrine of *res judicata* is part of our law. It is provided under section 9 of the CPC 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 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."

The doctrine of *res judicata*, as provided under section 9 of the CPC, contains the rule of completeness of litigations. Its objective is that there should be finality of litigations and that a person should not be vexed twice for the same cause. The doctrine ousts the jurisdiction of the court where a matter in issue has been heard and finally decided by a competent court in a former suit between same parties. In the case of **Peniel Lotta** (supra) the Court stated that:

"The doctrine of res judicata is provided for in section 9 of the Civil Procedure Code, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigations. It makes 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."

It is also a trite principle of law that the applicability of the doctrine of *res judicata* is dependent upon the cumulative establishment of five pre-conditions; **One**, that the matter in issue in the subsequent suit was directly and substantially in issue in the former suit, **two**, the parties in the former and subsequent suit must be the same or the suits must be between the parties' privies claiming under them, **three**, the parties must have litigated under the same title in the former suit, **four**, the court

which decided the former suit must have been competent to try the subsequent suit and **five**, the matter in issue must have been heard and finally decided in the former suit.

In the instant appeal, the rivalry between the parties is not on the 2nd, 3rd or 4th conditions as stated above but on the 1st and 5th conditions. While it is the appellant's position that the matters in issue or causes of action in Civil Case No. 5 of 2018 and Commercial Case No. 72 of 2006 were not the same, it is the respondents' stance that the matters in issue were the same. Further, whereas the appellant argues that the matters in issue in Commercial Case No. 72 of 2006 as well as in Civil Case No. 187 of 2012 were not heard and finally decided, the respondents stand firm that the matters in issue were heard and finally decided. Based on the above, the issue for our determination on whether Civil Case No. 5 of 2018 was *res judicata*, is thus, narrowed down to two minor issues on whether the matters in issue in Commercial Case No 72 of 2006 and Civil Case No. 5 of 2018 were the same and on whether the matters in issue in Commercial Case No. 72 of 2006 and Civil Case No. 187 of 2012 were heard and finally decided.

Beginning with the issue whether the matters in issue in Commercial Case No 72 of 2006 and Civil Case No. 5 of 2018 were the same, it is our observation that, as rightly argued by Mr. Ngudungi, the matters in issue

were not the same. According to the record, the appellant's claim in Civil Case No. 72 of 2006 was essentially for a declaration that the appellant was the lawful owner of the seized goods in question and also for an order that the same be released and handed over back to it. At page 109 of the record of appeal, the High Court framed and recorded 6 issues. The first two issues were; whether the appellant was the lawful owner of the seized goods in question and whether the 4th Respondent was in unlawful possession of the disputed electrical materials/tools. That being the case, in Civil Case No. 72 of 2006, the vital matter in issue was on whether the appellant was the lawful owner of the seized goods in question. To the contrary, in Civil Case No. 5 of 2018, according to paragraph 5 of the plaint, found at page 15 of the record of appeal, the appellant's claim was for Tshs. 596,070.982.00 being the value of alleged missing seized goods. In Civil Case No. 5 of 2018 the matter in issue was thus, no longer on the ownership of the seized goods but on the claim for Tshs. 596,070,982.00. It became so because after the dismissal of Commercial Case No. 72 of 2006 on 21.08.2007, the 1st respondent, by a letter dated 18.01.2012, annexed to the plaint and appearing at page 31 of the record of appeal, undoubtedly after completion of the investigations revealing that there was no evidence to prove that the seized goods from the appellant had

been illegally obtained by the appellant, invited the appellant to be handed back the materials and tools in question.

Logically and by implication, the 1st respondent's act of deciding to handover the seized goods back to the appellant had no other meaning than that the appellant's ownership of the same was no longer questionable. The said act by the 1st respondent and particularly the fact that some of the said seized goods were allegedly found missing, created a new cause of action to the appellant hence the institution of Civil Case No. 5 of 2018. It is thus, our finding that the matters in issue in Commercial Case No. 72 of 2006 and Civil Case No. 5 of 2018 were quite different. Further, as the appellant's claims in Civil Case No 5 of 2018 were based on a new cause of action, the doctrine of *res judicata* could not be applicable.

Turning to the last issue on whether the matters in issue in Commercial Case No. 72 of 2006 and Civil Case No. 187 of 2012 were heard and finally decided, we again, agree with Mr. Ngudungi that, neither in Commercial Case No. 72 of 2006 nor in Civil Case No. 187 of 2012, did the High Court hear and finally decide on matters in issue involved therein. As we have alluded to above, the matter in issue in Commercial Case No. 72 of 2006 was on the ownership of the seized goods in question. This issue was not finally decided by the High Court. The High Court refrained

from determining the issue. In its judgment, at page 126 of the record of appeal, the High Court concluded on the issue by stating that,

> *"Based on [the] evidence on record the issue of materials was still under investigation by the police, Exhibits D7 & D9. The court is not in a position to conclude that the materials used belonged to the Plaintiff."*

Again, at page 127 of the record of appeal, the High Court restated that:

> *"From the evidence adduced in court it has not been clearly established as to what materials and tools belonged to the Plaintiff or the Defendant. The matter is still a subject of an investigation (Exhibits D7 and D9)."*

From the above, it is clear that the High Court found itself not in position to decide on the ownership of the seized goods in question, because the issue was still under police investigations. In other words, what the High Court found was that the appellant had pre-maturely claimed to be declared the legal owner of the seized goods in question. It should also be borne in mind that, on appeal by the appellant, in Civil Appeal No. 102 of 2008, the position taken by the High Court to refrain from making a decision on the issue of ownership of the seized goods in question, was upheld by this Court which, at page 12 of its judgment,

stated that there was no justification for interfering with the holding that the issue of ownership of the seized goods in question, was still under investigation by the police. It is thus, our firm finding that the matter in issue in Commercial Case No. 72 of 2006 was not finally decided by the High Court and the doctrine of *res judicata* could not apply to Civil Case No. 5 of 2018.

Regarding the issue as to whether the matter in issue in Civil Case No. 187 of 2012 was heard and finally decided by the High Court, it is our firm view that, just as it was in Civil Case No. 5 of 2018, the matter in issue in Civil Case No. 187 of 2012 was for payment of Tshs. 596,070,982.00 being the value of the alleged missing seized goods. It is however, not disputable that the High Court, in that case, did not hear the parties and finally decide on the said matter in issue because Civil Case No. 187 of 2012, was 'dismissed' for being incompetent. It was found that the suit was filed without the mandatory notice to sue the Government in contravention of the Government Proceedings Act. Civil Case No. 187 of 2012 was 'dismissed' on technical grounds, the matter in issue was not adjudicated and it cannot be said that the suit was decided on merit. In order for the matter to be said to have been heard and finally decided, the decision must have been determined on merits. The doctrine of *res judicata* is inapplicable where there was no decision on merits in

the former suit. See- **Charles Thys v. Hermanus P. Steyn** (Civil Appeal No. 45 of 2007) [2016] TZCA 760 (1 March 2016;TanzLII) and ***Sarkar Code of Civil Procedure***, 9th Ed. 2000 by Sudipto Sarkar and V.R. Manohar, at page 79. Since the matter in issue in Civil Case No. 187 of 2012 was not heard and finally decided, Civil Case No. 5 of 2018 could not be *res judicata* as erroneously found by the High Court.

Finally, we note, as also pointed out by Mr. Ngudungi, that, the High Court, having found that Civil Case No. 187 of 2012, was incompetent, it dismissed the suit instead of striking it out. As the suit was not heard and decided on merit but was found to be not maintainable and incompetent, the High Court ought to have struck it out rather than dismissing it. Under these circumstances where the phrase 'dismissal' was erroneously used, we ignore the phrase and look at the substance of the matter and take to it that the suit was actually struck out and not dismissed. See- **Ngoni-Matengo Cooperative Marketing Union Ltd v. Alimohamed Osman** [1959] EA. 577 and **Simon Josephat** (supra). In that regard, we find the case of **Zanzibar Telecom Co. Ltd** (supra) cited by the respondents, is in that respect, not relevant.

In the event and for the above given reasons we conclude that the High Court erred in holding that Civil Case No. 5 of 2018 was *res judicata* to High Court Commercial Case No. 72 of 2006 and Civil Case No. 187 of

2012. The appeal is thus, allowed. Going forward, we direct that Civil Case No. 5 of 2018 be heard and determined on merit by the High Court. The appellant will have its costs.

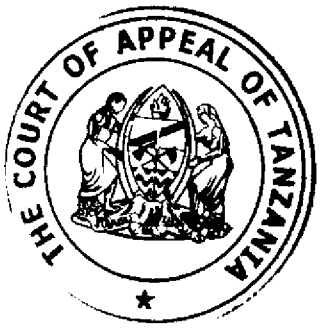
DATED at **DAR ES SALAAM** this 20th day of February, 2025

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

E. M. FELESHI
JUSTICE OF APPEAL

Judgment delivered this 21st day of February, 2025 in the presence of Ms. Bernadetha Fabian, learned counsel for the Appellant and Mr. Mkumbo Elias, learned Senior State Attorney for the Respondents, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL