IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUBUBA, J.A.)

CIVIL APPEAL NO. 3 OF 2001

BETWEEN

UMOJA GARAGE .....APPELLANT

AND

N.B.C. HOLDING CORPORATION.....RESPONDENT

(Appeal from the Ruling of the
High Court of Tanzania at
Dar es Salaam)

(Mackanja, J.)

dated 12th November, 1999

in

Civil Case No. 63 of 1999

JUDGMENT OF THE COURT

LUBUVA, J.A:

The appeal arises from the decision of the High Court (Mackanja,J) of 12.11.1999 in Civil Case No. 63 of 1999. The history of the matter is that on 6.11.1984, the appellant and the respondent signed a loan agreement in order to enable the appellant to cover part of the construction costs for his factory building. According to the agreement, the appellant was to obtain a term loan of an aggregate amount of shillings 1,900,000/- payable in 20 instalments. The first instalment was due fifteen months after the signing of the agreement. For the loan, the appellant mortgaged the property comprised under CT No. 28907 Plot No. 24 Block "JJ" within Lindi Township. Apart from availing the funds, it is apparent that the respondent also undertook to purchase the

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machinery equipment for the appellant. As a result, the appellant received the machinery equipment from Kilimanjaro Machinery Tools Ltd. on 26.6.1986, and the other machinery equipment from Sweden on 3.3.1987. The appellant was also granted additional term loan money which added up to a total of shillings 6,795,000/- loan amount outstanding. On 19.8.1989, the machinery in the appellant's Umoja Garage in Lindi underwent an inspection and trial run exercise by ~~two experts~~ from the Small Scale Industries Organisation (SIDO). On 19.8.1989 the experts, A. Lindstrom and L. Magai inspected and up started the machinery in the appellant's Umoja Garage. In their commissioning report (Exh. "A") of 19.8.1989, some inadequacies in the machinery, including the fact that the machinery from Sweden was second hand, were revealed. The appellant wrote several letters of complaint to the respondent regarding these inadequacies.

The respondent wrote to the appellant a letter demanding payment of the money paid under the loan agreement. In the letter the respondent threatened to sell the appellant's property which was mortgaged as security for the loan. This prompted the appellant in filing Civil Case No. 83 of 1993 against the respondent. Among the reliefs sought was a declaration that the appellant was not in breach of the loan agreement to warrant the sale of the appellant's mortgaged property under the agreement. The appellant was awarded this relief. In addition it was also ordered that the loan agreement be determined. Apparently, the appellant again instituted Civil Case No. 55 of 1998, against the respondent which was dismissed on the ground that it had been instituted against a non-existent legal entity. Then, he instituted Civil Case No. 63 of 1999 from which this appeal arises. In this case, the appellant sought several reliefs one of which was a declaration that by supplying incomplete and non-performing second hand

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machinery, the respondent contravened the principal terms of the agreement such that the respondent could not either determine the agreement or take any action adverse to the appellant. At the commencement of the trial, the respondent raised a preliminary objection that the matter was res judicata because in Civil Case No. 83 of 1993, the matter based on the same cause of action involving the same parties had been finally determined. The learned trial judge sustained the preliminary objection. He held that as the matter in issue in Civil Case No. 83 of 1993 was also directly and substantially in issue in Civil Case No. 63 of 1999, the doctrine of res judicata applied. The suit was dismissed. The appellant has preferred this appeal against the decision.

The appellant is unrepresented. He has filed a detailed, narrative six-point memorandum of appeal which, in essence, raises one point of complaint. That is, that the learned trial judge erred in holding that the principle of res judicata applied to the case. Elaborating he contended that res judicata does not apply to the instant case because the matter in issue in Civil Case No. 83 of 1993 is not directly and substantially in issue in this case - i.e Civil Case No. 63 of 1999. He further said in the former case, Civil Case No. 83 of 1993, he had instituted the suit in order to restrain the respondent from auctioning the appellant's mortgaged property before the repayment of the loan was re- scheduled. The reason, he maintained, was that there was an inordinate delay of about 2½ years before the machinery was delivered after signing of the agreement. For this reason, and as observed earlier, the

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appellant filed Civil Case No. 83 of 1993, seeking among others, a declaration that he (appellant) had not breached the agreement and that the loan agreement be determined. As regards the instant case- Civil Case No. 63 of 1999, the appellant strongly urged the Court to hold that the situations is different. In this case, it was the appellant's contention that he instituted the suit on the ground that he should not be held liable for paying the loan or any other claim based on the loan agreement because it was the respondent who breached the terms of the agreement. He vigorously urged that apart from the fact that there was a delay in the delivery of the machinery, the machinery delivered was incomplete, non performing and second hand. In that situation, the appellant insisted, the cause of action in this case is different from that in Civil Case No. 83 of 1993. For instance, the appellant argued, in the previous suit he could not raise the issue pertaining to the machinery being second hand and non-performing because this aspect had not been brought to light at that time. In support of his submission, among other authorities, the Court was referred to its decision in the cases of Stephen Masatu Wasira v. Joseph Sinde Warioba and Attorney General, Mza Civil Application No. 1 of 1998 and Hezekiel Bakari Sanga, Tanzania Zambia Railway Authority, Civil Appeal No. 99 of 1998, (both unreported).

Mr. V. Luanda, learned counsel for the respondent vehemently countered these submissions. He submitted that the principle of res judicata properly applied in this case because the matter in issue in this case, the subject matter of this appeal, was also directly and substantially in issue in the previous suit in Civil Case No. 83 of 1993. In both cases, Mr. Luanda claimed, the appellant is alleging breach of the loan agreement on the basis of which the various reliefs are sought. In that case, he argued,

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it was open for the appellant to raise all the various reliefs in the previous suit and not to come to the court instituting one suit after the other based on the same cause of action indefinitely.

We have closely considered these submissions. It is common knowledge that the objective behind the doctrine of res judicata is to ensure finality in litigation. In the case of Stephen Wasira (supra) cited to us by the appellant, the Court underscored the application of this principle in Tanzania. Like the position obtaining in other jurisdictions with a similar legal system, this cardinal principle of justice is well entrenched in the laws of this country. Section 9 of the Civil Procedure Code, 1966, provides as follows:

> "9 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."

And Explanation IV to section 9 provides that:-

> Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

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From these provisions of the law the question falling for consideration is whether res judicata applied in this case. As already indicated, in both Civil Case No. 83 of 1993 and No. 63 of 1998, the same loan agreement of 6.11.1984 is central to the issues involved. Among the reliefs sought in Civil Case No. 83 of 1993 was a declaration that the plaintiff is not in breach of the loan agreement. The appellant also sought a declaration that the loan agreement was legally determined. In Civil Case No. 63 of 1999, the subject of this appeal among other reliefs sought was a declaration that by supplying incomplete and unproductive second hand machines, the respondent (original defendant) contravened the terms of the agreement. Holding that the matters directly and substantially in issue in the instant case the subject of this appeal were also directly and substantially in issue in the previous case, Civil Case No. 83 of 1993, the learned trial judge inter alia, observed:-

> "Indeed, the cause of action which constitutes the matters which are directly and substantially in issue in the former suit are the same in the instant suit, namely the breach of the loan agreement by defendant."

On the basis of the reliefs sought as indicated above, we are respectfully in agreement with the learned trial judge that the matters which had been directly and substantially in issue in Civil Case No. 83 of 1993, between the same parties in the High Court were also directly and substantially in issue in the subsequent Civil Case No. 63 of 1999. In both cases, the claims are based on alleged breaches of the agreement by the respondent. We cannot

accept the appellant's claim that the matters which were substantially and directly in issue in both cases were different. In his attempt to explain the distinction between the two suits, the appellant charged that in the former suit, Civil Case No. 83 of 1993, he could not make it as a ground of defence or attack that the respondent was in breach of agreement by supplying incomplete, unproductive and second hand machinery. The reason, he maintained was that at that time the element of the deficiency of the machinery had not been brought to light. In this light, it was the appellant's submission that res judicata does not fall within the ambit of Explanation IV to Section 9 of the Civil Procedure Code. We do not think that the appellant is correct in this submission. From the record, it is clear that the expert's commissioning report Exh. "A" was furnished on 19.8.1989. It is from this report that the appellant became aware of the fact that some of the machinery imported from Sweden was second hand. In the circumstance, it is our view that by the time the suit in Civil Case No. 83 of 1993 was filed on 11. 6.1993, it was within the knowledge of the appellant that the machinery was incomplete and second hand. In that situation, we are of the view that the matter falls within the ambit of Explanation IV to Section 9 of the Civil Procedure Code. That is, in instituting Civil Case No. 83 of 1993, the claim based on alleged breach of the agreement on account of the machinery supplied being second hand ought to have been made ground of defence or attack. Admittedly, the situation would be different if the defects in the machinery were discovered and brought to the knowledge of the appellant after the filing and determination of the previous Civil Case No. 83 of 1993.

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This was not the case and so, the matters which were directly and substantially in issue in the subsequent Civil Case No. 63 of 1999 would properly be deemed to have been matters directly and substantially in issue in Civil Case No. 83 of 1993. This, we think, is in accord with the views expressed by the learned author Mulla in his commentary on Explanation IV of the Indian Code of Civil Procedure which is in pari materia with Explanation IV to Section 9 of our Civil Procedure Code. In Mulla, Code of Civil Procedure, Volume I, 15th Edition at page 114, the learned author states:

> "The principle underlying Explanation IV that res judicata is not confined to issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of litigation and so, clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

These views by the learned author we think also aptly apply to the instant case. The appellant is raising claims based on alleged breach of the agreement which are so closely part of the subject matter of litigation in the previous suit in Civil Case No. 83 of 1993. Consequently, when the appellant instituted Civil Case No. 83 of 1993, the breach of the agreement was a matter which might and ought to have been made a ground of defence. The appellant having failed to raise the matter in the previous suit, it would be an abuse of court process to allow the same matter to be litigated again in the subsequent Civil Case No. 63 of 1999. Not only would it be an abuse of court process to allow such matter to be subject

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of litigation in the subseqnent case, the matter would, we think, under the provisions of Explanation IV to Section 9 of the Civil Procedure Code be deemed to have been a matter directly and substantially in issue in the case - Civil Case No. 63 of 1999. In the event, we are satisfied that the learned trial judge properly invoked the doctrine of res judicata.

We think this ground based on res judicata is sufficient to dispose of this appeal. However, before concluding this matter we wish to go a bit further by briefly addressing on another aspect. As indicated earlier, among other reliefs sought and awarded to the appellant in Civil Case No. 83 of 1993, was a declaration that the loan agreement was legally determined. Consequently, with the determination of the agreement on 24.10.1994 when the judgment was delivered, the position of the matter was that the loan agreement was no longer enforceable in law. That is, in practical terms, as a result of the court decision, the agreement was, as it were, brought to an end, it was no longer binding upon the parties. Since this decision of the High Court was not reversed on appeal, it is still valid. It follows therefore that as the appellant's claim against the respondent in Civil Case No. 63 of 1999 was based upon alleged breach of the loan agreement which, as just indicated, was determined by the High Court in Civil Case No. 83 of 1993, it had no leg to stand on. In other words, there was no legal foundation upon which to base the claim. The suit being based on an unenforceable agreement, could hardly be sustained on this ground as well.

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For the reasons we have endeavoured to explain, we are settled in our minds that this appeal has no merit, it is dismissed with costs.

DATED AT DAR ES SALAAM THIS 30TH DAY OF SEPTEMBER, 2001.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

N. M. MWAIKUGILE
REGISTRAR COURT OF APPEAL