



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION**



(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Audace Ngiye, J)

APPLICATION NO. 4 OF 2017

(Arising from Reference No. 10 of 2013)

UNION TRADE CENTER LIMITED (UTC) CLAIMANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA RESPONDENT**

AND

**SUCCESSION MAKUZA DESIRE REPRESENTED BY
MAKUZA JEAN FRED 1ST APPLICANT/INTERVENER**

**SUCCESSION NKURUNZIZA GERARD REPRESENTED BY
NKURUNZIZA JANVIER 2ND APPLICANT/INTERVENER**

NGOFERO THARCISSE 3RD APPLICANT/INTERVENR

22nd September 2017

RULING OF THE COURT

A. INTRODUCTION

1. The Applicants herein, Succession Makuza Desire, Succession Nkurunziza Gerard and Ngofero Tharcisse are shareholders in Union Trade Center Limited (UTC Ltd).
2. By their joint Notice of Motion dated 18th April 2017, they have sought leave pursuant to the provisions of Article 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “**the Treaty**”) and Rules 21 and 36 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as “**the Rules**”) to be allowed to intervene and participate as parties in Reference No. 10 of 2013.
3. The above Reference seeks to hold the Government of the Republic of Rwanda responsible for the alleged misconduct of the Kigali City Abandoned Property Commission in taking over the UTC Ltd Mall as an abandoned property.
4. Whereas the 3rd Applicant has made the Application himself, the 1st and the 2nd Applicants have appointed Makuza Desire and Nkurunziza Janvier (hereinafter referred to as “**the Representatives**”) to represent them in this Application, respectively.
5. The Application is supported by the following grounds spelt out in the Notice of Motion:
 - a) ***That the Applicants are shareholders in UTC Ltd and do not agree with the Statement of Reference presented by the Claimant;***



b) That the claim was filed on behalf of UTC Ltd yet as shareholders they did not pass such a resolution hence it is important to be represented in the case to ensure that their interests are protected;

c) That all the Applicants/Intervenors were not made parties to the Reference while the Claimant knew that the orders sought by them would affect, and have now affected the Applicants adversely as minority shareholders; and

d) That legal fees and costs payable by UTC Ltd may be awarded to the Respondent thus affecting the Intervenors.

6. The said two Representatives for the 1st and the 2nd Applicants respectively, and the 3rd Applicant have each deposed an Affidavit in support of the Application.

B. REPRESENTATION

7. Ms. Molly Rwigamba, Learned Counsel, represented the Applicants. Mr. Francis Gimara and Isaac Bakayana, Learned Counsel, represented the Claimant while Mr. Nicholas Ntarugera and Mr. George Karemera, Learned Counsel, represented the Respondent.

C. CASE FOR THE APPLICANTS

8. In their Affidavits, and as elaborated at the hearing, the Applicants submitted firstly, that as shareholders in UTC Ltd, they are not aware of any resolution of shareholders of UTC Ltd or its Board in terms of Articles 141 and 142 of the Company Act, 2009 of Rwanda that authorized Mr. Rujugiro Tribert Ayabatwa, the majority shareholder in UTC Ltd, to file the aforesaid Reference or Claim against the Attorney General of The Republic of Rwanda in this Court.



9. Secondly, they further contended that, as minority shareholders, they are directly affected by the unlawful conduct of Mr. Rujugiro who is in exile out of Rwanda and has abandoned his duties in UTC Ltd as a shareholder and as a chairman of the Board.
10. Thirdly, they claim a direct interest in the matter based on the fact that ***“if the Court proceeds without their participation in this Claim as shareholders, their interests in UTC Ltd may be affected in the sense that they may be condemned unheard.”***
11. Fourthly, they argued that the Reference may expose the company to counter claims and orders for payment of legal fees and costs to the Respondent which, as shareholders of UTC Ltd, will affect them and their interest in the company.
12. Lastly, the Applicants state that the Reference or the Claim impedes potential investors from investing in UTC Ltd.

D. THE CLAIMANT’S CASE

13. On the other hand, the Claimant vide its Affidavit in Reply deponed by Mr. Francis Gimara, as elaborated at the hearing, opposed the Application vigorously.
14. Firstly, the Claimant contended that the Application is barred by the doctrine of *res judicata* in the sense that it involves the same parties and the same subject matter that was brought to the attention of this Court vide **Application No. 9 of 2014** whose Ruling was delivered on the 29th March, 2017 striking out the Application with costs. In addition, the Claimant submitted that the proper procedure for the Applicants to follow should have been an appeal and not a fresh Application. Therefore, in the circumstances, the Applicants cannot be allowed to act



as though the order that struck out their plea to be enjoined in the Reference was non-existent.

15. Secondly, Mr. Bakayana submitted that the Interveners should accept the case as it is at the time of intervention [see Rule 36(5) of the Rules], and that all they can do is making arguments either in support of the Claim or in opposition of thereto. Instead, the Claimant states that the grounds that are being brought through the present Application are new in that they relate to incorporation of UTC Ltd, its shareholding as well as the fear that costs may be awarded by this Court. In the event, it is the Claimant's case that this Application is improper because those arguments are fresh and will affect the trajectory of the Reference.
16. In conclusion, the Claimant argues that this Application cannot stand and the same should be struck out with costs.

E. CASE FOR THE RESPONDENT

17. The Respondent on his part had no objection to the Application. This was clear from the Affidavit in Reply deposed by Mrs. Kabibi Specioza, the Division Manager of Civil Litigation in the Respondent's Office as well as on what Learned Counsel for the Respondent stated at the hearing. In his view, noting the provisions of Article 40 of the Treaty and Rule 36(4) of the Rules, this Court has the discretion to grant the Application.

F. THE APPLICANTS' RESPONSE

18. In reply to the Claimant's answer to the Application, the Applicants firstly submitted that this Application is not barred by *res judicata*. They relied on the case of **Standard Chartered (Uganda) Limited vs Mwesigwa Geoffrey Philip in Miscellaneous Application No. 44 of**



2012 where it was held that: “a ruling on a preliminary point of law which is not on the merits does not render the main matter *res judicata*.” Therefore, the decision of this Court to strike out Application No.9 of 2014 on technicalities and not on the merits of the Application could not bar the Applicants from filing a fresh application to intervene in the same Court and that *res judicata* was therefore improperly invoked as the earlier Application was never been dealt with on its merits.

19. On the orders sought, they stated that they are not bringing in new issues for determination because they are wholly supportive of the Respondent’s case and were also intent on protecting the Applicants’ interests in UTC Ltd based on the facts and evidence that they have provided to the Court.

20. Lastly, the Applicants indicated that the Claimant is unable to prove the prejudice or the harm that it stands to suffer if the Applicants are granted leave to intervene in this matter while the Interveners are likely to suffer a huge prejudice if they are not allowed to intervene as prayed. In addition, it will be in the interest of justice to allow the Application as to do so will allow the Court to have all information necessary to make a balanced decision in the Reference.

G. COURT’S DETERMINATION

21. Upon close scrutiny of the pleadings filed by the Parties and having heard the rival arguments of the Parties at the hearing, it seems to us that the present matter raises a procedural question of whether this Application is *res judicata*. In our considered view, we have to determine and settle the said issue first before considering the merits of this Application if that will be necessary.



22. In his Affidavit and at the hearing, the Claimant contended that the Application is barred by the principle of *res judicata* and in support of this ground of objection, Learned Counsel for the Claimant submitted that the matter in issue has previously been dealt with and fully litigated with finality by this Court. However, Mrs. Rwigamba, Learned Counsel for the Applicants, strongly opposed this submission contending that this case cannot be treated as one barred by *res judicata* because it was not in earlier proceedings decided by this Court on its merits. That what transpired earlier was just a declaration of non-compliance with rules and consequently, the striking out of **Application No. 9 of 2014** does not operate as a bar to the bringing of a fresh Application by the same parties (the Applicants) seeking the same reliefs but using the correct procedure.
23. In the above context, we are alive to the fact that there are no specific provisions governing this Court in determining whether a matter is *res judicata* or not.
24. We are also aware that as a general principal of law, 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 or are 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 (See Richard Kuloba in his book entitled **Judicial Hints on Civil Procedure**, 2nd Edition, page 42).
25. Therefore, it is our understanding that the court before which a plea of *res judicata* is raised is not deprived of its jurisdiction to hear the case;



the court only declines to exercise its jurisdiction to allow the parties to relitigate a matter when it is satisfied that the same parties are suing in the same capacity and that the issue before it is the same as that alleged to have been the subject of adjudication on the merits in previous proceedings (See G.R. Mandavia v. Rattan Singh; Civil Appeal No. 57 of 1963, Eastern Africa Law Reports, [1965] E.A.).

26. The essentials for the applicability of the principle of *res judicata* are well summarized by Richard Kuloba (*supra*) as follows:

- a) *The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;*
- b) *The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;*
- c) *Such parties must have been litigating under the same title in the former suit;*
- d) *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;*
- e) *The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.*

27. All the above elements must be established by the pleader. However, in the present matter only three elements exist, that is, (a), (b) and (c)



while (d) and (e) cannot be established here. Element (d) above requires that the matter must be finally and conclusively heard on merits and a conclusive decision thereon entered but in this matter the previous Application was not conclusively heard but was struck out on technicalities. Therefore, the doctrine cannot be properly applied here. With regard to element (e), the pleader must establish that the matter was determined by a competent Court. In this case, it cannot be denied that this Court did not determine the matter on merit although it was and is still competent to do so.

28. We must also add that no prejudice would be caused to the Claimant as he has been given an opportunity to formally respond to all the issues to be raised by the Applicants in this Application.

29. In conclusion, the Application is not *res judicata* and the objection of the Claimant on the ground that the Applicants' Application is barred by *res judicata* is overruled.

30. Having so stated, what is before us in the issue is whether this Application is competent in terms of Rule 36(2)(e) and (5) of the Rules.

31. In their Notice of Motion and at the hearing, the Applicants vide their Learned Counsel, Ms. Rwigamba, contended that the Application is brought under Article 40 of the Treaty and Rules 21 and 36 of the Rules. Mr. Ntarugera and Mr. Karemera, Learned Counsel for the Respondent did not object to the Application contending that it was properly brought under Article 40 of the Treaty and Rules 36(4) and (5) of the Rules. However, Mr. Bakayana, Learned Counsel for the Claimant, opposed the Application contending that it was outside the scope of Article 40 and Rule 36(2) (e) and (5) of the Rules. Indeed, we agree that these mentioned provisions provide for the manner in which an application for



intervention in a pending Reference before this Court should be made and the conditions it should comply with. However, for the purpose of this Ruling, we shall examine the provisions of Rule 36(2)(e) and (5) only. We hereby reproduce the said provisions for ease of reference:

“36 (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as amicus curiae shall be by notice of motion.

(2) An application under sub-rule (1) shall contain:

- (a)***;
- (b)***;
- (c)***;
- (d).....***;
- (e) a statement of the intervener’s or amicus curiae’s interest in the result of the case.***

(3)

(4)

(5) The intervener or amicus curiae shall accept the case as it is at the time of intervention.”

32. The word used in these provisions is “shall” meaning the aforesaid conditions are mandatory to an application seeking intervention in a pending reference before this Court.

33. On our part, we have carefully considered the rival submissions before us and we must begin by addressing our minds to the facts that the admission or non-admission of an intervener to any judicial proceeding is a matter of discretion. In that regard, the Court has a discretion to allow any intervention if it considers that the interests of justice would be served.



34. Discretion, as we understand it, must always be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party (see FORSC and Others vs. Burundian Journalists' Union and Another, EACJ Application No. 2 of 2013).
35. This discretion is also codified in Rule 36(4) which provides that if an application for leave to appear as an intervener is found to be "justified", the Court shall allow the application and fix the time within which the statement by the intervener should be filed.
36. In addition, as was stated in Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others [2014], eKLR, an intervener, or as is the term elsewhere, an interested party, must have an interest in the proceedings and its submissions must be relevant to the same proceedings and raise new contentions which may be useful to the Court.
37. The role of an intervener or interested party in proceedings was even more clearly defined by the Supreme Court of Kenya in Trusted Society of Human Rights Alliance (supra) where is stated thus:

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause."



38. We are in agreement with the Learned Judges and the question that we must pose at this stage is, have the Applicants met the above test? Firstly, there is a statement of interest made on their behalf by Mrs. Rwigamba, an advocate and who is an officer of this Court. We take her word on the subject and more critically, the Claimant conceded that the Applicants are minority shareholders in UTC Ltd.
39. Secondly, looking at the Applicants' Statement of interest again, it is clear to us that the likely outcome of the Reference before the Court has, with or without intervention, a direct impact on all shareholders in UTC Ltd, since they have an interest not otherwise adequately represented. And a direct stake in the outcome of litigation is important in satisfying the "interest" requirement under Rule 36(2)(e) of the Rules.
40. Thirdly, that because an intervener is akin to a third party to judicial proceedings, the Court can only take what it considers relevant from such an intervener and the ultimate control over what the intervener can do or state before the Court is the Court itself.
41. Lastly, looking at **Reference No. 10 of 2013** and noting the issues in contest, it would be in the wider interests of justice that we admit the Applicants as interveners in the sense that they can contribute to the Court's total understanding of the case but the intervention shall be within the parameters of Rule 36(2)(e) and (5) of the Rules. In fact, an intervener is not entitled to widen or add on to the points in issue (see **R. v Morgentaler [1993] 1 S.C.R 462.**)

H. DISPOSITION

42. For the above reasons, the Application dated 18th April 2017 is allowed and Succession Makuza Desire, Succession Nkurunziza Gerard and

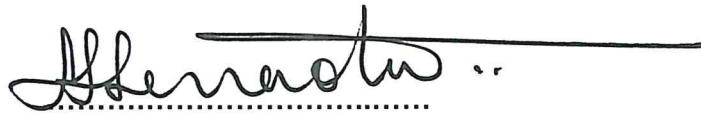


Ngofero Tharcisse are enjoined as first, second and third Interveners in these proceedings. Their participation shall be limited to statements and submissions in support of the Respondent under Rule 36(2)(e) and (5) of the Rules.

43. Each party shall bear its own costs.

44. It is so ordered.

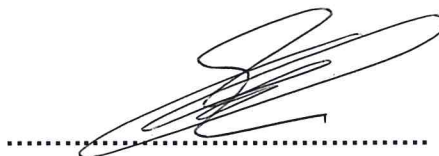
Dated and delivered at Arusha this 22th day of September 2017.



HON. JUSTICE ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE



HON. JUSTICE FAUSTIN NTEZILYAYO
JUDGE



HON. AUDACE NGIYE
JUDGE