

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPEAL NO. 61 OF 1999

BETWEEN

PENIEL LOTTA APPELLANT

AND

1. GABRIEL TANAKI }
2. SAMWEL TANAKI }RESPONDENTS
3. ELIAS ABRAHAM }

(Appeal from the decision of the
High Court of Tanzania at Arusha)

(Mroso, J.)

dated 7th December, 1995

in

Civil Appeal No. 18 of 1995

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The question in this appeal is whether the suit in Civil Case No. 9 of 1995 instituted in the Resident Magistrate's Court of Arusha is res judicata. That court and the High Court on first appeal held in the affirmative. The question has its origins in Civil Case No. 38 of 1986 before the Primary Court at Enaboishu. In that case the second respondent, Samwel Tanaki, was the plaintiff, the defendants were two women, Sindani Menyembere and Silato Sungure (or Sung'are), who are respectively sister and mother of the appellant, Peniel Lotta. The issue in the suit was the ownership of a piece of land at Sekai village in Arumeru District. The Primary Court found in the second respondent's favour and ordered the two women to vacate the suit land and move to their own lands known to exist elsewhere,

But being of the view that these women had stayed on the suit land as licensees, the court directed the second respondent to build them alternative huts at their new abode. This decision was upheld by the District Court in Civil Appeal No. 11 of 1986 and there was no further appeal.

In 1995 the appellant, with leave of the High Court, commenced the present proceedings against the second respondent and two others claiming ownership of the same land. He averred in his plaint that the land was donated to him by his mother in 1952, and that the respondents had since 1986 trespassed into the same and committed waste therein. He prayed for their ouster and for compensation of 55,492,272/= for the alleged waste. Preliminary objections were taken on the respondents' behalf involving questions of pecuniary jurisdiction, limitation of time and res judicata. The other questions terminated in the High Court while res judicata and compensation constitute the subject matters of this appeal. Mr. Chadha and Mr. Umbulla, learned counsel, appeared for the appellant and the respondents respectively.

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 litigation. 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. The scheme of section 9,

therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.

Both courts below were alive to these conditions. They stated, though, that the appellant was not a party to the Enaboishu case but that he was bound by the decision therein for he was litigating under the same title as his mother. We think, with respect, after holding that the appellant was not a party to the Enaboishu suit, a gap had been created in the scheme of section 9 and it was not enough to hold that the appellant was litigating under the same title as his mother. It was necessary to go further and establish whether, in the alternative to being a party, the appellant was a privy to his mother, that is, claiming under her, which is different from litigating under the same title.

It was strongly argued by Mr. Chadha that the appellant was not claiming under his mother since his plaint put his title to the land prior to the Enaboishu case. In his submission, the defendants in that case

were wrong parties. He contended, citing a passage from the 15th edition of MULLA ON THE CODE OF CIVIL PROCEDURE, that in order for the suit to be barred, the appellant would have obtained the land subsequent to the Enaboishu case. Mr. Umbulla replied that the appellant was claiming under his mother since he had an interest in the Enaboishu case. He said if his mother were wrongly sued, she could have said so.

The question in the case therefore narrows down to the simple issue whether the appellant is claiming under his mother. Mr. Chadha's argument that he is not was based on a passage on p. 136 of MULLA where it is stated:

The ground of privity is property and not personal relation. To make a person a privy he must have acquired an interest in the subject matter of the action by inheritance, succession or purchase subsequently to the action or he must hold the property subordinatedly, e.g. as a sub-lessee.

We do not doubt the correctness of this statement but we say it does not say it all. It excludes the phenomenon of common interest litigation which section 9 is expressed to cover. Explanation VI to the section states thus:

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and other, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

MULLA observes on p. 143 that Explanation VI is not confined to representative suits under O.1, r.8 and we think that, too, is correct. That means a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit. The appellant claims to have owned the suit land since 1952. That land was in the occupation of his mother and his sister, giving all three a common interest therein. In 1986 the two women were sued, adjudged licensees of the second respondent's family, and ordered off the land. The appellant was present, witnessing what was taking place, but taking no step, like seeking to be substituted or joined as defendant. So much aware of the goings on was he, and so much was his interest therein, that he was present in the District Court to receive the judgment on appeal. On these facts, we think, he cannot be dissociated from that litigation but must be deemed to claim under his mother for the purposes of section 9. We therefore agree with Mr. Umbulla that the suit is barred.

We also wish to observe that the appellant does not appear to be litigating bona fide. In Civil Case No. 31 of 1993 before the Resident Magistrate's Court, he armed himself with a power of attorney and sued his sister, Sindani Menyembere, as well as the first and third respondents in this appeal claiming that the suit land was the property of his maternal uncle, one Kimasirwa Sung'are. The suit was struck out for want of leave.

That is when he turned around to institute Civil Case No. 9 of 1995 asserting his own title to the same land. We think that amounts to abuse of the court process and indulgence in frivolous and vexatious litigation. The courts have a right and a duty to prevent such abuse and to strike out offending proceedings.

Mr. Chadha also suggested, as it were, that the High Court should have remitted the issue of compensation for trial by the Resident Magistrate's Court. We fail to see how that could have been possible after the court concurred in the finding that the suit was res judicata. In fact compensation was considered in the Enaboishu case and the order to build alternative huts for the defendants proceeded from that consideration. That issue, too, was therefore res judicata.

In the light of the foregoing, we uphold the decision of the High Court and dismiss the appeal with costs.


DATED at ARUSHA this 14th day of September, 2001.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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


(F.L.K. WAMBALI)
DEPUTY REGISTRAR