IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., LUANDA, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 105 OF 2011

THE SOITSAMBU VILLAGE COUNCIL.....APPELLANT

VERSUS

1. TANZANIA BREWERIES LIMITED
2. TANZANIA CONSERVATION LIMITED } ..... RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 31st day of May, 2011
in
Land Case No. 2 of 2010

JUDGMENT OF THE COURT

4 & 21 May, 2012

NSEKELA, J.A.:

This appeal has as its origin in Land Case No. 2 of 2010 in which the plaintiff is the Soit Sambu Village Council, a body corporate under the Local Government (District Authorities) Act. The defendants are (i) Tanzania Breweries Limited and (ii) M/s Tanzania Conservation Limited. It is pleaded in paragraph 6 of the plaint, *inter alia*, that in the Resident Magistrates Court of Arusha vide Civil Case No. 74 of 1987, one Isata Ole

Ndekerei and 14 others sued the 1st defendant in respect of certain land in which the 1st defendant was declared as the lawful occupier of that disputed piece of land. Apparently this decision has not been appealed against.

The 1st defendant's written statement of defence raised, *inter alia*, a preliminary objection which had four sub-issues, the first one being on **res judicata**. What the 1st defendant was alleging was that a decision on the matters had been finally decided, inter partes, earlier in RM Civil Case No. 74 of 1987. We take the liberty to quote paragraph 1 of the written statement of defence which provides –

> 1. *That on the 1st day of hearing of the suit the 1st defendant shall raise a preliminary objection based on the following points of law namely: -*
>
> (a) That the suit is ***res judicata*** *as a similar suit by the pastoralists being purportedly represented by the plaintiff was conclusively determined*

between them and the 1st defendant. The 1st defendant shall rely on the full force and effect of the contents of paragraph 6 of the plaint;

(b) That the suit is bad in law for being a disguised representative suit;

(c) That the suit is misconceived as this Court has no powers to declare the plaintiff the owner of registered land by adverse possession.

(d) That the plaint is defective for want of the plaintiff's signature.

(e) That the suit is bad in law for non-joinder of the Ngorongoro District Council in view of the contents of paragraphs 13, 15, 17 and 22 of the plaint.

After considering the submissions of the learned counsels for the parties, the learned judge upheld the 1st defendant's preliminary objection

and dismissed Land Case No. 2 of 2010 for being **Res Judicata** in the eyes of the law. He declined to pursue the second defendant's preliminary objection since it would be indulging in a futile exercise and wastage of his precious time, as he put it.

The appellant/plaintiff was aggrieved with this decision and has come to us on appeal. He is represented by Mr. John Materu, learned Counsel. The first respondent/defendant was represented by Mr. John Umbulla and the third respondent/defendant was represented by Mr. Sinare Zaharini. The appellant filed a five point memorandum of appeal. The first ground of appeal stated –

> "1. *That the Honourable Judge erred in law and in fact in holding that Land Case No. 2 of 2010 is* ***Res Judicata*** *in the eyes of the law."*

Mr. Materu, learned counsel for the appellant at the outset referred the Court to the case of **PENIEL LOTTA v GABRIEL TANAKI AND OTHERS** [2003] TLR 312 at page 314 where the Court discussed section 9 of the Civil Procedure Code, Cap. 33 R.E. 2002 relating to the doctrine of

res-judicata. He submitted that the issues and subject matter were decided in Civil Case No. 74 of 1987 in the Resident Magistrate's Court, Arusha. The issues in the Resident Magistrates Court were formulated as follows –

> *(i) Whether the land was allocated to the defendants by competent authorities;*
>
> *(ii) Whether the suit land was occupied before the alleged allocation.*

He added that the issues in Land Case No. 2 of 2010 in the High Court as presented in the plaint were not the same issues. There are new issues in the High Court case that were not before in the Resident Magistrate's case. The learned advocate also raised the question of the subject-matter. In RM Civil Case No. 74 of 1987 the subject-matter was land measuring approximately 10,000 acres, whereas in HC. Land Case No. 2 the acreage was put at 12,617.15 acres, and hence the subject matter was not the same. Mr. Materu also took issue with the parties involved. The plaintiff in Land Case No. 2 of 2010 was Soit Sambu Village Council and the defendants were **Tanzania Breweries Ltd.** and **Ms Tanzania**

Conservation Ltd. In Civil Case No. 74 of 1987 the plaintiff were **Isata Ole Ndekerei** and **14 others** and the defendants were **Tanzania Breweries Ltd**. and **Tanzania Farms Co. Ltd**. The learned advocate submitted that it was not possible for the High Court to decide these issues without calling evidence. These were matters of mixed law and fact and hence did not qualify to be called preliminary objections.

Both Mr. Umbulla, and Mr. Zaharini learned counsel for the first and second respondents readily conceded that the issue relied upon by the trial judge did not qualify as a preliminary objection as a point of law. They added that the matter be remitted to the High Court with directions that full trial be conducted before another judge.

Our starting point to lay the foundation for our decision is the well-known case of **MUKISA BISCUIT MANUFACTURING CO. LTD**. v **WEST END DISTRIBUTORS LTD**. [1969] E.A. 696 at page 701 where Sir Charles Newbold, P. states as follows –

> *"A preliminary objection is in the nature of what used to be a demurrer.* ***It raises a pure point of law which is argued on the assumption that ali the facts pleaded by the other side are correct. It cannot be ralsed if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*** *(emphasis added).*

A preliminary objection should be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as preliminary objections only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits.

The first ground of appeal before us reads as follows –

> *"1. That the Honourable Judge erred in law and in fact in holding that Land Case No. 2 of 2010 is* ***Res Judicata*** *in the eyes of the law."*

This was the only issue considered and determined by the learned trial judge and the issue was raised as a preliminary point of law. He was therefore obligated to consider the issue as such and not on the merits of the case. The doctrine of **res judicata** was considered by this Court in **PENIEL LOTTA v GABRIEL AND OTHERS** [2003] TLR 312 wherein it stated at page 314 as follows –

> *"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."*

Let us commence with who the parties were in Land Case No. 2 of 2010 in the High Court of Tanzania (Land Division), the subject matter of this appeal. The plaintiff is the Soit Sambu Village a body corporate incorporated and registered under the Local Government (District Authorities) Act. The defendants are (i) Tanzania Breweries Ltd. and (ii) Ms. Tanzania Conservation Ltd. In his Ruling the learned judge stated thus –

> *"With due respect to the learned Counsel, under paragraph 6 of the plaint, the plaintiff admit that the landed property, subject matter in Civil Case No. 74 of 1987 in the RM's Court of Arusha Region,* ***is the same to this case as well****. They admit that "... on the 16th day of May, 1990, the court delivered a judgment adjudging the 1st defendant, the rightful occupier of the disputed land." Under paragraph 11, they further admit that "... the applicant (sic) has been in occupation and have improved the said disputed land by building, farming, residing and preserving and using it for pasture". The plaintiff should not be heard now to assert that the subject matter*

is not the same, no it is always known that "parties are bound by their own pleading."

With respect, we ask ourselves a question, who were the parties in the Resident Magistrate's Court Arusha in Civil Case No. 74 of 1987? Were the proceedings in this case admitted in evidence in Land Case No. 2 of 2010 in the High Court? These are facts that will have to be established by evidence during the trial in the High Court. Then the High Court will be able to determine that the parties in the Resident Magistrates Court, Arusha and in the High Court are the same or privies claiming under them. This cannot be done at the commencement of the trial but at the end.

The learned judge discussed the question of ownership of the land. This is what he said –

"Issues on ownership was apparent in the RM's Court case as well as in this instant matter as it is revealed in the plaint. The RM's Court as evidenced also by paragraph No. 6 of the plaint decided that the 1st defendant is the rightful occupier of the disputed land. I am

therefore, wholly satisfied that the subject matter and the issue decided in the RM's Court case are substantially the same as at issue in the instant case."

Now issues of ownership of the disputed land cannot be resolved in the pleadings. There must a fully-blown trial to that effect. The learned judge appeared to rely on paragraph 6 of the plaint to resolve this seemingly complex issue. It is clear to us that the relevant facts in the pleading in dispute were not agreed upon. On the pleadings as they are it was not possible for the trial court to adjudicate upon whether the plea of **res judicata** could stand. It was incapable of disposing of the suit. It should have been dealt with at the end, and not at the beginning of the trial. An objection whose disposal requires proving or disproving of facts or evidence ceases to be a preliminary point of law.

In the event, we allow the appeal with costs. It is so ordered.

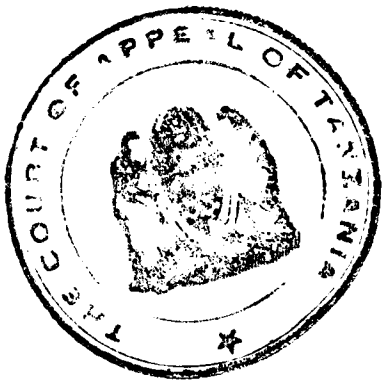
DATED at **ARUSHA** this 17th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL