IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., AND KWARIKO, J.A.)

CIVIL APPEAL NO. 44 OF 2013

MASUMBUKO KOWOLESYA MTABAZI ....APPELLANT

VERSUS

DOTTO SALUM CHANDE MBEGA .... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Land Division) at Dar es Salaam]

(Nchimbi, J.)

Dated the 20th day of October, 2010
in
Land Appeal No. 79 of 2007

....

JUDGMENT OF THE COURT

16th & 26th March, 2020

MWAMBEGELE, J.A.:

At the centre of controversy between the parties to this appeal is a parcel of land described as Plot No. 927, Block H, Mbezi in the City of Dar es Salaam. We shall elsewhere refer to it as the disputed land. The decision from which this appeal stems is the judgment of the District Land and Housing Tribunal (the DLHT) for Kinondoni in Land Application No. 263 of 2005 in which Dotto Salum Chande, the respondent successfully sued the appellant Masumbuko Kowolesya Mtabazi for, inter alia, trespass and a declaration that he is the lawful owner of the

disputed land. His first appeal to the High Court (Land Division) was not successful, hence this appeal.

The material background facts to the dispute are not difficult to comprehend. We find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the appellant got a letter of offer to the disputed land on 29.07.1987 from the Ministry responsible for land matters through the Commissioner for Lands. Subsequently, on 23.02.2001, he obtained a building permit with a view to erecting a structure thereon. He fenced the area. However, in that same year; that is 2001, the disputed land was allegedly trespassed upon by a certain Jonathan Mathias Mahela who the appellant successfully sued in the Resident Magistrate's Court of Dar es Salaam at Kivukoni vide Civil Case No. 23 of 2001.

In 2004, however, the appellant was sued by the respondent herein in the District Court of Kinondoni for trespass over the disputed land vide Civil Case No. 75 of 2004. That case was later dismissed for want of prosecution. In the same year, the respondent sued the appellant in the DLHT for, as already hinted above, inter alia, trespass and a declaration that he is a lawful owner of the disputed land whose judgment is the subject of this appeal. The respondent claimed in the

application and adduced evidence that she obtained a letter of offer on the disputed land on 16.04.1997 and processed and obtained a certificate of title to that land on 24.02.1998. The DLHT decided in favour of the respondent declaring the appellant a trespasser and the respondent a lawful owner of the disputed land. The appellant was also ordered to demolish structures thereon, if any, and give vacant possession on the disputed land.

Aggrieved, the appellant unsuccessfully appealed to the High Court. Undeterred, he has come to this Court seeking to assail the decision of the High Court on four grounds of grievance; namely:

> "1. The High Court erred in failing to hold that the Application before the Kinondoni District Land and Housing Tribunal was res judicata in view of the decision of the Kivukoni Resident Magistrate's Court Civil Case No. 23 of 2001 and Kinondoni District Court Civil Case No. 75 of 2004 in which the subject matter was the same land known as Plot No. 927, Block 'H', Mbezi.
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> 2. The High Court erred in law in upholding the decision of the Kinondoni District Land and Housing Tribunal although the same was not

based on the pleadings of the parties and consequently had no legal basis.

3. The High Court should have made a finding that the application before the Kinondoni District Land and Housing Tribunal was barred by the law of limitation and that the Appellant had acquired a title by prescription.
4. The Appellant was in the circumstances entitled to compensation for the developments he had made on the suit land after he was declared a lawful owner by Kinondoni Resident Magistrate Court in Civil Case No. 23 of 2001."

When the appeal was placed before us for hearing on 16.03.2020, both parties, though duly served, did not enter appearance. The notice of hearing effected on the appellant shows that he was served on 05.03.2020 through his advocate, Mr. Sylvester Eusebi Shayo of a law firm going by the name Sylvester Shayo & Co. Advocates. The respondent was served by publication in the Mwananchi Newspaper of 06.03.2020 as previously ordered by the Court. Pursuant to rule 112 (1), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules), we decided to retreat to compose this judgment relying on the written submissions filed by the appellant under rule 106 (1) of the Rules. The respondent did not file her written submissions. She, unlike the

appellant, could not be deemed to have appeared in terms of rule 112 (4) of the Rules.

In the written submissions of the appellant, it was submitted on the first ground that Civil Case No. 23 of 2001 declared that the appellant was the lawful owner of the disputed land and that that was a judgment in rem which bound the respondent until it was set aside by an appellate court because of the principle that a judgment in rem is conclusive against everybody. The appellant added that there now exist two judgments of two courts of competent jurisdiction giving two contradictory declarations of the status of the disputed land. The appellant thus called upon the Court to rectify the anomaly by affirming the principles of judgment in rem as opposed to judgment in personam. On this proposition, the learned counsel referred us to p. 213 para 245 of the book titled **The Doctrine of Res Judicata**, by Turner AK. He added that if not quashed and set aside, the decision of the High Court will create a bad precedent and cause chaos in the administration of justice.

Regarding Civil Case No. 75 of 2004 in the District Court, the appellant's counsel submitted that the resultant decree dismissing the suit was binding upon the respondent as such, the tribunal erred in

holding that the dismissal was not a decision on merits which was not binding upon the respondent. The learned counsel referred us to **Suwed Sadick v. Raymond Angoufon Leiya & Angoufon A. L. Nkya**, Land Case No. 24 of 2004 (unreported) wherein the High Court (Kileo, J. – as she then was), in similar circumstances, held that a dismissal for want of prosecution is conclusive and can be relied upon to support the plea of res judicata.

With regard to the second ground, it was submitted that the DLHT decided that the appellant's letter of offer was tampered with by altering the date of that letter and that the High Court erred in dismissing the appellant's submission to the effect that the issue was not properly raised. That the High Court erred in holding that the decision of the DLHT could not be faulted because, while the parties were giving evidence, they were allowed to address on that document although it was not part of the proceedings. The learned counsel cited **Patel v. Larji Makanji** [1957] EA 314 to buttress the point that the finding that the appellant's letter of offer was tainted with fraud was not supported by the record. He also referred us to **James Funke Gwagilo v. Attorney General** [2004] TLR 16 and **Fatma Idha Salum v. Khalifa Khamis Said** [2004] T.L.R. 423 to reinforce the point that the only way

to raise issues is through pleadings so that parties are given a fair chance of calling witnesses and of addressing the court in defence.

The appellant's advocate combined his submissions in respect of the third and fourth grounds of appeal. He submitted that there was evidence that the appellant was allocated the disputed land in 1987 and obtained a building permit in 2001. He added that when the disputed land was trespassed upon by a Mr. Mahela, the Resident Magistrate's Court decided in his favour by declaring him a rightful owner. In the premises, he submitted, even if the DLHT and the High Court were correct in finding that the disputed land was rightly allocated to the respondent, justice and equity demanded that at the minimum, the High Court should not have upheld the DLHT's decision refusing to compensate him. He submitted that failure to order compensation caused a grave injustice to the appellant and prevented him from enjoying the fruits of the decree in Civil Case No. 23 of 2001.

Having summarized the facts of the case and submissions of the appellant, we now turn to confront the grounds of appeal in determination of the appeal before us. We shall tackle one ground after the other in the order they appear as reproduced above.

The first ground of appeal was also a ground of complaint in the High Court. The appellant faults the High Court that it erred in law in failing to hold that Application No. 61 of 2005 was res judicata Civil Case No. 23 of 2001 of the Resident Magistrate's Court of Dar es Salaam at Kivukoni. The High Court dismissed the complaint on the ground that the respondent was not a party to Civil Case No. 23 of 2001 and therefore that the doctrine of res judicata could not apply. We think the first appellate court was quite right in dismissing the complaint the subject of the first ground of appeal. The doctrine of res judicata is part of our laws and is embodied in section 9 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (the CPC). For easy reference, we find it apt to reproduce the section hereunder. It reads:

> *"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."*
> [Emphasis supplied].

The principle was well articulated by the Court in **Yohana Dismas Nyakibari and Another v. Lushoto Tea Company Limited and 2 Others**, Civil Appeal No. 90 of 2008 (unreported) in which it was held:

> *"There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These 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."*

In the case at hand, there is no gainsaying that the parties to Civil Case No. 23 of 2001 in the Resident Magistrate's Court of Dar es Salaam at Kivukoni were not the same parties in Land Application No. 61 of 2005 in the DLHT which is the subject of this appeal. Neither were they privies claiming under them. As already alluded to above, it was the appellant who sued Jonathan Mathias Mahela in Kivukoni Resident

Magistrate's Court while in Land Application No. 61 of 2005 in the DLHT, the parties are the appellant and Dotto Salum Kowolesya, the respondent. In the premises, as the conditions enumerated above must co-exit, we are positive that the doctrine of res judicata could not apply then and cannot apply now.

To take the point a little bit further, we wish to reiterate our decision in **Registered Trustees of Chama cha Mapinduzi v. Mohamed Ibrahim Versi & Sons and Another**, Civil Appeal No. 16 of 2008 (unreported) in which the defendant in the former suit was **Naibu Katibu Mkuu CCM** and the plaintiff in the subsequent suit was **the Registered Trustees of CCM**. The Court held that the parties were not the same as to invoke the doctrine of res judicata – see also the discussion in **Peniel Lotta v. Gabriel Tanaki and others** [2003] T.L.R. 312.

While still on the first ground, the appellant has also referred to Civil Case No 75 of 2004 in which the appellant was sued by the respondent in Kinondoni District Court which was on the same subject matter as attracting the supplication of the principle of res judicata. But this complaint also cannot attract the invocation of the doctrine of res judicata because, as rightly put by the first appellate court, Civil Case No

75 of 2004 "was not heard and finally determined by a competent court". We say so because, **first**, the case was dismissed for want of prosecution and therefore was not finally determined on its merits and, **secondly**, by the time it was lodged in Kinondoni District Court, the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 was already in place, it having been promulgated by GN. No. 174 of 2003 to come into force on 01.10.2003, and in terms of section 4 thereof, District Courts no longer had jurisdiction to entertain land matters. Civil Case No 75 of 2004 was therefore not only entertained by a court without jurisdiction and therefore not a competent court but also was not finally determined. It follows that Application No. 61 of 2005 of the DLHT was not res judicata Civil Case No. 23 of 2001 of the Resident Magistrate's Court of Dar es Salaam at Kivukoni.

Before we rest our discussion on the first ground of appeal, we wish to address the argument raised by the appellant in his written submissions to the effect that Civil Case No. 23 of 2001 was a judgment in rem which bound the respondent until it was set aside by an appellate court because of the principle that a judgment in rem is conclusive against everybody. We think the appellant's counsel has misapprehended the meaning of a judgment in rem. Was the judgment

in Civil Case No. 23 of 2001 a judgment in rem as to bind the whole world including the respondent? We have serious doubts. As appearing at pp. 77 through to 85 of the record of appeal the appellant sued Jonathan Mathias Mahela for trespass to, and a declaration that he is a lawful owner of, the disputed land. That case was decided in favour of the appellant as apparent in the judgment of the Resident Magistrate's Court and its concomitant decree appearing at pp. 7 - 9 of the supplementary record of appeal determining the following issues; **one**, whether the Plaintiff is a lawful owner of the disputed plot No. 927 Block H Mbezi Medium Density, Dar es Salaam, **two**, whether the Defendant trespassed thereon and caused damage, and, **three**, to what reliefs are the parties entitled, in favour of the appellant. We do not think a judgment obtained out of these issues would be one in rem. In **Mariam Ndunguru v. Kamoga Bukoli & Others** [2002] TLR 417 the High Court grappled with an akin situation. The facts in that case fall in all fours with the facts before us. In that case, the appellant filed a suit against two defendants in the Resident Magistrate's Court seeking eviction of them, an order declaring them trespassers, an order of injunction as well as damages. She was successful. She then sought to enforce that judgment against the respondents who were not parties to that suit. The High Court held that that judgment:

"... was a judgment in personam, described more accurately as a judgment inter partes, not a judgment in rem; it was a judgment against only the defendants in that suit."

In distinguishing what a judgment in rem was from a judgment in personam, the High Court observed at p. 421:

"So in this sense the judgment of the court was a judgment in personam, against the defendants only, and not in rem   The common law, to my understanding, recognises both judgments in rem and judgments in personam. It all depends on the nature of proceeding in which the particular type of judgment is sought. Thus a judgment in an ordinary action of contract or tort will be a judgment in personam or, more accurately, a judgment inter partes, a judgment declaratory of status would be a judgment in rem. As seen above the reliefs in the present case indicate that the suit was founded on trespass which is tort. It was sought in it that the defendants be declared to have been trespassers on the suit land and therefore they should be evicted from there and be made to pay compensation for the trespass.   The

> judgment in the suit was a judgment in personam, and not a judgment in rem...."

We subscribe to the position taken by the High Court in **Mariam Ndunguru** (supra) as depicting the correct position of the law. The judgment in Civil Case No. 23 of 2001 between the appellant and Jonathan Mathias Mahela was a judgment in personam and not one in rem. It therefore did not bind the appellant as Mr. Shayo would want us hold.

We wish to elucidate here that a judgment in rem, just like a judgment in personam, may attract the application of the principle of res judicata, however, we are certain that that holds true only in circumstances where its main tenets under section 9 of the CPC, and the illustrations thereof, are met. The situation is exacerbated in the case at hand by the fact that the letter of offer to the appellant was found to be tampered with and therefore not genuine. Over and above, we do not think that the decision in Case No. 23 of 2001 defeated the rights of the respondent who has a better title to the disputed land.

The first ground of appeal is therefore without merit.

The second ground of appeal is a complaint that the High Court erred in law by upholding the decision of the DLHT which was not based on pleadings. We are alive to the trite law that arguments in courts as well as decisions thereon must be based on pleadings. The subject of complaint here is the issue of validity of the offer issued to the appellant as it was alleged to have been tampered with. The DLHT allowed the parties to address on it. The appellant complains that the High Court ought not to have upheld the decision of the DLHT which allowed the parties to address on it as it was not part of the pleadings. We find this complaint as lacking in merits. The DLHT called the parties to adduce their respective evidence and in the process there arose the issue of tampering or otherwise of the offer. In the circumstances, we are settled in our mind that it was incumbent upon the DLHT to make a decision thereon. We find solace on this stance in our decision in **Agro Industries Ltd v. Attorney General** [1994] TLR 43. There, like here, there arose an issue whether the court could make a determination on issues not at all pleaded but which the court allowed parties to address it on them. The Court held:

> *"When a trial court allows parties to address it on any issues, the court must conclusively*

determine those issues, notwithstanding that the issues were not in the pleadings".

We reiterated the position taken in **Agro Industries** (supra) in the decision we rendered as recent as 20. 02.2019 in **Rungwe Freight & Construction Co. Ltd and Another v. International Commercial Bank (T) Ltd**, Civil Appeal No. 133 of 2015 (unreported) in which we were confronted with an identical situation and held:

> *"A Court may base its decision on an unpleaded issue if it appears from the course of the trial that the issue has been left to the Court for decision ... so long as a Court allows the counsel to address it on certain issues, then the judge has to conclusively decide them."*
> *(See also: **Odd Jobs v. Mubia** [1970] EA 476).*

In the case at hand, the DLHT heard the parties on the validity or otherwise of the offer (at pp. 103 and 105). On the authority of **Agro Industries Ltd** (supra) and **Rungwe Freight & Construction Co. Ltd** (supra), it was quite apposite to conclusively determine it. This ground of appeal is likewise devoid of merit and we dismiss it.

The third ground of appeal was not raised in the High Court. There were no arguments in the High Court regarding ownership by prescription (adverse possession) by the appellant. But, as it is an issue of law, we do not hesitate to entertain it. We are aware that ownership by adverse possession arises from long ownership inconsistent with the rights of the lawful owner. However, case law has it that the doctrine of adverse possession would not be invoked in respect of a registered land. We were confronted with an akin argument in **Registered Trustees of the Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others,** Civil Appeal No. 193 of 2016 (unreported) and observed at p. 26:

> *"Possession could never be adverse if it could be referred to a lawful title .... It has always been the law that permissive or consensual occupation is not adverse possession. Adverse possession is occupation inconsistent with the title of the true owner, that is, inconsistent with and in denial of the right of the true owner of the premises (see the referred English cases of* ***Moses v Lovegrove*** *and* ***Hughes v Griffin*** *(supra)."*

In the case at hand, the respondent acquired title to the disputed land in 1997 and that counts to only eight years to 2005 when Application No. 61 of 2005 was filed in the DLHT. The time dating back from 1997 to 1987 cannot be counted because possession by adverse possession only operates against rights of a lawful owner and the respondent was not a lawful owner before 1997. In addition, the claim for ownership by adverse possession does not apply here since the appellant seems to claim that he was actually the lawful owner by virtue of allocation.

Be that as it may, this argument only serves to cement the fact that the appellant is not confident about his ownership of the disputed land. It also strengthens the respondent's case which was supported by proprietary documents including the offer of the right of occupancy as well as the certificate of title to the disputed land. The third ground of appeal is also without merit.

The gist of the complaint in ground four is that the High Court and the tribunal erred in not awarding the appellant compensation for developments he had made on the disputed land. This ground need not detain us. We are of the considered view that compensation for unexhausted improvements can not apply in favour of a trespasser.

Thus, being a trespasser, the appellant cannot be entitled to any compensation. The Court, when confronted with a similar situation in **Tenende Budotela & Another v. The Attorney General**, Civil Appeal No. 27 of 2011 (unreported) held:

> *"Having held that the appellants had no customary land rights at the Ilomero Hill Forest Reserve, it follows that their occupation of the same was by way of trespass.* ***Being trespassers, the appellants and their co-trespassers are not entitled to compensation."***

We are guided by our decision in **Tenende Budotela** (supra) as depicting the correct position of the law in this jurisdiction. The appellant had no better title and became a trespasser to the disputed land the moment it was legally allocated to the respondent on 16.04.1997 and a certificate obtained in the following year. His letter of offer was tampered with and held to be not genuine. He was therefore not entitled to compensation. The High Court was therefore quite right in refusing him compensation.

In the upshot, we are satisfied that this appeal is devoid of merits. It stands dismissed. As the respondent did not appear and did not file any reply written submissions, we make no order as to costs.

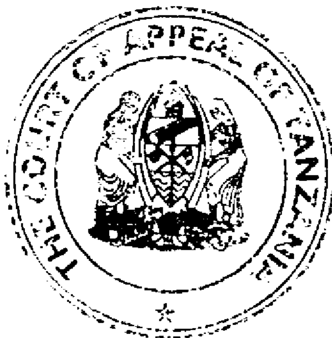
DATED at **DAR ES SALAAM** this 25th day of March, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of March, 2020 in the presence of Mr. Stephen Lucco, learned counsel for the appellant and the absence of the Respondent, is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL