

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: WAMBALI, J.A., SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 165 OF 2019

PRAVIN GIRDHAR CHAVDA.....APPELLANT

VERSUS

YASMIN NURDIN YUSUFALIRESPONDENT

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania, Land
Division at Dar es Salaam)**

(Mgonya, J.)

dated the 18th day of August, 2017

in

Land Case No. 128 OF 2017

JUDGMENT OF THE COURT

18th March & 5th April, 2022

KIHWELO, J.A.:

The appellant, Pravin Girdhar Chavda seeks the reversal of the decision of the High Court of Tanzania, Land Division (Mgonya, J.) dated 18th August, 2017 which upheld the preliminary objection raised by the respondent to the effect that the suit was *res judicata* and therefore dismissed it with costs. Aggrieved by the impugned decision the appellant has come before this Court by way of appeal.

We find it crucial, at the outset, to preface the judgment with a brief historical background which appropriately describes what precipitated this

appeal. The appellant instituted Land Case No. 94 of 2013 in the High Court of Tanzania at Dar es Salaam suing the respondent for trespass on the suit plot, that is to say, Plot No. 263, registered with Certificate of Title (CT) No. 32774, Land Office (L.O) No. 69877, Mbezi Beach, Dar es Salaam (henceforth "the suit property"). The case proceeded *ex parte* after the respondent failed to file a Written Statement of Defence within the prescribed time. After hearing the Plaintiff's case, the suit was dismissed by Hon. Teemba, J. and subsequently, the appellant on 24th April, 2017 lodged Land Case No. 128 of 2017 before the High Court of Tanzania (Land Division) which was ultimately assigned to Lady Justice Mgonya, J. In that matter, the appellant was claiming against the respondent among other things a declaration that, the appellant is a rightful owner of the suit property. In response, the respondent filed a Written Statement of Defence on 19th May, 2017. But before the suit could proceed to hearing in earnest, and as a rule of practice, the trial court had to contend with the preliminary point of objection, notice of which had earlier been lodged along with the Written Statement of Defence. The preliminary point of objection was to the effect that the suit by the appellant before the trial court was *res judicata* and therefore the trial court was *functus officio* to determine the matter. In the end, the trial Judge was satisfied that the preliminary objection was

meritorious and accordingly the suit was dismissed with costs, hence this appeal.

The appellant has lodged a Memorandum of Appeal which is comprised of one ground of complaint only namely;

"That the trial Judge erred in law and facts by finding that Land Case No. 128 of 2017 is Res Judicata to Land Case No. 94 of 2013."

When, eventually, the matter was placed before us for hearing on 18th March, 2022 the appellant had the services of Mr. Abdallah Gonzi, learned counsel who was assisted by Mr. Frank Mushi, learned counsel whereas the respondent was fending for herself, unrepresented. Both the learned counsel for the appellant and the respondent lodged written submissions either in support or in opposition to the appeal which they, respectively, fully adopted during the hearing. In the upshot, Mr. Gonzi invited us to allow the appeal with costs, whereas the respondent urged us to dismiss the appeal with costs.

Arguing in support of the appeal Mr. Gonzi contended that the learned trial Judge was wrong to hold and find that Land Case No. 128 of 2017 was *res judicata* to Land Case No. 94 of 2013. Elaborating further, he forcefully submitted that, whereas in Land Case No. 94 of 2013 the parties were

Pravinchandra Girdharlal Chavda and Yasmin Nurdin Yusufali, in Land Case No. 128 of 2017 the parties were Pravin Girdhar Chavda and Yasmin Nurdin Yusufali and curiously submitted that these were not the same parties. He went ahead to fault the trial Judge's finding that the matter was *res judicata*. In his view, he argued that the judicial pronouncement by Hon. Teemba, J. in Land Case No. 94 of 2013 that Pravinchandra Girdharlal Chavda and Pravin Girdhar Chavda were not one and the same person is still valid and binding to date. Mr. Gonzi argued that by holding that the suit is *res judicata* the learned trial Judge had no jurisdiction to overturn the decision of a fellow High Court Judge and that her decision violates the doctrine of estoppel that prohibits a court of law from re-litigating an issue of law or fact that was raised and determined in the previous case. To facilitate the appreciation of the proposition put forward by the learned counsel, he referred us to the case of **Mohamed Enterprises Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (unreported) and **Issa Athumani Tojo v. Republic** [2003] T.L.R. 199.

Elaborating further, Mr. Gonzi submitted that for the doctrine of *res judicata* to apply all the four elements referred under section 9 of the Civil Procedure Code, Cap 33 R.E. 2019 ("the CPC") must simultaneously and cumulatively exist. Reliance was placed in the case of **George Shambwe**

v. Tanzania Italian Petroleum Co. Ltd [1995] T.L.R. 20. In his view, he argued that two elements out of the four referred under section 9 of the CPC did not exist in the instant appeal and that is to say, Land Case No. 94 of 2013 and Land Case No. 128 of 2017 did not involve the same parties as earlier on hinted and the decision in Land Case No. 94 of 2013 was not finally and conclusively determined, and according to him, Hon. Teemba J. did not determine the matter on merit. Mr. Gonzi urged us to find that the learned trial Judge erred in law and in fact to hold that Land Case No. 128 of 2017 was *res judicata* to Land Case No. 94 of 2013 while all the conditions stated under section 9 of the CPC did not exist.

We wish to remark in passing that, although the respondent lodged written submissions on 11th November, 2019 in reply to the appellant's written submissions, we did not find them to be useful for the determination of the dispute before the Court for the reasons that her submissions focused on the ownership of the suit property and not the impugned decision.

In this appeal, the point for determination in the sole ground of appeal is whether or not Land Case No. 128 of 2017 was *res judicata* to Land Case No. 94 of 2013.

Our starting point will involve a reflection of the law that provides for the doctrine of *res judicata*. For the sake of clarity, we wish to reproduce the provision of section 9 of the CPC which provides thus:

*"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 added]*

We have emboldened the text in the above excerpt as a demonstration of the elements that needs to be proved for the doctrine of *res judicata* to apply. Speaking of the above provision, it is, perhaps, pertinent to observe that, the law in this country, like the laws of other jurisdictions, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong. Therefore, the object of section 9 of the CPC 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. In the case of **Peniel Lotta v. Gabriel Tanaki and Others** [2003] T.L.R. 312 while discussing the applicability of section 9 of the CPC the Court observed that:

"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.

We have given due consideration to the rival arguments by the counsel for the parties and we think, the gravamen of this appeal seems to lie on two issues, that is whether parties in Land Case No. 94 of 2013 and Land Case No. 128 of 2017 were the same and whether the matter in issue in Land Case No. 94 of 2013 was heard and finally decided.

Starting with the first issue, we think in an attempt to answer it, we should let the record of appeal, at pages 6 and 10 speak for itself:

"PLAINT

*The **Plaintiff** above named states as follows:*

1. That the Plaintiff is a natural person, adult, citizen of Tanzania residing and doing business in Dar es Salaam through his companies in the name of BUILDERS (V.M. CHAVDA) LTD and CITY PROPERTIES LTD. **The Plaintiff is also officially known by other variations of his names which are:**

- (i) Pravinchandra Girdhar Chavda;
- (ii) Pravin Girdhar Chavda;**
- (iii) Pravin Girdharlal Chavda;
- (iv) Pravieen Girdhar Chavda;
- (v) Praveenchandra Girdharlal Chavda; and
- (vi) Pravinchandra Girdharial Chavda.**

and his address of service for the purposes of this suit is in the care of:

Abdailah Gonzi (Advocate)

Law Guards Advocates

2nd Floor, Togo Tower,

Kawawa Road,

Kinondoni, P.O.Box 763,

Dar es Salaam

Email: gonzi112@gmail.com

Copy of Statutory Declaration showing the variations in the names of the Plaintiff is attached herewith to form part of this Plaint as Annexure PG 1.

2. 2 to 13 N/A

3. *That the Plaintiff instituted Land Case No. 94/2013 between Pravinchandra Girdharlal Chavda and Yasmin Nurdin Yusufali in the High Court of Tanzania at Dar es Salaam suing the Defendant for trespass to the suit property. The case proceeded ex parte after the Defendant failed to file a written statement of defence within the prescribed time. After hearing the evidence presented by the Plaintiff, the case was dismissed by Hon. Teemba, J., in an ex parte Judgment, on technical grounds that the suit was filed by **Pravinchandra Girdharlal Chavda** while the title deed showed that the plot is registered in the name of **Pravin Girdhar Chavda** as the owner thereof. The case was dismissed without being determined on merit and the Court ruled that the Plaintiff in that case in the name of **Pravinchandra Girdharlal Chavda** had no locus standi to sue for the land owned by **Pravin Girdhar Chavda** without there being sufficient explanation on the variations. Copy of the Judgment in Land Case No. 94/2013 between Pravinchandra Girdharlal Chavda and Yasmin Nurdin Yusufali dated 4th September, 2015 is attached herewith as **Annexure PG 13**. [Emphasis added].*

The above excerpt is a clear testimony that the appellant and the respondent were Plaintiff and Defendant in both Land Case No. 94 of 2013 and Land Case No. 128 of 2017 and the learned trial Judge in the impugned

Judgment was undeniably right to hold that Land Case No. 128 of 2017 was *res judicata* to Land Case No. 94 of 2013 given what was impleaded by the appellant himself and the facts of the case that were presented before her. In our considered opinion, the argument by the learned counsel for the appellant that the parties in Land Case No. 94 of 2013 and Land Case No. 128 of 2017 were not the same is erroneous and misleading. As alluded before, the respondent had nothing useful to argue in respect of this issue.

We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and they cannot be allowed to raise a different matter without due amendments being properly made. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves. For this stand, see for instance, **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported) and **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161. With respect, we are constrained to decline the energetic argument by the learned counsel for the appellant as we are decidedly of the settled view that parties in Land Case No. 94 of 2013 and Land Case No. 128 of 2017 were the same.

We are well aware that, the learned counsel for the appellant referred us to the case of **Issa Athumani Tojo** (supra) in trying to convince this

Court to find that the learned trial Judge was estopped from litigating an issue which was already decided by a fellow judge. However, we wish to express this more in sorrow than fear that, this argument did not assist the learned counsel for the appellant, and in the contrary it works in the favour of the respondent, as the learned trial Judge decided the matter on the basis of section 9 of the CPC and found out that the matter was *res judicata*.

We will now turn to the second issue on whether the matter in issue in Land Case No. 94 of 2013 was heard and finally decided. On our part, we think that, this issue should not detain us much. Records of proceedings bear out that in the ensuing case for the appellant before Teemba, J. in Land Case No. 94 of 2013 the trial was conducted *ex parte* after the respondent defaulted to lodge the Written Statement of Defence and at the height of the trial on 4th September, 2015 the court dismissed the suit for being devoid of merit. For clarity we wish to reproduce part of the Judgment in Land Case No. 94 of 2013 in particular at pages 47 and 48 which reads:

"As already observed, the plaintiff's case was heard ex parte for the reason stated earlier in this judgment. However, only PW1, the plaintiff appeared and testified to prove his

ownership over the suit plot. Therefore, the question stands for determination is "whether the plaintiff has proved lawful ownership of the suit plot."

*Exhibit P3, the duplicate of the Certificate of Title (CT No. 32774 was issued to **Pravin Girdhar Chavda** for a term of 99 years from 01/07/1978. On top of that, there is another document exhibit P2 from the Office of the Registrar of Titles issued on 31/07/1987. This document reveals that, the suit plot with title No. 32774, Plot 263 Mbezi Beach Dar es Salaam was registered in the name of **Pravin Girdhar Chavda**. The plaintiff has told the court that the original Certificate of Title went missing when his brother was deported from the country. **With all due respect, the plaintiff has not proved ownership of the suit plot.** There is no evidence to show that the owner of the plot, as named on the documents, is the plaintiff."*[Emphasis added]

Furthermore, Hon. Teemba, J. finally at page 48 held that:

"That being said, the plaintiff's suit is dismissed in its entirety."

Clearly, the excerpt above is unambiguous that, the matter was determined on merit and hearing was conducted *ex parte* and that Hon. Teemba, J. analyzed the evidence on record and finally came to the conclusions that the appellant did not prove the case and consequently dismissed the suit. A cursory glance at the conclusion of Hon. Teemba, J.

the issue of *locus standi*, we don't think formed the *ratio decidendi* of the case upon which she based to decide the matter.

We hasten to state that, in the instant appeal the trial Judge was justified to hold that Land Case No. 94 of 2013 was heard and finally decided for the clear reasons as stated above.

In our considered opinion the trial Judge was undeniably right to arrive to the conclusion she arrived at, considering the fact that section 9 of the CPC squarely applies in the circumstances of the present appeal as we have observed above and taking into account the position we held in the case of **Peniel Lotta** (supra).

Before we take leave, we bear in mind the famous words of Lord Shaw in **Haystead v. Commissioner of Taxation** [1926] A.C. 155 at page 166 while discussing the common law principle of *estoppel per rem judicatum* or *res judicata* and in which this Court has always sought inspiration:

*"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension, by the Court of the legal result. **If this were permitted, litigation would have no end except when legal ingenuity is exhausted.**"*[Emphasis added]

The overarching policy objective being to ensure that litigation comes to an end.

In view of the foregoing position, we find no merit in the sole ground of appeal. Consequently, we dismiss the appeal in its entirety with costs.

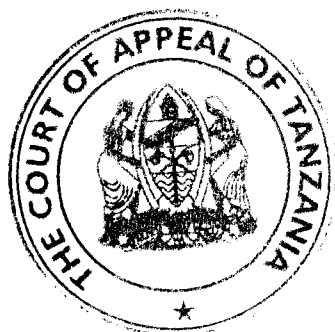
DATED at DAR ES SALAAM this 1st day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered on this 5th day of April, 2022, in the presence of Mr. Abdallah Gonzi, learned counsel for the appellant and the Respondent in person, unrepresented is hereby certified as a true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL