

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MKUYE, J.A., KOROSSO, J.A., And MAIGE, J.A.)

CIVIL APPLICATION NO. 549/17 OF 2019

MARIA CHRYSOSTOM LWEKAMWA APPLICANT

VERSUS

PLACID RICHARD LWEKAMWA 1ST RESPONDENT

LUCAS RICHARD KAMI 2ND RESPONDENT

**(Application for Revision arising from the decision of the High Court
of Tanzania (Land Division) at Dar es Salaam)**

(Makani, J.)

dated the 22nd day of October 2019

in

Civil Case No 385 of 2017

.....

RULING OF THE COURT

30th August, & 16th September, 2022

KOROSSO, J.A.:

Before us is an application for revision brought by way of a notice of motion under rule 65(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on the following grounds:

- i. That after the High Court (Land Division) had laid down Ruling and Drawn Order in respect of preliminary objection (P.O) on res judicata before Hon. Madam Justice C. W. Makuru, the same Court became "functus officio". Hence, Madam Justice Makani*

had no jurisdiction to entertain subsequent preliminary objection on res judicata.

- ii. The Honourable trial Judge erred in law and fact by failure to discern jurisdictional differences between the High Court (Land Division) and Kinondoni District Land and Housing Tribunal including variance to litigants' basis of legal wrangle before ruling High Court suit res judicata.*
- iii. The Honourable trial Judge erroneously dispensed with long-established rules of practice, prudence, and professional conduct amongst judges before she overturned the preceding decision by her sister judge on the same matter without pointing out clearly their lines of departure.*
- iv. The Honourable trial Judge misconstrued the plaintiff's status by reducing her to other beneficiaries of the estate of the late Richard Lwekamwa when the Sale Agreement points out her status quo as co-owner of the disputed property.*
- v. It is well grounded under the core of English doctrine of precedent that where a judge is confronted with a decision binding on him because it was delivered by one of co-ordinate jurisdiction, in theory, he is bound to apply the principle there laid down even if he is satisfied that the principle is incorrect.*

The notice of motion is supported by the affidavit avowed by Christian L. Rutagatina, the advocate for the applicant. The respondents resisted the application through a jointly filed affidavit in reply deposed by both of them.

The background to the application as discerned from the record of the application is that the matter which originates from Probate Cause No. 3 of 2011 was filed at Kolekero Primary Court at Bukoba upon the death of Mr. Richard Lwekamwa, who had died intestate in 2009. The deceased was survived by two wives (one of them the applicant) and nine children amongst them being the 1st and 2nd respondents. The deceased estate included various properties such as houses, motor vehicles, farmland, and cattle herds. One of the houses included in the estate of the deceased in the Probate Cause cited above was one situated on Plot No. 318A (now Plot No. 2007), Kawe Beach, Kinondoni Municipality, registered under Certificate of Title No. 142542 (suit property) in the name of the respondents herein.

Mr. Stephen Lwekamwa (not a party in this application) was appointed by Kolekero Primary Court at Bukoba to administer the deceased's estate. However, the applicant filed Application No. 1 of 2012 in the same Primary Court seeking revocation of the appointed

administrator of the estate. The application was successful and the appointment of Stephen Lwekamwa as the administrator of the estate of the deceased was revoked. Subsequently, Stephen Lwekamwa successfully applied for revision in the District Court of Bukoba in Probate Revision No. 1 of 2012 and it was ordered that Stephen Lwekamwa continue as the administrator of the estate of the deceased. His powers as an administrator of the estate of the deceased having been restored, Stephen Lwekamwa proceeded to distribute the properties in the estate to the heirs, which included the applicant and all the deceased children. The 1st and 2nd respondents were given among other things the suit property while the applicant and her children were given among other things, the house on Plot No. 318B (now Plot No. 2006).

Dissatisfied, the applicant lodged an application at the Kolekero Primary Court at Bukoba in Civil Case No. 3 of 2013 objecting to the distribution of the suit property to the 1st and 2nd respondents claiming that she has been deprived of her matrimonial home and additionally queried why the suit property was subjected to distribution by the administrator of the estate of the deceased while she was a co-owner of the same. The application was successful. Aggrieved by the decision by Kolekero Primary Court of Bukoba in Civil Case No. 3 of 2013, the

administrator of the estate challenged the decision in the District Court of Bukoba in Civil Appeal No. 2 of 2014. The said decision was overturned, and the District Court ordered that the distribution of the deceased estate by its administrator remain undisturbed. There is no record that there was an appeal against the decision of the District Court.

Sometime after the order of the District Court reinstating the administrator of the deceased estate, the applicant initiated a resurvey process of the suit property and plot No. 318B, Kawe Beach, an undertaking which led the said plots to be renamed, the suit property becoming Plot No. 2007 and Plot No. 318B Kawe Beach becoming Plot No. 2006. Thereafter, the applicant without involving other allocatees sold to Exaud Epimaki Kilawe and Leonard Shayo the house on Plot No. 2006 (originally plot No. 318B) which had been allocated to her and her two children (Lweyunga Lwekamwa and Mutalemwa Lwekamwa). Her two children and co-allocatees instituted a suit in the High Court, Land Division in Land Case No. 380 of 2015 to challenge the sale. The dispute ended in a settlement out of court.

The applicant then proceeded to evict the tenants of the 1st and 2nd respondents who lived in the suit property and took possession of the premise. Thereafter she initiated the process to sell the suit property. The

respondents instituted a suit at Kinondoni District Land and Housing Tribunal in Land Application No. 105 of 2014 seeking a declaratory order that they were lawful owners and vacant possession of the suit property. The default judgment was in favour of the respondents. The respondents initiated execution proceedings leading to the eventual eviction of the applicant. The applicant then filed an application for an extension of time to set aside the *ex parte* decision in Misc. Land Application No. 454 of 2017, which was later withdrawn on 30/10/2017. Moreover, on 12/10/2017, the applicant instituted Land Case No. 385 of 2017 in the High Court, Land Division at Dar es Salaam against the respondents herein and the Commissioner for Lands seeking that she be declared the rightful owner of the disputed property and the Commissioner for Land be ordered to rectify the CT No. 142542 for Plot No. 2007 by deleting the names of the respondents and replacing it with the applicant's name.

Before the hearing commenced, since the respondents had filed preliminary objection points contending that the case was *res judicata* to Probate Cause No. 3 of 2011 of Kolekero Primary Court, the High Court Judge proceeded to hear and determine it. On 5/9/2018, the High Court, Makuru J., overruled the objection stating that the matter was not *res judicata* for reason that at the Primary Court the issues for determination

related to probate cause of the estate of Richard Lwekamwa while what was before her was the determination of the ownership of the disputed land. The other factor the High Court Judge considered was that the two matters had different parties and thus concluded that the threshold of a case being *res judicata* was not met.

Thereafter the case was called for hearing on merit before another High Court Judge who had taken over the case, however, the High Court had to entertain another preliminary objection filed on 5/7/2019 by the respondents alleging that the case before the High Court was *res judicata* to Land Application No. 105 of 2014. The High Court (Makani, J.) in her ruling of 22/10/2019 sustained the point of objection raised stating that while aware of the ruling by the predecessor Judge, she was of the opinion the said decision did not bar her from determining the objection points raised since Hon. Makuru, J. had determined the issue with respect to the probate cause of the Primary Court, and her decision was based on an objection that the matter is *res judicata* to Land Application No. 105 of 2014. The suit was thus dismissed. The ruling of the High Court by Makani, J. is what has prompted the present application for revision by the applicant.

On the day of hearing before us on 30/8/2022. Mr. Christian L. Rutagatina, learned Advocate represented the applicant, whereas Mr. Rajabu Mrindoko, learned counsel entered appearance for both respondents.

When accorded an opportunity to amplify the application, Mr. Rutagatina commenced by adopting the notice of motion, supporting affidavit, and the filed written submissions. For the learned counsel for the applicant, there were two issues for determination by the Court. The first issue is the failure of the successor High Court Judge (Makani, J.) when entertaining the preliminary objection before her to properly consider the deliberation in the ruling that determined the preliminary objection in Civil Case No. 105 of 2004 by the predecessor High Court Judge (Makuru, J.). He argued that taking that into account, the filing of the new points of objection before Makani, J. was improper since the matter of whether the case was *res judicata* had already been determined by Makuru J. in the same court. Mr. Rutagatina argued further that the fact that the objection on the case being *res judicata* with respect to Land Case No. 395 of 2015 was determined twice before different judges is obvious and that is erroneous as there was no reason for the two judges to have different decisions on the same matter.

The learned counsel for the applicant asserted that the erroneous decision of the High Court by Makani J. led to the pertinent concerns in the case ending up pending without determination. He contended that there were pertinent concerns such as the valuation of the suit property and the fact that what was sold was only a portion, that the suit property was owned by two people but was recorded as part of the deceased estate which led to its inclusion in the inventory of the deceased properties. He cited the cases of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Naseer**, Civil Application No. 33 of 2012 (unreported) to reinforce his arguments on the sanctity of the decision of a Judge and the fact that another Judge is not supposed to set aside the decision of another Judge. He concluded his submission by urging the Court to quash and set aside the decision of Makani, J., and order that the hearing of the suit proceeds before another Judge. About costs, he prayed that it be granted to one who deserves it.

Mr. Mrindoko on his part commenced by adopting the affidavit in reply and the written submissions filed by the respondents. He intimated his satisfaction with the decision of the High Court by Makani, J. and urged the Court not to interfere but only confirm it. He argued that Makani, J. took over from Makuru J. in presiding over Civil Case No. 385 of 2017 and

the preliminary objection related to it being *res judicata* as against Land Case No. 105 of 2004 and not otherwise. The learned counsel argued that the contention by Mr. Rutagatina is misconceived and misleading since the preliminary objection raised and determined by Makani, J., was on a point of law, not determined before, and thus could be raised at any time.

Mr. Mrindoko pointed out that the respondent's argument was that the suit was *res judicata* to Probate Cause No. 3 of 2011 of Kolekero Primary Court which culminated in the distribution of the deceased property and was confirmed by the District Court of Bukoba in Civil Appeal No. 2 of 2014. He argued that Makuru, J., overruled the objection but when the respondents filed another preliminary objection before Makani, J. that Land Case No. 385 of 2017 was *res judicata* to Land Application No. 105 of 2014, in her findings Makani, J. dismissed the suit finding it *res judicata* having held that she was not barred to determine subsequent preliminary objections on *res-judicata* having found the suit was *res judicata* as regards the probate proceedings but did not apply the principle of *res judicata* with respect to Land Application No. 105 of 2014 which was the subject of the objection which had been dealt with by Makuru, J.

On the contention that Hon. Makani, J. was *functus officio* in determining the point of objection, he referred us to the decision of the

defunct Court of Appeal for East Africa in **Kamundi v. Republic** [1973] T.L.R. 540 where it discussed when a court can be said to be *functus officio* and the Court held that this is when the court disposes of the case finally. According to him, the order of Makuru, J. that overruled the respondent's preliminary objection on the matter being *res judicata* related to a different case to the one in the preliminary objection determined by Makani, J. He maintained that the two orders were founded on different matters and thus the High Court was at no instance rendered *functus officio*.

The learned counsel asserted that the cited case of **Mohamed Enterprise (T)** (supra) is distinguishable since the circumstances differ from that of the instant case. He contended further that there is no decision by Hon. Makuru, J. on the applicability of the principle of *res judicata* in respect to Land Application No. 105 of 2014 as against Land Case No. 385 of 2017 to render the High Court *functus officio*. He thus prayed for the dismissal of the ground.

The learned counsel contended further that the record of the revision shows clearly that the point of objection on the suit being *res judicata* was raised during the defence hearing and Makuru, J., did not determine it. He contended that the record of the revision reveals that

Hon. Makani, J., drew a line of departure on what the predecessor Judge had considered and determined, and it was after having satisfied herself that the said decision did not bar her to consider whether the suit was res judicata. He concluded by urging us to find the instant application to be misconceived and dismiss it with costs.

The rejoinder by Mr. Rutagatina was generally a reiteration of his submission in chief stressing the impropriety of the successor High Court Judge in determining the same issue determined by a predecessor Judge. He urged us to grant the prayers sought in the application.

In determining this application before us we find that the main issue for determination is the propriety of the decision of Makani J., as it relates to the decision of Makuru J. regarding the preliminary objections before each of them in Civil Case No. 385 of 2017. The learned counsel for the applicant and the respondent had opposing views on the issue. Whilst the learned counsel for the applicant contends that Makani J. decision is improper for reason that she was *functus officio* since a similar preliminary objection had been determined by her predecessor judge, the learned counsel for the respondent resisted this contention arguing that what was determined by Makuru J. pertains to a different subject matter and that Makani, J. was not functus officio to determine the matter as she did.

We find it important to briefly travel the terrain of case law to better understand the principle relating to when a court can be said to be *functus officio*. In the case of **John Mgaya and Four Others v. Edmundi Mjengwa and Six Others**, Criminal Appeal No. 8 (A) of 1997 (unreported) where the Court quoted with approval the principle laid down by the defunct Court of Appeal for Eastern Africa in **Kamundi v. Republic** (supra) which held that:

"A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not guilty or by passing sentence or making some orders finally disposing of the case."

Furthermore, in the case of **Mohamed Enterprises (T)** (supra) the Court held that:

"Once judgment and decree are issued by a given court, judges (magistrates) of that court become "functus officio" in so far as the matter is concerned."

In Land Case No. 385 of 2017, which gave rise to the instant application, the Ruling dated 5/9/2018 by Makuru J., related to the determination of four preliminary points of objection raised by the respondents (then, the

1st and 2nd defendants) including the objection stating that the Honourable Court has no jurisdiction to try and determine the matter (*res judicata*). In the determination of the point of objection on the matter being *res judicata*, the High Court judge proceeded first to cite the relevant provision addressing the doctrine of *res judicata* and the tests for its application and then stated:

"As well stated by Mr. Rutagatina, Probate Revision No. 1 of 2012 at Bukoba District Court and Civil Appeal No. 3 of 2014 are creatures of Kolekero Primary Court in Civil Case No. 3 of 2011 in which the issue for determination was probate and administration of the estate of the late Richard Lwekamwa. While in the instant case, the issue for determination is ownership of the disputed land. Further to that, the parties in the aforementioned proceedings were Stephen M. Lwekamwa and Maria Lwekamwa while in the instant case the parties are Maria Chrysostom Lwekamwa, Placid Richard Lwekamwa on one side and Lucas Richard Kami and the Commissioner for Lands on the other side. On that basis it apparent that this suit does not meet all the tests of res judicata as provided under section 9 (supra). Therefore, the first preliminary objection is with no merits and is hereby overruled."

After discussing all the objection points and finding them to lack merit, the High Court judge concluded by overruling the raised objections with costs.

On the part of Makani J., who took over presiding Land Case No. 385 of 2017 from Makuru J., before her for determination was a point of objection that the matter is *res judicata* because it was directly or substantially in issue with Land Application No. 105 of 2014 determined by Kinondoni DLHT, commenting on the ruling by Makuru J. she stated:

"Indeed, there was a preliminary objection that was raised and decided upon by this court. The objection was also on res judicata and the court as correctly stated by Mr. Rutagatina overruled the objection... It is apparent from above, that the basis of the said objection was the Probate No. 1 of 2012 at Bukoba District Court which were creatures of Civil Appeal No. 3 of 2014 and Civil Case No. 3 of 2011 and the present suit and not Land Application No. 105 of 2014 which is now the subject of the preliminary objection before me. The court is therefore not barred from determining this preliminary objection because it has not made a decision of the applicability of the principle of res judicata in respect of Land Application No. 105 of 2014."

Clearly, a review of the above excerpt from the ruling of Makani J., shows that on her part she decided to proceed with determining the preliminary objection point convinced that it differed in context from the one decided by Makuru, J. After revisiting the record of revision what is plain is that both preliminary objections arose from Land Case No. 385 of 2017 and the parties are similar to those in the instant appeal apart from the Commissioner for Lands as the 3rd defendant. In that case, the applicant claimed among other reliefs to be declared the rightful owner of the suit property and for the Commissioner for Lands to effect the requisite changes of names on ownership of the suit property. Land Application No. 105 of 2014 in DLHT was filed by the respondents to seek a declaration that they be declared the lawful owners of the suit property and for vacant possession of the suit property. The DLHT determined the matter in favour of the respondents. In the ruling of Makuru, J. at page 3 thereof, the existence of the proceedings in Land Application No. 105 of 2014 and the related *ex parte* order were brought to the knowledge of the court. It can thus not be said that Makuru, J. was unaware of the same in the process of overruling the point of objection on the matter being *res judicata*.

Essentially, the challenge on ownership in both decisions arose from the distribution of the deceased estate of Richard Lwekamwa by the administrator Stephen Lwekamwa who gave the respondents the suit property as their share of the estate of their deceased father. Therefore, clearly, the decisions in Probate Revision No. 1 of 2002 at Bukoba District Court and Civil Appeal No. 3 of 2014 relate to the decision of Kolekero Primary Court in Civil Case No. 3 of 2011 as they relate to the administration of the estate of the deceased Richard Lwekamwa. Indeed, the two respondents derive their title from Probate and Administration Cause No. 3 of 2011 at Kolekero Primary Court as per the distribution of the estate of Richard Lwekamwa (deceased) by the administrator, while the applicant's claims are as expounded dissatisfied with the distribution of the property of the deceased grounded on her claims of being a part purchaser of the suit property, claims which were subject to determination by the Court in Land Case No. 385 of 2017 whose determination came to a standstill upon the impugned ruling by Makani, J.

The fact that in her ruling Makani J., observed that the parties were all beneficiaries of the estate of the late Richard Lwekamwa and so they are all claiming ownership of the said property on account of the distribution of the said estate by the administrator one Stephen Lwekamwa

demonstrates that the preliminary objection before her was a string of what had already been determined by Makuru J. as it relates to the Probate case of the estate of Richard Lwekamwa. Therefore, with due respect, we are of the view that Makani, J., having found thus, she should not have proceeded to hear and determine again an objection on whether the matter was *res judicata* understanding that another Judge had dealt with a similar issue relating to the same subject matter. It is settled that a judge or magistrate should refrain from setting aside the decision of a fellow judge or magistrate (see, **Mohamed Enterprise** (supra)).

It is trite law that when a court finally disposes of a matter, it seizes to have jurisdiction over it. The application of this principle was emphasized in the case of **Tanzania Telecommunication Company Limited and Others v. TriTelecommunications Tanzania Limited** [2006] I EA 393. Indeed, as stated above, after Makuru J., had determined the objection on the matter being *res judicata* on a matter that is founded on the administration of the estate of Richard Lwekamwa, there was no need for another judge to decide on the same issue as what transpired in the instant case. In consequence, we find this ground has merit. We are also of the view that this ground is enough to dispose of the matter.

That said and done, we invoke the revisional jurisdiction vested in the Court and hereby nullify the ruling by Makani J., dated 22/10/2019 in Civil Case No. 385 of 2017, and set aside the order arising therefrom. We further order that, the hearing of Civil Case No. 385 of 2017 proceed for hearing from just before the hearing of the preliminary objection raised by the respondents before Makani J. Costs will be in the cause.

DATED at DAR ES SALAAM this 15th day of September, 2022.


R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 16th day of September, 2022 in the presence of Mr. Christian Rutagatina, learned counsel for applicant also holding brief of Mr. Rajab Mrindoko, learned counsel for Respondents is hereby certified as a true copy of the original.




J.E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL

