

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., KENTE, J.A., And KIHWELO, J.A.)**

**CIVIL APPEAL NO. 316 OF 2019**

**ZUBERI PAUL MSANGI ..... APPELLANT**

**VERSUS**

**MARY MACHUI ..... RESPONDENT**

**(Appeal from the Ruling and Order of the High Court, (Land Division)**

**at Dar es Salaam**

**(Maige, J.)**

**Dated the 6<sup>th</sup> day of September, 2019**

**in**

**Land Case No. 361 of 2017**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

27<sup>th</sup> September, & 27<sup>th</sup> October, 2022

**KENTE, J.A.:**

One of the pillars of the modern law of civil procedure as derived from Roman Jurisprudence and which has been accepted throughout the Common Law Jurisdictions with the utmost respectability, is the doctrine of res judicata. According to Shivan Goelin in his article entitled "Rome has spoken, the cause has ended. Rome Spoke Through her Laws" (<https://www.shivan.com/articles/rome-has-spoken-the-cause-has-ended-rome-spoke-through-her-laws>):

ssrn.com/abstract=3307814) from which we can obtain a pertinent illustration, simply stated, the doctrine means that:

*"If a person though defeated at law sues again, he should be answered "you were defeated formerly".*

Today, it is generally understood among the legal fraternity, that the doctrine of res judicata is based upon two other maxims of Roman law. **One**, that, **interest reipublicae ut sit finis litum**, that is, it concerns the State that there should be an end to law suits, and **two**, that, **nemo debet bis vexari pro una et eadem causa**, that is, no man should be vexed twice over for the same cause. Otherwise, no one can gainsay that, when the doctrine is applicable, if it is not given full effect, an abuse of the court process takes place.

We have no doubt whatsoever that, the doctrine of res judicata as provided under section 9 of the Civil Procedure Code, Chapter 33 of the Laws, makes today both good sense and good law; and the reason why we have found it appropriate to preface this judgment by the above jurisprudential background will gradually be laid to bare.

The appellant Zuberi Paul Msangi is an administrator of the estate of his deceased father, the late Edward Mbonea Msangi, who died intestate on 12<sup>th</sup> March, 1997. Similarly, the respondent Mary Machui is the administratrix of the estate of the late Caroline Machui who, likewise, died intestate on 5<sup>th</sup> May, 1995. It is common ground that, before they passed on, the late Edward Mbonea Msangi and Caroline Machui were involved in litigation in a dispute over the ownership of a piece of land known and described as Plot No. 81 Block B Part II Tabata Area within the District of Ilala in Dar es salaam Region. The proceedings in the Resident Magistrate's Court of Dar es Salaam (at Kisutu) in Civil Case No. 34 of 1991 were commenced by the late Caroline Machui in a plaint claiming that, the said piece of land belonged to her, after she was allocated by the then Land Department of the Dar es Salaam City Council sometime in 1980. The said allocation was in return for her plot located at Kipawa Area which she had surrendered to the Government to pave the way for the expansion of the Julius Nyerere International Airport. On the other hand, the late Edward Mbonea Msangi claimed that the same piece of land was allocated to him by the same City Council following his application in 1989.

In the judgment of the trial Resident Magistrate's Court (Ruhangisa-RM as he then was), the late Caroline Machui was found to have proved her claim and she was accordingly declared to be the lawful owner of the said piece of land. For the sake of exactitude and in view of the conclusion we have arrived at in this judgment, it would be useful to make a pertinent remark that, the judgment of the Resident Magistrate's Court which has neither been quashed nor set aside or otherwise varied by a higher court, was handed down on 28<sup>th</sup> January, 1994. It is as well not irrelevant to state here that, in 2009, the respondent sold the said piece of land to one Elton Victus Mahenge who went on to issue all occupants of the disputed piece of land plot including the present appellant with a notice requiring them to vacate or risk a forceful eviction.

Armed with the letters of administration of the estate of his deceased father, the appellant unsuccessfully sued the said Elton Victus Mahenge before the High Court (Land Division) in Land Case No. 93 of 2013 claiming, *inter alia* that, the said piece of land belonged to his deceased father. While sustaining the objection raised by the defendant in that suit, the learned trial judge of the High Court (Mohamed, J), observed and correctly so in our view

that, since the parties therein were persons claiming title over the same property respectively under the late Edward Mbonea and Caroline Machui, the suit before him was res judicata to the earlier mentioned Civil Case No. 34 of 1991 before the Resident Magistrate's court.

Following the decision by the High Court, the appellant appears to have fallen into a deep slumber. After four years however, as if he was all along trying to identity his real enemy, but apparently not knowing that he could be jumping out of a frying pan into fire itself, he turned around and lodged another suit in the same division of the High Court this time suing the respondent praying for a declaratory order that he was the lawful owner of the suit property. Accordingly, the appellant prayed for a permanent injunctive order restraining the respondent (the defendant then) or anyone claiming title under her from entering into and occupying the suit property.

Upholding the preliminary point of objection which was raised by the respondent and after considering the arguments advanced from both sides, the learned trial judge of the High Court (Maige, J, as he then was) made an observation and finding to which it is worthwhile to refer. He reasoned, thus:-

*"Since in this matter the plaintiff is claiming the suit property against the same defendant whose title on the suit property is traceable from the said Caroline, this suit is res judicata. In any event, there being a ruling by my brother Mohamed on the same issue, I would have constructively been functus officio to decide otherwise."*

The appellant was not satisfied with the ruling of the High Court striking out the suit on account of being res judicata. This appeal is an expression of his grievances against the decision of the High Court.

At the hearing of the appeal, whereas the appellant was represented by Ms. Lucy Nambuo learned advocate who lodged a two-points memorandum of appeal, the respondent was represented by Mr. Godfrey Taisamo who, like Ms. Nambuo, had represented his client before the High Court. Although Ms. Nambuo appeared to present the appellant's grievances in multiples, as correctly maintained by Mr. Taisamo in his insightful written submissions, the only issue calling for our determination in this appeal is whether the suit before the High Court was res judicata to Civil Case No. 34 of 1991 which was heard and finally determined by the Resident Magistrate's Court as held by the High Court judge.

Therefore, if we may get straight to the point instead of beating around the bush, we can dispose of this appeal by looking at the uncontested factual background giving rise to this dispute which we have already revisited and thereafter gauge it against the applicable law.

In terms of section 9 of the Civil Procedure Code, to make the suit before the High Court *res judicata* to Civil Case No. 34 of 1991 which was decided by the Resident Magistrate's Court, it had to be and, indeed it was established by the respondent that: -

- (i) The matter directly and substantially in issue in the suit before the High Court, was directly and substantially in issue in the suit before the Resident Magistrate's Court;
- (ii) The suit before the Resident Magistrate's Court was between the same parties or privies claiming under them;
- (iii) The parties in the suit before the High Court was litigated under the same title in the suit before the Resident Magistrate's Court.
- (iv) The Resident Magistrate's Court which decided the former suit was competent to try the said suit; and

- (v) The matter in issue before the High Court was heard and finally decided in the suit before the Resident Magistrate's Court.

(See **Peniel Lotta v. Gabriel Tanaki and Others** [2003] T.L.R. 312).

However, it was strongly submitted by Ms. Nambuo that, in the present dispute, the doctrine of res judicata was brought in by the respondent to cover up the fact that, subsequent to the determination of the suit by the Resident Magistrate's court which had decided in favour of the late Caroline Machui, the parties (the late Edward Mbonea Msangi and Caroline Machui) went ahead to settle the matter before the Principal Pastor of the Tanzania Full Gospel Bible Fellowship thus implying that, the disputed piece of land had become the property of the late Edward Mbonea Machui. That is why, according to Ms. Nambuo, on one hand, there has never been any attempt by the respondent to execute the decree of the Resident Magistrate's Court and, on another hand, the judgment and decree of the Resident Magistrate's Court has never been challenged on appeal.

In what seems to be a totally mixture of two distinct issues, instead of addressing herself to the most important question as to whether the suit before the High Court was res judicata to the suit which was heard and



conclusively determined by the Resident Magistrate's Court, the learned counsel drifted into challenging the validity of the sale agreement between the respondent and Elton Vitus Magenge and contended in the end that, the suit property belonged to the appellant. Ms. Nambuo complained that the trial judge failed completely to appreciate all the circumstances surrounding the case hence ending up determining the matter before him somewhat superficially. In an overly sympathetic rather than legalistic style, the learned counsel concluded that, unless the suit is tried and determined on merit, the appellant stood to be victimized for no good reason.

For his part, after addressing himself to the real point in controversy and, considering the uncontested factual background giving rise to this dispute, the rest was downhill for Mr. Taisamo. He submitted that, the appellant could not re-open the fresh proceedings in the High Court over the same property which was declared by a competent court to belong to the late Caroline Machui whose estate is now under the administration of the respondent. The learned counsel sought to challenge the appellant's counsel for alleging that subsequent to the decision by the Resident Magistrate's Court, the parties had settled the matter for TZS: 600,000.00 before a

church-leader. Based on the above stated arguments, Mr. Taisamo invited us to dismiss the appeal for lack of merit.

In view of the fact that the five conditions requisite for the doctrine of res judicata to come into play were established by the respondent both in the present appeal and in the suit before the High Court, we accept the invitation by Mr. Taisamo without demur. The combined effect of the respondent's proof of existence of the said five conditions is that, being the administrator of the estate of his deceased father, the appellant could not be heard to re-open the same suit which had already been heard and conclusively determined by the Resident Magistrate's Court. In so holding, we are mindful of Ms. Nambuo's misplaced contentions based on speculations and imports of which, it was not a surprise to us that Mr. Taisamo made no efforts to counter. However, one thing that is certain is the fact that, without disrespect to, nor otherwise belittling our most esteemed spiritual leaders to whom we always pay unfeigned respect, a court's decision finally determining a dispute between the parties, can neither be overturned nor superseded or varied by the decision of a church-leader, no matter his rank.

It is for the foregoing reasons that we find the appellant's complaint against the decision by the learned trial judge on the footing of some other circumstances not based on law as launched by Ms. Nambuo seeking to oppose the formidable defence of res judicata with which we are concerned, to be unfounded both in law and in fact.

On the whole therefore, we find no merit in this appeal which we accordingly dismiss with costs.

**DATED at DAR ES SALAAM this 19<sup>th</sup> day of October, 2022.**

R. K. MKUYE

**JUSTICE OF APPEAL**

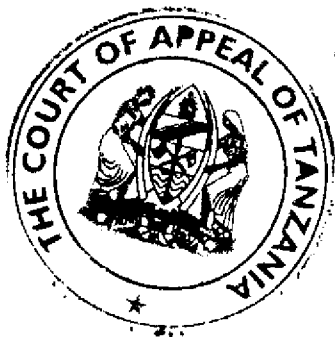
P. M. KENTE


**JUSTICE OF APPEAL**

P. F. KIHWELO

**JUSTICE OF APPEAL**

The judgment delivered on this 27<sup>th</sup> day of October, 2022 in the presence of Ms. Lucy Nambuo, learned advocate for the appellant who also holds brief for Mr. Godfrey Taisamo, learned advocate for the respondent is hereby certified as a true copy of the original.



  
**S. P. MWAISEJE**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**