IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MKUYE, J.A., KAIRO, J.A. And, MDEMU, J.A.)

CIVIL APPEAL NO. 436 OF 2022

DIOCLES KAMUHABWA ..... APPELLANT

VERSUS

THEONEST KAMUHABWA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, at Bukoba)

(Kilekamajenga, J.)

dated the 11th day of June, 2021

in

Land Case Appeal No. 4 of 2020

JUDGMENT OF THE COURT

12th & 22nd March, & 2024

KAIRO, J.A.:

This is a second appeal. The appellant seeks to challenge the judgment and decree of the High Court of Tanzania, Bukoba District Registry, delivered on 11th day of June, 2021 in Land Case Appeal No. 4 of 2020.

The background to the appeal can briefly be stated as follows: At Karabagaine Primary Court, the respondent sued the appellant's father, one Sosthenes Kamuhabwa in Civil Case No. 8 of 1993 claiming ownership of the land in dispute, but he lost. Displeased, the respondent

successfully appealed to the District Court vide Civil Appeal No. 16 of 1995. The appellant's father was aggrieved and decided to appeal to the High Court, Bukoba District Registry in Civil Appeal No. 134 of 1995. However, the appeal was later on 1st November, 2013 withdrawn with leave to refile, by Mr. J.S. Rweyemamu, the advocate of the appellant's father by then. However, no appeal was filed since then.

In 2016 the appellant filed Land Application No.42 of 2016 against the respondent in the District Land and Housing Tribunal (the DLHT or the Tribunal). It was the appellant's claim that, the land in dispute was gifted to him by his father way back in 1989, and thus prayed to be declared a rightful owner and in fact, he was so declared. Aggrieved, the respondent appealed to the High Court which allowed the appeal. In its decision, the High Court observed that, since the appellant's father was litigating with the respondent over the land in dispute in Civil Case No. 8 of 1993, hence, Land Application No. 42 of 2016 of the DLHT was *res-judicata.* The appellant was not amused by the said decision, thus, lodged this appeal armed with the following grounds:-

1. *That, the first appellate court erred in law and fact to hold that application No. 42 of 2016 before the DLHT was res-judicata to Karabagaine Primary Court Civil Case No. 8 of 1993 and Bukoba District Court in Civil Appeal No. 16 of 1995.*

2. *That whether the magistrate in Civil Appeal Case No. 16 of 1995 of Bukoba District Court erred in law and fact to hold that after reversing the Karabagaine Primary Court judgement in Civil Case No. 8 of 1993, the tittle of the land in dispute was reverted to the respondent.*
3. *That, the first appellate court failed to re-assess and re-evaluate the evidence.*

At the hearing of the appeal, Messrs. Al-Muswadiku Chamani and Eliphazi Bengesi, both learned counsels represented the appellant and the respondent respectively.

When invited to amplify the grounds of appeal, Mr. Chamani fully adopted the appellant's written submissions without more. He prayed the Court to consider them and allow the appeal.

Mr. Bengesi, on his part, also adopted the respondent's submissions opposing the appeal and implored the Court to find them sufficient to counter the appeal and accordingly, dismiss it.

However, Mr. Bengesi aired some concerns as regards the record of appeal, which according to him, renders the appeal incompetent. We allowed him to proceed after a no objection from Mr. Chamani. The following were his concerns: -

One, that the appellant neither inserted in the supplementary record of appeal, a letter to the District Registrar requesting for the documents lodged as supplementary record, nor a letter from the District Registrar informing the appellant that the documents lodged as supplementary record were ready for collection. It was his contention that, in absence of the said letters, it is not known as to the source as well as authenticity of those documents. **Two**, that the appellant was ordered to lodge supplementary record of appeal to which he did, but together with it, he added a certificate of correctness of record plus the appellant's and respondent's addresses of service, which according to him, was not part of the ordered supplementary record of appeal. **Three**, that the appellant cited rule 95 (5) of the Rules, as an enabling rule to certify the correctness of the record of appeal, but in the supplementary record of appeal, rule 96 (5) of the Rules was cited as an enabling provision for the certification. He contended that, the situation has left the Court in a dilemma for not knowing under which provision the appellant made his certification. As a way forward, Mr. Bengesi urged the Court to strike out the record of appeal with costs, for want of competence.

Replying on failure to attach a letter to and from the District Registrar concerning the documents lodged as supplementary record of appeal, Mr. Chamani submitted that, there is no law which compels a party to do so when filing the supplementary record of appeal and that, even Mr. Bengesi has not cited any to support his arguments.

On our side, we join hands with Mr. Chamani's argument over the issue. Besides, we do not see any harm in so doing. In our view, the presence of the said certificate of correctness of record, by itself is enough to authenticate the genuiness and correctness of the documents lodged. That apart, the documents do not form part of the contents of the case to render the appeal incompetent as submitted by Mr. Bengesi.

Regarding the inclusion of other documents in the supplementary record of appeal apart from those ordered to be filed, Mr. Chamani responded that, the said documents to wit; the certificate of correctness and addresses of service of the parties were included into the record of appeal to fulfil the legal requirement under rule 96 (5) of the Rules.

Coming to the concern that the appellant cited rule 95 (5) and 96 (5) of the Rules when certifying the corrections of the record in the original and supplementary records of appeal, Mr. Chamani stated that rule 95 (5) does not exist adding that, the citing of it was just an

oversight. He further refuted the presence of dilemma on the part of the Court as alleged by Mr. Bengesi.

It is true that the appellant has cited rule 95 (5) and 96 (5) of the Rules as enabling provisions in the certificates of correctness of the record in the original and supplementary record of appeal respectively. Nevertheless, the law is now settled that citing a wrong provision is curable and does not render the record of appeal incompetent. On that account, we are of the firm view that the raised concerns are minor and do not go to the root of the matter. As such, neither of them renders the appeal incompetent. We accordingly overrule the same.

Before addressing the grounds of appeal, Mr. Chamani raised a point of law in the written submissions to the effect that, the trial Tribunal did not adhere to the legal requirement in respect of the participation of assessors in the determination of the application before it. He argued that, despite the fact that the said point was not included in the memorandum of appeal, the Court has a duty to look at it and accordingly determine the same. He cited the case of **B. 9532 CPL. Edward Malima vs Republic,** Criminal Appeal No. 15 of 1989 (unreported) to back up his argument.

In elaboration, Mr. Chamani submitted that though the Chairman of the Tribunal in its judgment referred to the opinions of L.D. Mpanju and F. Rutabanzibwa who sat as assessors in Land Case No. 42 of 2006 and departed from them, the purported opinions were neither recorded in the proceedings nor read over to the parties before composing the judgment. In that regard, it was his contention that, the trial proceedings and its judgment were vitiated for lack of fully participation of the assessors. He referred the Court to the case of **Rev. Peter Benjamin vs Tumaini Mtazamba @ Mrema**, High Court Land Appeal No. 69 of 2019, Bukoba District Registry into which Kilekamajenga, J. guided the Tribunal on how the assessors' opinions are supposed to be recorded. He therefore invited the Court to quash and nullify the proceedings and judgments of both the DLHT and the High Court as they arose from the nullity proceedings and decision of the DLHT.

Mr. Bengesi readily conceded to the pointed-out anomaly as well as the submitted consequence, reasoning that the anomaly went to the root of the matter, as such, the matter cannot be left to stand.

Indeed, it is true that the raised point of law regarding assessors was not raised in the memorandum of appeal, but as argued by the learned counsel, the same can be raised at any time, even at the

appellate stage. See also in **Ms. Faida Hussein & Company Limited vs Tanzania Harbours Authority**, Civil Appeal No. 60 of 1999 and **Ex-Police No. E. 5812 PC. Renatus Itanisa vs The Inspector General of Police & Another**, Civil Appeal No. 147 of 2018 (both unreported). Basing on the said stance of the law, we now venture to determine the pointed-out anomaly.

According to Mr. Chamani, the anomaly has two limbs, **one;** the opinions were not recorded, and **two;** the opinions were not read to parties. The issues to be addressed therefore is whether the pointed-out anomaly exists and if yes whether it vitiates the Tribunal's proceedings.

The participation of assessors in the determination of land matters is guided by sections 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019, (the Act). For ease of reference, we take liberty to reproduce the said provisions as follows: -

> *"(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.*
>
> *(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out*

their opinion before the Chairman reaches the judgment."

Further to that, Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No 174 of 2003 requires every assessor present at the trial to give his/her opinion in writing at the conclusion of the hearing and before the Chairman composes a judgment. It provides: -

"Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."

It is worth noting that, section 23 (1) of the Act was complied with as it is on record that the Chairman sat with two assessors namely; L.D. Mpanju and F. Rutabanzibwa. The Court shall therefore analyse the Tribunal's compliance with section 23 (2) of the Act.

The record of appeal shows that after the conclusion of the trial, the case was adjourned to allow assessors to opine as can be verified by the following excerpt at page 96 of the record of appeal:

*"... **Adv. Chamani:** I filed final written submission, let the case be placed before assessors for opinion.*

***Tribunal:** Mr. Bengesi also filed his final submission.*

Order:

(i) Assessors to record their opinions

(ii) Mention on 17/10/2019.

Sgd: E. Mogasa

Chairman

30/9/2019."

The record further reveals that, the assessors' opinions were not ready on the scheduled date and thus, the case was adjourned to 24th October, 2019 for the purpose of recording their opinions (page 97 of the record of appeal). On the scheduled date, part of the record reads as follows after recording the coram:

"... L. D. Mpanju not recorded her opinions, she is sick at Dar es Salaam.

Order:

(i) Mention on 25/11/2019

(ii) The assessor to record her opinion.

Sgd: E. Mogasa

Chairman

30/9/2019."

It is important to mention that, at page 101 of the record of appeal, there is a hand written opinion of F. Rutabanzibwa dated 23/10/2019 which, in our view is in compliance with the above excerpt. We are saying so because the Tribunal under order (ii) categorically stated *"the assessor to record her opinion"* in singular and the referred assessor therein was a female. By that date, only F. Rutabanzibwa had his opinion recorded. The opinion of another assessor ie. L.D. Mpanju, was slotted for another date.

It is also on record that on 25/11/2019 when the matter was scheduled for mention, both assessors were present together with the parties and the Tribunal ordered the judgment to be pronounced on 23/1/2020 and later adjourned to 30/1/2020 (pages 98 – 99 of the record of appeal). It is imperative to note that at page 100 of the record of appeal, there is again an attachment of a handwritten opinion of L. D. Mpanju dated 18/11/2019. It is our take therefore that, on 25/11/2019 when the Chairman ordered the judgment date to be on 23/1/2020, he already had the opinions of both assessors recorded in handwritten form. In that context, the judgment was composed after the assessors' have filed their opinions. Thus, the opinions were, for the purpose of the law, recorded as required. It goes that the allegation that the

assessors did not record their opinions before the tribunal composed its judgment, is with respect, not correct. The first limb of the argument thus, fails.

Mr. Chamani has also argued that the assessors' opinions were not read over to parties. However, after going through the record, we have observed that, the Chairman departed from the opinion of assessors on the ground that their opinion were influenced by the fact that the suit was *res judicata* which is a contentious issue before the Court. Let the record of appeal at page 140 speak by itself regarding this fact:

> *"In the opinions of L. D. Mpanju and F. Rutabanzibwa, they were influenced by the case between the respondent and Sostenes Kamuhabwa, and they seem to imply that the suit is RES JUDICATA"* (page 140 of the record of appeal)."

In our view, since the issue of *res judicata* which we are now called upon to determine was opined by the assessors and was a point of departure by the Chairman, and since the parties to the suit were present throughout the proceedings including the judgment date, it can safely be ruled out that the assessors' opinions were read over to the parties. But even if the opinions were not read to parties, we believe no

prejudice was occasioned to the parties in the circumstances of this case. Again, the second limb of the argument also fails.

For what we have endeavoured to discuss, the point of law raised has no merit and we overrule it.

We now revert to consider the merit of the appeal starting with the 1st ground into which the 1st appellate Court is faulted in its finding that Land Application No. 42 of 2016 before the DLHT was *res-judicata* to Karabagaine Primary Court Civil Case No. 8 of 1993 and Bukoba District Court Civil Appeal No. 16 of 1995. It was the argument of Mr. Chamani that the parties in the referred matters are different. Besides, the 1st appellate court erred to rely on the documents of the previous matters to reach at the said finding. He contended that, the stance of the law is to the effect that, the annextures attached along with either the plaint or WSD are not evidence. It was his further contention that, the High Court's decision was grounded on the evidence which was not properly adduced during trial, as such, the consideration of the extraneous matters resulted to a wrong decision. He referred the Court to the case of **Godbless Lema vs Musa Hamis Mkanga & Others**, Civil Appeal No. 47 of 2012 and **Ismail Rashid vs Mariam Msati**, Civil Appeal No. 75 of 2015 (both unreported) to fortify his arguments.

Mr. Chamani further contended that the High Court mis-interpreted the application of the said doctrine. Elaborating, he submitted that, the High Court in its analysis stated that there is dearth of evidence to suggest that the disputed land is different from the one contested in 1993, which according to him, there was no evidence to prove *res judicata*.

In his further elaboration, the appellant's counsel argued that, even if the property involved is one and the same, still it does not necessarily render the cause of action identical or convert the matters directly and substantially in issue to be the same. He cited the case of **Chama cha Mapinduzi vs Mohamed Ibrahim and Sons, and Another,** Civil Appeal No. 16 of 2008 (unreported) to back up his contention.

In his further argument, Mr. Chamani also submitted that the High Court was also required to consider the reliefs claimed by the parties in the said matters which, in his view, were different. Illustrating, he contended that, the late Sosthenes Kamuhabwa, (the appellant's father) was claiming *"shamba na matofari yenye thamani ya laki sita"* (literally translated to mean *"a farm and bricks worth 600,000/="* in Civil Case No. 8 of 1993 while at the DLHT in Land Application No. 42 of 2016, the

appellant (applicant therein) was claiming to be declared the owner of the suit land, among other reliefs.

It was also the contention of the appellant's counsel that the names of the parties in the cases adjudged to be *res judicata* were different, yet there was no affidavit to prove that the names belonged to the same person.

In reply, Mr. Bengesi vehemently opposed the arguments by Mr. Chamani. He submitted that, the doctrine is provided in section 9 of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC) whereby five tests have been provided in determining whether or not the contentious case is *res judicata*. He submitted that one of the tests is that the former suit must have been between the same parties or privies claiming under them. He clarified that, though the appellant was neither a party in Civil Case No. 8 of 1993 nor in Civil Appeal No. 16 of 1995, but his father one Sosthenes Kamuhabwa, still, the appellant was claiming under his father in the Land Application No. 42 of 2016 as he was litigating on the basis of a common interest as regards the subject matter of the suit within the meaning of section 9 of the CPC, having inherited the land in dispute from his father. Mr. Bengesi further submitted that, apart from the parties litigating under the same title, even the reliefs claimed by the

parties in the two referred cases were the same contrary to what was submitted by the appellant's counsel.

Regarding the argument by Mr. Chamani that the names of the parties differ, the respondent's counsel dismissed the same and further submitted that, the argument is out of context and meritless. On that basis, he argued that, all the cited cases by Mr. Chamani disputing the concept of *res judicata* in the appellant's submission are distinguishable insisting that, the High Court was correct to reach to the said conclusion.

Having thoroughly gone through the record of appeal, and the submissions made by the parties, we are of the considered view that the main issue for our determination as regards the first ground is whether or not Land Application No. 42 of 2016 before the DLHT was *res-judicata* to Karabagaine Primary Court Civil Case No. 8 of 1993.

We find it relevant first to understand the definition of *res judicata*. According to Black's Law Dictionary, Ninth Edition, *res judicata* is defined as hereunder:

> *"an affirmative barring the same parties from litigating a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and that could have been raised but was not raised in the suit"*

In our legal system, the said doctrine is provided for under section 9 of the CPC which provides for the circumstances under which the doctrine of *res judicata* operates. For clear understanding, we wish to reproduce the provision as here under:

> *"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]

It is noteworthy that the objective of the doctrine hinges on the public policy that litigation has to come to an end so that the parties can continue with their normal developmental activities. It therefore bars multiplicity of suits and ensures finality of litigation, and in a way also protecting an individual from multiplicity of litigations. See: **Umoja Garage vs NBC Holding Corporation** [2003] T.L.R. 339.

Equally, the doctrine of *res judicata* was expounded in the following cases, to mention but a few: **Peniel Lotta vs Gabriel Tanaki & 2 Others** [2003] T.L.R. 312 and **The Registered Trustees of Chama cha Mapinduzi** (supra) when discussing the applicability of section 9 of the CPC.

Applying the above legal disposition to the facts at hand, the circumstances under which the doctrine operates shall be considered in determining whether the parties and issues involved or the cause of action are the same in the cases at issue.

According to the record of appeal, the parties in Civil Case No. 8 of 1993 were Theonest Kamuhabwa (the respondent) who sued Sostenes Kamuhabwa, the appellant's father claiming *"shamba na matofari yenye thamani ya laki sita"* literally translated to mean *"a farm and bricks worth 600,000/=").* It is on record that, the basis of his claim hinged on the alleged ownership of the land in dispute which he stated to have been bequeathed to him by his late father. He lost the battle, but later succeeded on appeal vide Civil Appeal No. 16 of 1995 at the District Court.

On the other hand, the parties in Land Application No. 42 of 2016 were the appellant who sued the respondent praying to be declared the owner of the land in dispute by the DLHT. He succeeded, but on appeal,

the High Court found the claim *res judicata*, hence, this appeal by the appellant. Analysing the reliefs claimed by the parties, it is evident that they revolve around the claim of ownership of the land in dispute. As such, the matter which was directly and substantially in issue in Civil Case No. 8 of 1993 were also directly and substantially in issue in Land Application No 42 of 2016.

We are aware that the appellant was not a party in the previous matter at the Primary and District Courts respectively, but his allegation that he has inherited the land in dispute from his father, means that the appellant was litigating under the same title in the former suits and had legal interest or privity in the said action as correctly submitted by Mr. Bengesi. This Court, in **The Registered Trustee of Chama cha Mapinduzi** (supra), quoting with approval the case of **Jarwat Singh and Another vs The Custodian of Evacuee Property**, New Delhi, 1985 AIR 1096 into which the Supreme Court of India, while examining section 11 of the Indian Code of Civil Procedure which is in *pari materia* with section 9 of the CPC observed: -

> ***"the test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings"*** [Emphasis added].

Mr. Chamani's has also argued that the High Court relied on the document attached to the pleadings which according to him was not evidence for being improperly adduced. As a result, it reached to a wrong decision and cited the case of **Godbless Lema** (supra) to fortify his argument. Upon perusing the record of appeal, we observed that, the annexed document in the cited case was the voters' card used to verify the list of registered voters. However, in the case at hand, the annexture was the decision of the District Court in Civil Appeal No. 16 of 1995. It is our firm view that the Court in the cited case was correct to require the voters' card to be first tendered and admitted before using it as evidence, while in the case at hand, the High Court was entitled to take cognisance or judicial notice of the said decision without requiring the same to be tendered and admitted. After all, there was no dispute over the presence of the said decision to require proof. As such, the cited case of **Godbless Lema** is distinguishable and we find the argument to have no merit.

As regards the argument by the appellant that the High Court's statement that "*there was dearth of evidence to suggest that the disputed land is different from the suit contested in 1993*" means that there was no enough evidence to prove *res judicata*, suffices to state

that the interpretation is not correct. In fact, the opposite is the case. In that regard, we see nothing to fault the High Court in its finding. Thus, the argument that there was no enough evidence to prove *res judicata* is with respect to Mr. Chamani, not correct.

Other issues to be determined are whether the court which decided the former suit was competent to try the subsequent suit and further whether the matter in issue was heard and finally decided in the former suit.

There is no dispute that the Primary and the District courts which previously decided the former suits were competent to try them and thus, it was proper to hear and finally determine them as they did. Likewise, the DLHT which determined the subsequent suit, the subject of this appeal, was also competent to do so. Without hesitation therefore, it is our firm view that, the answer to the said issues are in the affirmative.

Basing on what we have discussed above, we are of a firm view that all conditions before the suit can be declared *res judicata* were squarely met, and thus, the finding of the High Court was correct and we find nothing to fault it.

Having found that the Land Application No. 42 of 2016 before the Tribunal was *res judicata* to Karabagaine Civil Case No 8. of 1993 and

Bukoba District Court Civil Appeal No 16. of 1995, we do not see the need to venture in the determination of other grounds of appeal, as it will serve no purpose than just to be an academic exercise. Appeal is thus without merit, we accordingly dismiss it in its entirety, with costs.

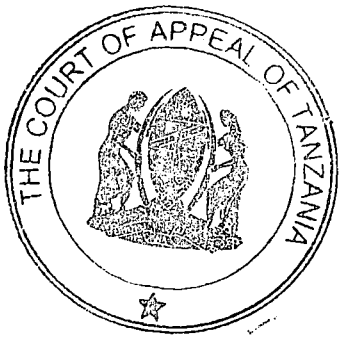
DATED at **BUKOBA** this 21st day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of Mr. Alli Chamani, learned counsel for the Appellant and in the present of the respondent, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL