

IN THE HIGH COURT OF THE UNITED REPUBLIC
OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

(PC) CIVIL APPEAL NO. 137 OF 2001 [FROM THE

DECISION OF THE DISTRICT COURT OF SENGEREMA

AT SENGEREMA CIVIL APPEAL NO. 7 OF 2001N. ORIGINAL FROM

NYEHUNGE PRIMARY COURT CIVIL CASE NO. 8 OF 2000

RASHID KAYANDAAPPELLANT

VERSUS

THOMAS LUTEMA.....RESPONDENT

JUDGMENT

MACKANJA, J.

The respondent unsuccessfully sued the appellant for recovery of a parcel of land before the Nyehunge Primary Court of Sengerema District. It seems that the trial court was satisfied that the plaintiff could not sue the defendant on the ground that the same defendant had a suit between him and the plaintiff's brother over a plot of land in the same area. Therefore, by operation of the

doctrine *res judicata* the plaintiff was estopped from suing the defendant. Secondly, the plaintiff lost his suit because the trial court found it to be time barred.

According to the evidence which was adduced before the trial court the plaintiff and all his witnesses swore that the land, the subject of this suit, was formally owned by the plaintiff's late father. That sometime during his last days, the plaintiff's father distributed his land to his sons. The plaintiff did not say exactly when the distribution to him was made and was approved by the clan council. However it was further the plaintiff's case that that parcel of land was allocated to other villagers during the Operation Vijiji in 1974. Later the farm was returned to the plaintiff's family.

On the other hand, the defendant and his witnesses stated that the suit piece of land was allocated to him in 1975 by the village committee which was concerned with the allocation of land to villagers in 1975 during Operation Vijiji. That this is the parcel of land which the plaintiff's brother sued the defendant to recover in the

trial court Civil Case No. 19 of 1999. According to the defendant the land which he succeeded to defend in Civil Case No, 19 of 1999 measured 30 acres and that the plaintiff in the instant matter sued the same defendant to recover 15 acres from the 30 acres the plaintiff's brother failed to recover from the defendant. This evidence was supported by a court witness named of Majaliwa Masasila who sat as an assessor during the trial of Civil Case No. 19 of 1999. He stated that the trial court in the earlier case visited the *locus in quo*. According to him the 15 acres which the plaintiff in the instant matter seeks to recover is part of the 30 acres which the defendant succeeded to defend during the suit which was instituted by the plaintiff's brother in the earlier case. The trial court would have found for the plaintiff but by operation of the doctrine of *res judicata* and on account of the law of limitation the suit was dismissed. The plaintiff succeeded in his first appeal before the Sengerema District Court which held that the plaintiff had succeeded to prove his case.

I will revisit the findings of the trial court as regards the doctrine of *res judicata*. In order to invoke the doctrine of *res judicata* the following matter must be established. First, the parties in the earlier suit must be the same as in the subsequent litigation. Two, the subject matter and the cause of action must not only be identical, it must be the same in both cases. So that the litigants in Civil Case No. 8 of 2002 must have been the same people who litigated in civil case 19 of 1999. The trial courts record shows that the plaintiffs, even though are brothers, are two different people. Therefore, although the subject of the suit in the latter case appears to be part of the subject matter in the first suit, *res judicata* cannot apply.

The learned appellate District Magistrate appears to have been influenced by passion rather than by reason when he questioned the authority of the trial court in calling an independent person to clarify the boundaries of the suit parcels of land. In my view the trial court properly directed itself on the evidence which was tendered before it. However, the trial court misdirected

itself over a point of law by wrongly applying the doctrine of *res judicata*, and, as a result strayed into error. In my judgment there was sufficient evidence which established that the suit parcel of land which the plaintiff seeks to recover is part of the land the defendant succeeded to defend in Civil Case No. 19 of 1999.

Consequently it is declared that the parcel of land which Thomas Lutema seeks to recover from Rashidi Kayanda is part of the land which his brother unsuccessfully claimed to recover.

In the result the appeal fails and is dismissed with costs.

The judgment will be delivered by the District Registrar.

(Sgd) Josephat M. Mackanja

JUDGE

Mwanza

13/10/2006

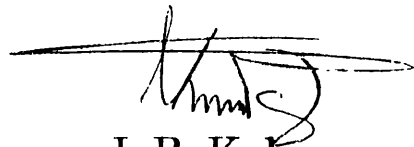
Date: 1.11.2006

Coram: J. R. Kahyoza – DR.

Appellant } Both present.
Respondent }

B/C: P. Alphonse – RMA.

Court: Judgment delivered in the presence of the parties.



J. R. Kahyoza
DISTRIT REGISTRAR
MWNZA
1/11/2006