IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM.

CIVIL APPEAL NO. 56 OF 2011

(Originating from Civil Application No. 21 of 2010, in the

District Court of Kinondoni District, at Kinondoni)

NEEMA THEOPHILUS MKONYI.....APPELLANT

VERSUS

CHRISTIAN THEOPHILUS MKONYI..... RESPONDENT

JUDGMENT

15/08/2012 & 05/09/2014.

The appellant in this appeal, NEEMA THEOPHILUS MKONYI challenges the ruling of the District Court of Kinondoni District, at Kinondoni (District Court) dated 20/7/2011 but delivered on 21/7/2010. The respondent, CHRISTIAN THEOPHILUS MKONYI objects the appeal. The brief background of this matter goes thus; before the lower court, the appellant applied by way of chamber summons supported by an affidavit, for the following orders;

i. For the lower court to grant an order for the removal of the property on plot No. 2093, Block H. Mbezi area, Dar es salaam (suit property) from the list of items in the estate of the late Theophilus Isaria Mkonyi (the deceased).
ii. For Costs of that application.
iii. For any other order that the lower court could deem fit to grant.

The chamber summons (herein after called the application) was preferred under Order XLIII and s. 95 of the Civil Procedure Code, Cap. 33 R. E. 2002. The main ground for the application according to the affidavit supporting it was that, the respondent, as administrator of the estate of the deceased, wrongly included the suit property into the estate since the same belonged to her (the appellant, then applicant).

The responded lodged a preliminary objection (PO) against the application on the single ground that the same was *res-judcata.* The lower court upheld the PO and ultimately dismissed the application through the ruling, the subject matter of this appeal. The appellant preferred five grounds of appeal before this court, and I will reproduce them for the sake of a hasty reference;

1. That, the honourable Court erred in holding that the Application is res-judicata
2. That, the Honourable Court erred in law in relying on matters of facts and evidentiary matters to determine the preliminary objection.
3. That, the Honourable Court erred in law and in fact in holding that the trial Primary Court, Magomeni Primary Court had at the time authenticated the inventory list and therefore finally and conclusively determined the matter.
4. That, the Honourable Court erred in law and in fact in giving a contradictory decision by accepting that as the appellant herein was not a party to the probate case, but was only named as being among the heirs the application was logical and on the same time holding the application was res- judicata.
5. The Honourable Court erred in holding that the only avenue available to the applicant therein was to challenge the decision in probate cause No.143/2008 by way of either Review or Revision.

For these grounds, the appellant prayed for the following reliefs; that the appeal be allowed, the ruling of the lower court be overruled, the appellant be awarded costs for this appeal and for the lower court proceedings and the appellant be awarded any other relief this court will deem just to award. The respondent objected the appeal and it was directed that the same be disposed of by way of written submissions.

In my adjudication plan, I will test the first grounds of appeal by considering the arguments of the parties and make a finding. In case need arises, I will also do the same in respect of the rest of the grounds. The reason for this plan is that, according to the nature and anatomy of this appeal, the first ground of appeal will be capable of disposing of the entire appeal if it will be upheld.

In supporting the first ground of appeal through her learned counsel (PJC Premier Attorneys) the appellant argued to the following effect; that for invoking the doctrine of *res-judicata* according to s. 9 of Cap. 33; one must prove the following elements cumulatively and not alternatively;

i. That the judicial decision was pronounced by a court of competent jurisdiction.

ii. That the subject matter and the issues decided are the same or substantially the same as the issues in the subsequent suit.
iii. That the judicial decision was final and
iv. That it was in respect of the same parties or parties litigating under the same title.

The appellant supported the argument by the case of **Gerard Chuchumba v. Rector, Itaga Seminary [2002] TLR 213.**

The appellant further argued that, the District Court erred in not testing whether or not all the requisite elements of *res-judicata* had been established before making a finding that the application was *res-judicata* for been decided in the Probate and Administration Cause No. 143 of 2008 (probate matter) in the Magomeni Primary Court. She also contended that, parties in the probate matter were Christian Mkonyi (respondent) and Mary Mkonyi. The appellant was neither party nor witness in that probate matter and no any party litigated under the same title with her (appellant). In the application however, parties were the present appellant and the respondent. The appellant thus submitted that parties in the probate matter were not the same as those in the application and the District Court appreciated that fact in its impugned ruling, hence Res-judicata could not be pleaded.

The appellant also argued that the subject matter in the probate matter and in the application before the District Court were different since, in the probate matter the proceedings were for appointing an administrator of the deceased estate while the purpose for the application before the District Court was to withdraw the suit property from the list of the estate. Under such circumstances, she argued, the respondent could not invoke res-resjudicata as per the decision in the case of **Gurbachand singh Kalsi v. Yowani Ekors (1958) EA 450.**

In his replying written submissions, the respondent argued in respect of the first ground of appeal to the following effect; He did not dispute the elements of res-judicata as enumerated by the appellant. He however, argued that the appellant was aware of the probate matter and participated in the distribution of the estate in which said exercise the disputed property was bestowed upon her. He also argued that, the question of ownership of the disputed property was raised by the appellant's mother and was decided by the primary court to be part of the estate and thus subject to the letters of administration. The respondent thus argued that, though in the probate matter the title showed that the party was the respondent only

who applied for letters of administration, the heirs were also involved. He submitted that the doctrine of res-judicata can apply even where a previous matter was decided exparte. He supported this argument by the case of **Tanganyika Motors Ltd v. Trans-Continental Forwarders and another [1997] TLR. 138** and the book of Mulla on Code of Civil Procedure, Vol. 1, 4th edition at page 87.

The respondent further contended that, the appellant could have also resorted to file an appeal or review against the decision made by the primary court in the probate matter instead of filing a fresh application before the District Court; hence the application was res-judicata and offended s. 9 of Cap. 33. In the rejoinder submissions, the appellant basically reiterated her submissions in chief.

Having considered the first ground of appeal, the arguments by the parties, the record and the law, I am of the view that the main issue here is *whether or not the lower court was justified to hold that the application before it was res-judicata.* In my settled view, and as agreed by both parties and the lower court, the doctrine of res-judicata as provided for under s. 9 of Cap. 33 can be invoked only where all the above enlisted elements are established cumulatively and not alternatively, see also the decision by a panel of three Judges of this court in the case of **Tanzania Telecomms Co. Ltd and another v. Boniface Mjenjwa and 13 others, High Court Misc. Civil Appeal No. 2 of 2010, at Dar es Salaam** (Unreported).

I will now test if all the elements of the doctrine were established in the matter at hand. I will first inquire if the parties in the probate matter were also the parties in the application before the District Court. In case need arises, I will also test the rest of the elements of the doctrine. In the probate matter according to the record, the appellant was neither a party nor a witness. The active party was the respondent as petitioner for letter of administration of the estate. The District Court also appreciated this fact in its impugned ruling. The decision by the primary court (dated 20/6/2008) also vindicates this fact by demonstrating that in the process of appointing the administrator of the estate, the mother of the appellant, one Mary Mkonyi objected to the inclusion of the suit property into the estate. The primary court however, made a decision appointing the respondent as administrator of the estate and finding that the deceased had a share in the suit property.

The record thus shows no indication that the said Mary Mkonyi was litigating under the title of the appellant in the primary court. What she claimed

was only that the suit property was her own property though registered in the name of the appellant. She did not tell the primary court that she was representing the appellant in any way. Again, in the application (before the District Court) the parties were the appellant and the respondent, and the appellant did not allege that she was litigating under the title of the said Mary Mkonyi who had made an objection before the primary court. For these grounds I agree with the appellant's arguments that the parties in the probate matter were different from the parties in the application before the District Court.

In my further views, the fact that the appellant was mentioned in the primary court as one of the heirs of the estate did not legally make her a party to that probate matter. Cap. 33 which establishes the doctrine of res judicata does not define who is a party to court proceedings. But, Gardner, B. A, Jackson, T, Newman, M et al, (Editors) in their Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, pages 1231-1232 defines a party to court proceedings as a person who takes party in legal proceedings. I support this definition and add that, according to the practice in our jurisdiction a party to court proceeding is a legal or natural person who is interested in any court proceedings and prosecutes/claims or defends some rights therein, and is ultimately bound by the resulting verdict of the court. That person may thus pose as the plaintiff, or defendant, or applicant, or petitioner, or appellant, or respondent, or prosecutor, or accused person etc depending on the nature of the proceedings. Going by this definition, it cannot be said that the appellant in the matter under discussion was party to the primary court proceedings related to the probate matter.

Since I have found herein above that all the elements of res-judicata must be proved cumulatively before one successfully invokes this doctrine, and since I have just found that one element was not proved in the matter under discussion, (i. e. the parties were not the same in both matters, to wit the probate matter and the application before the District Court), I am not obliged to test the rest of the elements of the doctrine. I accordingly I find that under such circumstances, the doctrine of *res-judicata* could not be invoked. The main issue is thus determined negatively to the effect that the lower court was not justified to hold that the application before it was res-judicata. I therefore, uphold the first ground of appeal.

As I hinted earlier, the finding I have just made herein above reliefs me from testing the rest of the grounds of appeal since the upholding of the first ground of appeal is legally capable of disposing of the entire appeal according to the nature and anatomy of the appeal. I therefore, allow the appeal, set aside the ruling of the lower court dated 20/7/2011 and delivered on 21/7/2010. I will not however, condemn any party to pay costs since the lower court also contributed to the circumstances that led to this appeal by its failure to properly construe the law. I also order that if the appellant still wishes, the application before the District Court may be heard by another magistrate of competent jurisdiction.

However, following some suspected irregularities in the application before the District Court, I make the following directions; that before the hearing of the application commences (if parties will be interested with that hearing), the District Court shall satisfy itself on the competence of that application. In so doing, the District Court shall invite the parties to address it focussing on the following issues; whether or not the District Court has been properly moved under Order XLIII and s. 95 of the Civil Procedure Code, Cap. 33 R. E. 2002, whether it is proper for the appellant to file that application before the District Court challenging acts performed in the primary court and whether or not it is proper for the appellant to raise the issue related to ownership of the suit property by way of chamber application before the District Court. The District Court is not however, restricted to these issues only in testing the competence of the application. I make these particular directions under s. 44 (1) (a) of the Magistrates Court Act, Cap. 11, R. E. 2002, as interpreted by the Court of Appeal's decision in the case of **Director of Public Prosecution v. Elizabeth Michael Kimemeta @ Lulu, Criminal Application No. 6 of 2012, at Dar es salaam** (unreported) which held that the provisions give this court mandate to make directions to the magistrates' courts in form of guidance. It is accordingly ordered.

JHK. UTAMWA

JUDGE

5/5/2014