IN THE HIGH COURT OF TANZANIA
AT DODOMA

LAND CASE APPEAL NO. 44 OF 2016

(From the Decision of the District Land and Housing Tribunal of Dodoma District at Dodoma in Land Case No. 31 of 2016)

1. VEYCE YOHANA MZOGELA ..... 1st APPELLANT
2. SHEMA MALEKELA ..... 2nd APPELLANT

VERSUS

1. CAPITAL DEVELOPMENT AUTHORITY ..... 1st RESPONDENT
2. NGURA NGURA 2ndRESPONDENT

JUDGMENT

SEHEL, J.

This appeal emanates from the ruling delivered by the District Land and Housing Tribunal that dismissed the appellant's Land Case No. 31 of 2016 for being res-judicata.

The facts of the case lie in narrow compass. The appellants previously sued the respondents in respect of the same subject matter. It was application no. 120 of 2013. This application was dismissed on 13th day of January, 2016 for failure of both parties to

enter appearance. Upon such dismissal, on 13th day of February, 2016 the appellants filed another application, Application No. 31 of 2016 in the same Tribunal against; the same parties; and on the same subject matter. The respondents raised a preliminary objection that Application No. 31 of 2106 is res-judicata. The preliminary objection was heard and the trial Tribunal dismissed the application with the following reason:

> *"I squarely agree with Mr. Kansumbile the counsel for the Capital Development Authority that the present application is res judicata. The applicants (appellants in the present appeal) could have opted to file an application to set aside dismissed orders but not refilling of the application. The application is wrongly filed and hereby dismissed with costs."*

Being dissatisfied by such dismissal, the appellants through the services of Corpus Law Attorneys have lodged the present appeal with three grounds of appeal. These are:

1. That, Honourable Chairman erred in law in determining that the matter is res-judicata while the matter was not finally and conclusively determined.

2. That, Honourable Chairman erred in law to rule out that the matter which the cause of action was not determined on merits is res-judicata.

3. That, Honourable Chairman erred in law to rule out that the matter merely which was dismissed for non-appearance of both parties the appellants were supposed to make application to set aside the dismissal order while the law provide an option for the appellants to file a fresh suit.

Mr. Mkami, learned advocate appeared to represent the appellants at the hearing of the appeal while the respondents were represented by Mr. Kansumbile, learned advocate. Mr. Mkami argued the grounds of appeal seriatim. For the first ground, he submitted that for the matter to be res-judicata four main element must be proved or shown as stated in the case of **Gerard Chuchuba Vs. Rector, Haga Seminary [2002] T.L.R 313.** The elements are:

1. The decision pronounced by a court of competent jurisdiction;

2. The subject matter and the issues decided are the same, or substantially the same as the issues in the subsequent suit,

3. The judicial decision was final,

4. It was in respect of the same parties litigating under the same title.

It was Mr. Mkami's argument that though the trial Tribunal had jurisdiction to determine the matter but the same was not determined on merit since the issue of legal ownership of the disputed land is not yet adjudicated upon. In support of his submission, he referred this Court to the **case of Jadra Karsam Vs. Harman Singh Ghogal** that was cited in approval in the case of **Gerard (Supra**) where it was stated that if the law allows the parties to go to the same court then it means that the matter was not conclusively determined. He also referred to an article by **Thomas**

Penberthy Fry titled "Finality of Judicial Decisions" published in the **Law Journal of the University of Queensland** law Journal at Page 10 under item (ii) it was stated that for a judgment or order to be said finally determined, there must be hearing in terms of giving evidence on the issues at controversy.

For the second ground, Mr. Mkami argued that since the previous matter was dismissed for non-appearance of both parties then it was not determined on merit as such it cannot be said that it was res-judicata. He cemented his argument by referring this Court to the book of **M.P Jan** in the **Code of the Civil Procedure Code of 2005** published by **Wadhwa & Co. Nagpur** where at Page 63 cited the case of **G.G. Patel Vs. Gulam Abbas** that held the matter not determined on merit cannot be res-judicata.

For the third ground, Mr. Mkami submitted that **Order IX Rule 4** of the Civil Procedure Act, Cap. 33 provides for a remedy for the matter which is dismissed for non-appearance of both parties. The remedy, he said, is for either filing a fresh suit or making application to set it aside and not just to make application for setting aside

dismissal order. Mr. Mkami argued that since Rule 11 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations of GN 174 of 2003 (the Regulations) is not applicable to the present scenario as both parties were absent and since there is lacuna in the Regulations then the Civil Procedure Act, Cap. 33 comes into aid.

For all these grounds submitted, Mr. Mkami prayed for the appeal to allowed with costs.

Mr. Kansumbile combined grounds number one and two in replying the grounds. It was his argument that the trial Tribunal decision was not based on the doctrine of res-judicata even though there was discussion of it. He submitted that since the Honourable Chairman found that the previous application was dismissed for non-appearance of both parties then the Chairman was of the firm decision that the appellants ought to file an application for setting aside dismissal order and did not base its decision on res-judicata. For the third ground, he submitted that Order IX Rules 3 and 4 of the Civil Procedure Act, Cap. 33 are not applicable as there is no lacuna. He said Regulations 11 (1) (a); (b); and (c) of the Regulations

need to be read as a whole. It was his argument in terms of Regulation

I prefer to start with the last ground since its outcome will determine other issues complained. The issue on this ground is whether the appellants had a right to file a fresh suit or not. Before answering this question, I would like first to discuss the procedure provided under the Regulations. Regulation 11 of the Regulations deals with the procedure of parties and consequence of non-appearance. Regulation 11 (1) (a) provides that on the day fixed for hearing and both parties are present then the dispute shall be heard. Sub regulation (1) (b) confers power to the Tribunal to dismiss the application when on the date fixed for hearing, the applicant is absent without good cause and he had received notice of hearing or was present when the hearing date was fixed. Sub-regulation (1) (c) also confers power to the Tribunal to proceed ex-parte against the respondent after being satisfied that the respondent was dully served or was present when the hearing date was fixed but failed to attend the hearing without good cause. If any party is dissatisfied

with the decision of the Tribunal made under sub regulation (1) then he can make an application to set it aside within 30 days(see Regulation 11(2) of the Regulations).

For better appreciation, Regulation 11 is quoted herein below:

"*11. (1) On the day the application is fixed for hearing the Tribunal shall:-*

a) Where the parties to the application are present proceed to hear the evidence on both sides and determine the application;

b) Where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant;

c) Where the respondent is absent and was duly served with notice of hearing or was present when the hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence,

proceed to hear and determine the matter ex-parte by oral evidence."

Reading closely Regulation 11 (1) (b) and (c) of the Regulations are not vivid as to whether they are applicable to situations where only one party appears and the other party does not appear. The way they are couched, it is just assumed that they refer to non-appearance of one of the party while the other party is in attendance. However, they do not specifically provide so. Unlike Order IX Rules 6 and 8 of the Civil Procedure Act, Cap. 33 whereby they clearly provide that when one party appears and the other party does not appear then the Court shall respectively dismiss the suit or proceeds ex-parte. Be it as it may, I have decided to take a liberal approach by interpreting that the two regulations deal with non-appearance of one of the parties only. This being the position then, can the provision of Order IX rules 3 and 4 of the Civil Procedure Act, Cap.33 be invoked.

Order IX of the Civil Procedures Act, Cap. 33 also deals with the procedure of appearance of parties and consequence of non-

appearance. Rule 1 provides that on the day fixed in the summons for the appearance of the defendant, the parties shall be in attendance either in person or by their respective advocates and the suit shall be heard. Rule 2 confers power to the Court to dismiss the suit if it is found, on the date so fixed, summons could not be served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges. Rule 3 also confers power to the Court to dismiss the suit when on the date so fixed the case is called on for hearing, neither party appears. In the aforesaid two circumstances where the suit is dismissed either for not payment of Court- fee or postal charges by the plaintiff or because of non-appearance of both the parties when the suit is called on for hearing, the remedy has been provided under Order IX Rule 4 of the Civil Procedure Act, Cap. 33. The remedy is for the plaintiff either to bring a fresh suit on the same cause of action or he may apply for setting aside the order of dismissal and for restoration of suit. Order IX Rule 4 provides:

"Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, ***as the case may be****, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit (emphasis is mine)."*

My bare reading of Order IX Rule 4 of the Civil Procedure Act, Cap.33 is that it provides in express term that the plaintiff is not precluded from filing a fresh suit on the same cause of action in the event the suit is dismissed under Rule 2 of Order IX of the Civil Procedure Act, Cap.33, but not under Rule 3 of Order IX of the Civil Procedure Act, Cap. 33. Meaning that the option of filing fresh suit is available when the plaintiff fails to pay court fees or postal charges and it is not applicable when both parties are absent. If both parties are absent then the plaintiff has to make an application to set aside

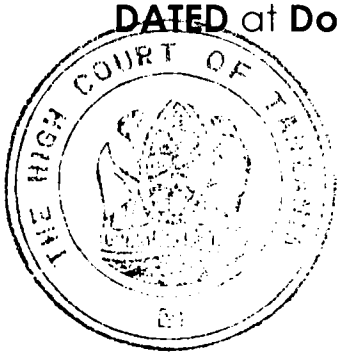
the dismissal order. I say so because of two main reasons. First, it is the insertion of the words "as the case may be" immediately after the provision of the two options. Secondly, reading through Order IX Rule 8 of the Civil Procedure Act, Cap. 33 it is manifestly clear that the Court is empowered to dismiss the suit when on the date fixed for hearing, the defendant appears, but the plaintiff does not appear, unless the defendant admits the claim. If the suit is dismissed under Rule 8, the remedy provided after such dismissal is under Order IX Rule 9 of the Civil Procedure Act, Cap. 33 whereby the plaintiff is to make an application for setting aside the order of dismissal and he is barred from bringing a fresh suit on the same cause of action. Logic dictates that it was not intended by the legislature to give the plaintiff a remedy of right to re-file and take it away the same remedy in a similar circumstance simply because one party appeared.

I therefore, do not agree with Mr. Mkami's submission that the appellants had a right to re-file the application. I join hands with the trial Chairman's findings that the appellants ought to file an

application to set aside the dismissal order but not refilling of the application. Having answered the third ground of appeal in negative then I do not see the need in proceeding into determining other complaints as they will be for academic purposes as I have find that the applicants had no option of filing fresh application.

All in all the appeal is dismissed with costs for lacking merit.

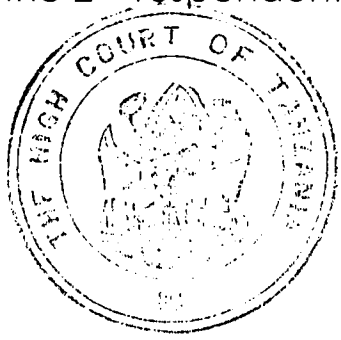
DATED at **Dodoma** this 08th day of December, 2016.



B.M.A Sehel

JUDGE

Judgment delivered in open court at Dodoma, under my hand and seal of the court, this 08th day of December, 2016 in the presence of Mr. Mkami, advocate for the appellants and Ms. Kyamba, advocate for 1st respondent and holding brief for Mr. Kansumbile, advocate for the 2nd respondent. Right of Appeal is fully explained.



B.M.A Sehel

JUDGE

08th December, 2016.