

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA**

LAND APPEAL NO.33 OF 2016

[C/F the District Land and Housing Tribunal of Arusha Appeal No. 21 of 2015 Originating from Majiya Chai Ward Tribunal Application No. 12 of 2014]

ELIAMANI NDUUNI1st APPELLANT

NG'INISAEI NDUUNI.....2nd APPELLANT

VERSUS

KWANENSIYA LEONARD TETI..... RESPONDENT

JUDGMENT

DR. OPIYO, J

The appellants having been aggrieved by the decision of the District Land and Housing Tribunal of Arusha at Arusha in Appeal No. 21 of 2015 preferred their appeal before this court on the following grounds;

1. The Trial District Land and Housing Tribunal erred both in law and fact in granting a relief which was not prayed by the Appellant.
2. That the tribunal erred in law and fact by upholding the decision of the majiya chai court through civil case no 113/2012 and decision of

the district court through civil appeal no 62/2013 whilst the said primary court above has no jurisdiction to hear dispute relating to land matters.

3. The Trial District Land and Housing Tribunal erred both in law and in fact by declaring that the Suitland belongs to the Respondent.
4. The Trial District Land and Housing Tribunal erred both in law and in fact by upholding the decision of the Primary Court through civil Case 113/2012 whilst the Appellant were not a party to the said suit.
5. That The Trial District Land and Housing Tribunal erred both in law and in fact by basing its decision on issues which were not part of the case.

The brief facts leading to the present appeal can be summarized as follows, the respondent Kwenensiya Leonard Teti filed matrimonial cause no 05/2010 before Majiya Chai Primary Court for divorce and division of matrimonial properties, the respondent, was given the suit land as her share in jointly acquired matrimonial properties, while she was in the process of executing the decree the appellant's brother, one Lazaro Mungure filed objection proceedings at Majiya Chai Primary Court vide Civil Case no 113 of 2012 contending that the land in disputes belonged to his sisters (the appellants herein) the objection proceedings was dismissed for reason that the objector has no locus, he appealed to the District court which equally dismissed his appeal.

Later the appellants Eliamani Nduuni and Nginisaeli Nduuni filed a fresh suit at the Majiya Chai Ward Tribunal claiming ownership of the suit land. The ward tribunal after full trial decided in favor of the appellants. Aggrieved, the respondent preferred the appeal at District Land and Housing Tribunal for Arusha which reversed the ward tribunal's decision and declared the respondent as lawfully owner of the suitland. Aggrieved the appellants have preferred the present appeal.

Before me the appellants were represented by Mr. Sabuni learned advocate while the respondent was represented by Mr. Yoyo learned advocate. Hearing of this appeal proceeded by way of written submissions. In course of his submissions the learned counsel for the appellant opted to drop the second ground of appeal. He submitted jointly on fourth and fifth grounds. Submitting on the fourth and fifth grounds of appeal it was the learned counsel's submission that, the District Land and Housing Tribunal of Arusha at Arusha in its appellate jurisdiction erroneously relied on the facts and decision of other judicial forum in reaching its decision whereby the decisions and facts has no any relationship with present suit including the **Majiya Chai Primary Court Matrimonial Cause No. 05/2015** decision. The case was between Kawenensiya Leornad Tety (Respondent) and Exaud Nduuni Mungure. That, the case was purely matrimonial cause filed by the Respondent herein for divorce and division of Matrimonial property and the Appellants therein was neither the party in the case nor having an information about the case. He submitted further that, again the decision of **the Arusha District Court in Civil Appeal No. 62/2013** between Lazaro Mungure and Kawenensiya Leonard and Exaudi

Nduuni which emanated from the **Majiya Chai Primary Court Civil Case No. 113/2012**. He argued that the tribunal relied on the said cases knowingly the Appellants were not parties to the same and the matter was not even determined to its finality.

It was the learned counsel's further submission that, the Appellate Tribunal had neither had the Appellate powers provided under section 34(1) of The Land Disputes Court Act, 2002 nor Revisional powers under section 36 of The Land Disputes Court Act, 2002 on the above mentioned cases. That being so, it was a misdirection on the part of the Tribunal to make decision on the present case basing on the irrelevant decisions and confer the ownership of the disputed land to the Respondent knowing that the court did not have any statutory authorities in relation to the two decisions.

Submitting in respect of the first and third grounds of appeal, the learned counsel stated that, under Section 11 of The Land Disputes Courts Act, 2002 and Section 4 of The Ward Tribunal Act [Cap 216 R.E 2002] the composition of The Ward Tribunal when making decisions shall constitute 3 women. This requirement was not abided with by the Trial Tribunal's proceedings and judgments as there were only 2 women. Non-compliance with the requirement of having three women in Coram of Ward Tribunal renders the whole decision a nullity. He argues that, having realized and quashed the decision of the Ward Tribunal (at page 3 of the Appellate Tribunal), the Appellate Tribunal ought to have ordered a trial De novo and not to declare the Respondent the owner of the suit Property. He stated that under similar circumstances, this court had decided in the case of

Lucas Mwaruka vs. Clemence Mwaruka, Misc. Land Appeal No. 27 of 2012 (Mugasha, J.)(Unreported)at page 5 to 6that

"....I nullify the entirely decision, Order and proceedings of Kiranyi Ward Tribunal in Land Application No. 195 of 2009 for being Nullity. I further proceed to nullify the proceedings of the Arusha District Land and Housing Tribunal in Land Appeal No. 90 of 2010 as it that decision was found from a decision which was a nullity....order retrial before the trial tribunal."

He went on submitting that, even if the Ward Tribunals are not bound by any rules of evidence or procedures applicable to any court as stated under **section15(1) of the Ward Tribunals Act**], but when the decision contains several irregularitiesand the first Appellate Tribunal confirms that the said irregularities go to the root of the case as incurable defects (at pg 3 of the judgment of the Appellate Tribunal) it makes the whole proceedings, judgment and decree totallynull and void.Again, in the circumstances the question of who is lawful owner of the suit land was not before the Appellate Tribunal for determination, rather what was before him was the issue of the illegality of the Trial Tribunals decisions. Thus to declare the Respondent the lawful owner of the suit land is a serious legal error on the part of the Appellate Tribunal. He submitted that what the Honourable Tribunal should have done after declaring the decision of Trial Tribunal void was to exercise its power to quash the entire decision and judgment and order the fresh suit to be conductedbefore a different panel of Ward Tribunal instead of confirming the ownership of the suit property

to the Respondent as it was so ordered at page 3, last paragraph of the appeal judgment.

Submitting in response to the appellant's first and third grounds of appeal, the counsel for the respondent submitted that, it is a settled law and indeed common knowledge to all members of this noble profession that previous judgments of the court are relevant to bar a subsequent suit or suits. That, the Court of law is bound by the law to take cognizance of previous judgment whenever the existence of any right already determined in the previous judgment is brought in question. He submitted further that, it is a trite law that the final decree of the court of law in exercise of matrimonial jurisdiction is a conclusive proof of ownership and that is what section 42 and 43 of the law of evidence Act, Cap 6 RE 2002 entangle. The sections provides that:-

42 "The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial."

And s 43. (1) "A final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing, is relevant."

(2) A judgment, order or decree referred to in subsection (1) is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declares that it had ceased or should cease; and

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property (emphasis supplied)”

It was the respondent's counsel further submission that, in the light of the position of law enumerated above, the first appellate Tribunal cannot be faulted on the grounds assailed by the Appellant's counsel due to the following clear reasons;

First of all, the Respondent ownership as vindicated under matrimonial cause No 5/2012 by Majiya Chai Primary Court was a conclusive proof of her ownership. That is to say, it was not upon the respondent to marshal it at the ward tribunal, but rather to bring it to the attention of ward tribunal, as she did to enable the tribunal to take cognizance of the existing right

conferred to the respondent by the court of law with competent jurisdiction to do so. He argued that, the fact that the matrimonial cause No 5/2012 of Maji ya Chai Primary Court was at no point in time varied and lifted by the higher Court in hierarchy, renders the respondent's ownership over the suit land, apparent and conclusive as against the whole world, to the extent that District Land And Housing Tribunal could not have any powers whatsoever under the law to nullify such ownership as emphasized and alluded by the appellant counsel.

Secondly, the decision of the 1st appellate tribunal, to nullify the trial tribunal findings and yet abstain from ordering for trial denovo cannot in the circumstance of the case under consideration be considered to be an irregularity or an act of conferring right to the Respondent out of nullity as argued by the appellant counsel. On the contrary, it ought to be noted that the respondent's ownership was already conferred to her far before the institution of ward tribunal proceedings by the appellant. That, what the 1st appellate tribunal did was a mere cognition that there was already a decision by the Court of law with competent jurisdiction that conferred ownership to the respondent far before the institution of ward tribunal's proceedings and that could not be at law validly reversed or nullified

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On the fourth and fifth grounds it was the learned counsel submissions that, in their defense at the Trial tribunal, the respondent herein furnished the tribunal with the Court judgment of matrimonial cause no 5/2012 of Majiya chai Primary Court which was a conclusive prove of her ownership. As if that was not enough, the respondent went extra mile providing Courts proceedings that revealed the initial attempts made by the

same appellants to challenge her ownership, the attempts that were made by their agent who contended to be acting on behalf of the appellant and who filed the objection proceeding vide civil case no 113/2013 at Majiya Chai primary court. Whereas in such case, the Majiya Chai Primary Court took cognizance of the Respondent's ownership already declared in Matrimonial cause and upon further appeal to Arusha district Court through civil appeal No 62/2013 the position was upheld. That notwithstanding, the conclusive evidence of Respondent's ownership was given before the trial tribunal, but trial tribunal abused the process and decided in appellants favor hence the appeal to the District Land and Housing Tribunal of Arusha reversing the decision.

I have given due consideration on the submission of both parties. The appellants centre of complaint centers on two major issues, namely effect of irregularity of trial tribunals proceedings and appellate tribunal going beyond its powers by determining matter which was not validly before it.

However before going into the merits of the appeal, I feel prudent to pause and consider the validity of trial tribunal's proceedings in the first place. This need arise from the factual background surrounding the whole matter. It is undisputed that the whole saga started by Majiya Chai primary court awarding the respondent the disputed property in matrimonial cause No 5/2010. This award attracted attention of one Lazaro Mungure, who identified himself as agent of the appellants herein to file objection proceeding at the same court vide civil case no 113 of 2012 against both parties to the matrimonial cause no 5/2010 i.e respondent and her husband (Kwenensiya Leonard Tety and ExaudiNduuni), the major claim

by Mr Lazaro Mungure , Exaudi Nduuni Mungure's brother was that the attached property belonged to their female siblings, the appellants herein. Lazaro Mungure lost in that case for lack of *locus standi* both at trial and first appeal at Arusha District Court in Civil appeal no 62/2013, dated 26/03/2014. From what is in the record, Lazaro gave up, the fact indicated by his failure to appeal from the dismissal order.

It is trite law that, when one is against the attachment of property which he or she claims to have interest in terms of order 21 rule 57, the relief he is readily entitled to is to file objection proceedings. In the matter at hand, I am of the settled view that after the appellants' brother lost in the matter of objection proceedings for lack of *locus standi* the appellants ought to have filed the same objection at the court that attached the property for the court to accord them right to be heard as far as the interest they claim over the said land is concerned. In the circumstances it was wrong for the appellants to have instituted the suit at Majiya Chai Ward Tribunal claiming ownership of the suit land despite the fact that the same was already allocated to the respondent by the Majiya Chai primary court, vide the matrimonial cause no 05/2010. By doing so, if allowed makes the situation vulnerable to yielding conflicting decisions over the same property, as it happened in the circumstances of this case. This is because respondent had already been declared lawfully owner of the suit land by Majiya Chai primary court vide the matrimonial cause no 05/2010, therefore since the right over the suit land was already established by the court of competent jurisdiction the appellants' act of filing a fresh suit at the ward tribunal was to invite the ward tribunal to determine ownership on the land whose ownership was already determined by the court with competent

jurisdiction. Therefore, appellants by filing a fresh suit instead of objection proceedings, after their purported agent failed for lack of locus, they manifested followed a wrong route in pursuit of their supposedly rights.

In the circumstances, the proceedings before Majiya Chai Ward Tribunal in Application No. 12 of 2014 and the subsequent appeal before District Land and Housing Tribunal of Arusha in Appeal No. 21 of 2015 cannot stand the competency test. I therefore proceed to nullify both the decisions and the proceedings of the two tribunals. The appellants, if still interested, can follow a proper forum to claim their interest on the suit land. I make no order as to costs as the issue disposing the appeal was raised by the court *suo motu*.

Ordered accordingly



A handwritten signature in black ink, appearing to read "M. Opiyo", is written over a horizontal line.

DR. M. OPIYO,

JUDGE

22/12/2017