

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND APPEAL NO. 26 OF 2018

*(Arising from Land Application No. 02 of 2018 f the Maswa District Land & Housing
Tribunal)*

**MALYALYA YUNGA..... APPELLANT
VERSUS**

KITALUMBA NGENGA..... RESPONDENT

JUDGMENT

Date of Last Order: 11/06/2020

Date of Judgment: 10/7/2020

MKWIZU, J.:

This appeal arises from the decision of the District Land and Housing Tribunal for Maswa in Land Application No. 2 of 2018 where the appellant lost the case hence this appeal.

It is from the records that the Appellant MALYALYA YUNGA, sued the respondent KITALUMBA NGENDA in Land Application No. 2 of 2018 claiming that without his consent, in October 2017 the respondent invaded the appellant's land measuring 13 acres. The respondent on the other

hand, contended that he is a lawful owner of the suit land and that appellant is the trespasser.

When the appeal was called on for hearing, the appellant had the services of Mr. Audax Constantine, Advocate and the respondent enjoyed the service of Mr. Frank Samwel also Advocate. The appeal was conducted by way of written submissions I thank both parties for their compliance with the order of the court as both filed their respective written submissions well within the plan. I intend not to reproduce the party's submissions.

Before I analyse the grounds of appeal presented, I find it pertinent to state albeit briefly, facts laying foundations of this appeal. At Maswa District Land and Housing Tribunal, three applicants mentioned as **MANJALE SAMSON, MABANZA NGENDA AND NGENDA SUMAYI** filed Land application No. 41 of 2010 against three respondents, **LYUBA IGING'HU, KITALUMBA NGENDA AND LUHAJA NGENDA**. In that application applicants claimed to be rightful owners of 69 acres located at Mwamungesha, Ikindilo Ward within Bariadi District which they inherited from their mother in the year 1992. They further alleged that, from 1992, they collectively owned the said land until 2007 when 2nd respondent who

basically is the applicant's uncle trespassed, claiming to be the owner. Applicants claim at the DLHT was for restoration of the said land or alternatively a compensation to the tune of 32,000,000/=. Respondent refuted the applicants claim. At the end of the hearing, trial tribunal found for the respondents and the entire piece of land 69 acres were declared the property of the 2nd respondent.

Applicants were not happy, they appealed to the High Court (Tabora) vide Land Appeal No 1 of 2012 which was on 16/2/2013 dismissed for being filed after expiration of the 45 days statutory period. The atmosphere remained quite until 2017 when present appellant, **MALYALYA YUNGA**, filed an application, Land application No 98 of 2017 before the DLHT, Maswa against one **KITALUMBA NGENDA**, 2nd respondent in Land application No 41 of 2010 and who was declared owner of the 69 acres in Land application No 40 of 2010. This claim again was over a piece of land in a similar location but which was estimated at 13 acres. The tribunal on 18/12/2017 ruled that the dispute before it is the same dispute adjudicated and finally determined by the tribunal and later High Court Tabora. It therefore struck out the application with costs. This was on 18/12/2017.

Immediately thereafter, in 2018, appellant filed second application, Land Application No. 2 of 2018 subject of this appeal. In this application, appellant had claimed to be a customary holder of the suit land measuring 13 acres since the year 1993 and that respondent has encroached his land without his consent. He prayed among others things declaration that he is the lawful owner and that respondent be declared a trespasser.

In his written statement of defence, respondent raised a preliminary objection on point of law that the matter is Res Judicata. On 30/4/2018, on request by the counsel for the appellant, tribunal ordered the preliminary objection to be heard by way of written submissions. It therefore set the schedule of filing the same. Respondent did not file the written submissions as ordered leading to the dismissal of the preliminary objection on 4/6/2018. Proceedings of the tribunal at page 3 and 4 are reproduced here under:

" 30/04/2018

Coram

E.F.Sululu - Chairman

Applicant - Present

Respondent - Present

T/Clerk - T. Kabume

Mr. Samwel Lugundiga for the Applicant: The respondent has filed preliminary objection we pray that the same be heard by way of written submissions.

Tribunal: Prayer granted.

Order: 1) The respondent to file written submission on or by 14/5/2018. reply by the applicant to be on 28/5/2018
2) Mention on 4/6/2018
3) Parties duly informed

E.F.Suluk

Chairman

30/04/2018

4/06/2018

Coram

Paulos L.s. Lekamoi - Chairman

Applicant - Samwel Lugundiga, Adv

Respondent - Present

T/Clerk - T. Kabume

Mr. Samwel Lugundiga for the Applicant: The application is coming up for ruling, the tribunal ordered the matter to be determined via written submission but he neglected hence we pray the preliminary objection to be dismissed.

Respondent: I was late to file the written submissions

Order: 1) The respondent preliminary objection is

hereby dismissed for want of appearance

2) Hearing on 30/7/2018

Paulos L.s. Lekamoi-

Chairman

04/06/2018”

On 30/7/2018 the tribunal re-opened the earlier on dismissed preliminary objections and heard the parties. Here is what transpired:

"30/07/2018

Corum

Paulos L.s. Lekamoi- Chairman

G. Chaba

R. Chambulilo } *Assessors*

Applicant - Samwel Lugundiga, Adv

Respondent -Present

T/Clerk - T. Kabume

Mr. Samwei Lugundiga for the Applicant: *Th is matter is coming up for hearing, we are ready for the same.*

Respondent: I am ready for hearing but the matter before you is resjudicata hence we pray to be heard on that very concept as the matter was heard by this tribunal and the same matter was reffered to Tabora I won the case there.

Order: *Section 95 of the CPC is hereby invoked to discuss the issue of resjudicata.*

Paulos L.s. Lekamoi

Chairman

30/07/2018"

Submitting on the preliminary point, respondent said, the matter was determined by the tribunal, the appeal was preferred to Tabora High Court and finally decided where he arose a winner. Appellant refuted the allegation, he said, what was before the tribunal and later on appeal before the High Court Tabora was different from what was before the tribunal for determination. On 21/8/2018, the District Land and Housing Tribunal dismissed the application for being res judicata. Discontented, appellant filed the present appeal in this court. In his petition of appeal date 19/10/2018, the Appellant raised two grounds as follows.

- 1. The Trial Chairman erred in law for ruling that the disputed land is a res judicata while it not Res judicata.*
- 2. That the trial chairperson erred in law in rehearing the preliminary objection which he formally dismissed and then in 30th he allowed the respondent to submit in relation to the same preliminary objection*

Having considered the grounds of appeal by the appellant, parties' submissions and the trial tribunal's records. I will determine second ground of appeal first because it challenge the legality of the procedure taken by the learned trial Chairman. As indicated in the brief facts of the matter, trial chairman re opened the hearing of the preliminary objection on 30/7/2018 and allowed parties to submit on the same after he had dismissed the same on 4th June, 2018. Was this a proper procedure? It is a trite law that once a court or tribunal has passed a valid decision after a lawful hearing, it becomes *functus officio* and cannot reopen the matter before the same court or tribunal. It is obvious from the quoted part of the trial proceedings above that, after an order that the preliminary objection be heard by way of written submissions, followed of course with the schedule on when each party should file his, respondent was to file his written submissions in support of the preliminary objection on 14/5/2018 while the reply was to be filed on 28/5/2018. Nothing was filed and for that reason, on 4/6/2018, the tribunal dismissed the preliminary objection and set the matter for hearing on 30/7/2018. Instead of proceeding with the hearing of the application on merit. Trial chairman re opened the preliminary objection and went on hearing parties submission and making a decision on it. This was totally wrong. Having dismissed the preliminary objection,

the trial tribunal was *functus officio*. To borrow a leaf from the Canadian case of **Chandler v. Alberta Association of Architects**, 1989 CanLII 41 (S.C.C.), [1989] 2 S.C.R 848, the Court said:

"as a general rule, once . . . a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or 'because there has been a change of circumstances. . . "

Similar position was expressed in the case of **Bibi Kisoko Medard Versus Minister for Lands, Housing and Urban Development and Another**, (1983) TLR 250 (HC) where the court held:

"In matters of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

I am in agreement with appellant's counsels' submissions. In my view, the trial tribunal was functus official after issuing its first Order dated 4th June, 2018. The second order made on 30/7/2018 and the proceedings that followed thereat was un procedural and illegal. It is for this reason that I find merit on this ground.

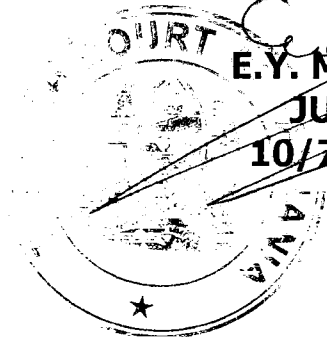

For the reasons above, the appeal is allowed to the extent that, this court nullifies the trial tribunal's order dated 30/7/2018 and the resultant proceedings and the ruling therefrom for being illegal and unfair. File is remitted back to the trial tribunal to proceed where it ended before 30th July, 2018 before another chairperson and another set of assessors. Costs to follow the events.

Order accordingly.

DATED at **SHINYANGA** this 10th day of **July**, 2020


E.Y. MKWIZU
JUDGE
10/7/2020

Court: Right of appeal explained to the parties.



E.Y. MKWIZU
JUDGE
10/7/2020