

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

PC - CIVIL APPEAL NO. 22 OF 2019

*(Original from Civil Case No. 04 of 2019 at Vwawa Urban Primary Court and
Civil Appeal No. 03 of 2019 Mbozi District Court at Vwawa*

**ADEOH WATSON WEGGAH.....APPELLANT
VERSUS
ANDSON CHOLE WEGGAH.....RESPONDENT**

JUDGMENT

Date of last Order: 29/05/2020

Date of Judgment: 13/07/2020

NDUNGURU, J.

This appeal centers on the claim of (9) nine cows by the appellant against the Respondent. At Vwawa Urban Primary Court, the Appellant, unsuccessfully sued Adeoh Watson Weggah on a claim of 9 herds of cattle that belongs to his deceased father in Civil Case No. 04/2019. It was claimed by the Appellant that his deceased father placed unto the respondent's custody nine herds of cattle for safe keeping. He thus prayed for the court to order the respondent to surrender the said cows to him as a deceased's son. The first trial court after having determined

the matter decided in favor of the respondent that the matter was time barred and the appellant has failed to prove his case.

Aggrieved with that decision entered on 22nd day of February, 2019 at Vwawa Urban Primary Court, the appellant appealed at the District Court of Mbozi at Vwawa in Civil Appeal No. 03 of 2019. The first appellate court dismissed the appeal with the reason that Civil Case No. 04 of 2019 appears to be Res judicata since the subject matter and the parties are the same in Case No. 21 of 2018 which was decided at Nyimbili Ward Tribunal, hence the present appeal.

Being further distressed with the decision of the first appellate court dated 22/07/2019, the appellant has in the memorandum of appeal raised four ground to wit:

- (i) That the appellant appeals against the decision of the Mbozi District Court delivered in favor of the respondent without considering the weight of evidence adduced by the appellant before the trial court.*
- (ii) That the appellant appeals against the decision of the Mbozi District Court delivered in favor of the respondent without considering names of the parties to the case.*

(iii) That the appellant appeals against the decision of the Mbozi District Court delivered in favor of the respondent as the appellant never used other names in his different dealing on the records.

(iv) That the appellant appeals against the decision of the Mbozi District Court delivered in favor of the respondent by saying that the case was Res Judicata.

The appellant therefore prays that this appeal be allowed with costs. In this appeal Ms. Beatrice Ruhamirwa appeared for the Appellant while Mr. Isack Chingilili appeared for the Respondent.

With the leave of the court, the parties filed their written submissions in support and against the appeal. In arguing to her first ground of appeal, the learned counsel Beatrice Aloyce Rukamilwa made a number of submissions which I find irrelevant to the matter at hand. The only two point I find relevant to put into consideration is balance of probabilities and res judicata.

With regard to the balance of probabilities, the learned counsel referred to us **Section 3(2) (b) and 112 of the Evidence Act Cap 6 R.E 2002**. It was her contention that the appellant was able to prove his case based on balance of probabilities. For her, the trial court decided the matter in favor of the respondent basing on weak evidence.

In arguing with the 2nd and the 3rd ground of appeal, Ms. Beatrice did not disputed that the suit started at Nyimbili Ward Tribunal in Civil Case No. 21 of 2018 and at Vwawa Urban Primary Court in Civil Appeal No. 02 of 2018 and later in Civil Case No. 04 at Vwawa Urban Primary Court. The learned counsel submitted further that the disputed names at the first appellate court are Adeo Chole Weggah. The true names for the appellant are Adeo Watson Weggah. Ms. Beatrice admitted that wrong citation of a party to a suit is fatal referring to this court the case of **Rashid Athuman Shaban vs. Trans Highway Co. Ltd. (2018)** High Court of Tanzania (unreported). For her, the District Court was wrong to state that the said Adeo Watson Weggah and Adeo Chole Weggah are the same person.

With regard to the principle of Res Judicata, the learned counsel referred to us **Section 9 of the Civil Procedure Code Cap 33 R.E 2002**. She added that the principle of Res Judicata must not be collateral; or incidental to the issue. For her, the matter at hand involves the issue of the administration of an estate of the late Watson Chole Weggah who was the appellant's father. It was contention that the appellant was neither the administrator of the deceased estate in neither Civil Appeal No. 02/2018 at Vwawa Primary Court nor in Civil Case No. 21 at Nyimbili Ward Tribunal but he was an administrator of his

father's estate in Civil Case No. 04 of 2019 at Vwawa Primary Court. Ms. Beatrice went on to state that at Nyambili Ward Tribunal in Civil Case No. 21 of 2018 and in Civil Appeal No. 02 at Vwawa Urban Primary Court the appellant lost the case since he had no locus stand.

Ms. Beatrice stated further that the appellant being appointed as the administrator of his father's estate, the court was in a position to guide him since he was suing on behalf of his father. She invited the court to find an inspiration in the principle laid in the case of **Paul Kavulaye Mgonja vs. Tanzania Electric Supply Co. Ltd.**, Labuor Revision No. 36/2014. High Court of Tanzania at Mbeya. For her the principle of res judicata does not apply in this matter. She prayed for the court to allow this appeal.

On his part, Mr. Isaack Chingilile, the learned counsel for the respondent came with two new issues. It was his contention that the said issues were not raised at the two trial courts to wit:

- (a) The appellant has no locus stand to move this court for not being administrator of the estates of Watson Weggah.*
- (b) The case filed in Primary Court when time barred.*

The learned Counsel referred to this court the case of **Agricultural Inputs Trust Fund vs. Stephano Simon Mwampashi,**

Civil Appeal No. 09 of 2018, High Court of Tanzania at Mbeya (unreported) and **Tanzania Pharmaceutical Industries Limited vs. Dr. Ephraim Njau AR-** Civil Case No. 05 of 1996 Court of Appeal of Tanzania (unreported). It was his submissions that the appellant had no locus to sue the respondent in his own name if at all he was the administrator of his deceased father. The learned counsel invited the court to refer **Section 6 of the Fifth Schedule of the Magistrate Courts Act R.E 2002** and the case of **Bruno Wenceslaus Nyalifa vs. The Permanent Secretary, Ministry of Home Affairs and the Honorable Attorney General**, Civil Appeal No. 82 of 2017 Court of Appeal of Tanzania at Arusha, **Ismail Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015, Court of Appeal of Tanzania Dar es Salaam (unreported) and **Shemsa Khalifa and two others vs. Suleiman Hemed**, Civil Appeal No. 82 of 2012.

In his second issue raised, the learned counsel submitted that failure to file the case within the prescribed time violates **Rule 2 item (b) of the Proceedings under Customary Laws GN 311 of 1964**.

In replying to ground number 1, 2 and 3 raised by the appellant, the learned Counsel for the Respondent submitted that Appeal No 3 of 2019 at Mbozi District Court was not heard on merit as it was dismissed

for being res judicata. The learned counsel went on to state that it was improper for the appellant to raise this ground on appeal.

In his rejoinder, the learned counsel for the appellant reiterated her earlier submissions adding that the two-pointed issues raised by the respondent submissions are baseless and devoid of merits. She insisted that at the trial court, the appellant was claiming for cattle's that belongs to his deceased father. She added that the appellant's father died in 2018 and on 2004 is when the village authorities ordered the respondent to return the cattle that belongs to the Appellants father.

With regard to the issue of res judicate, Ms Beatrice submitted that this court being the appellate court has the mandate to evaluate the evidence in record and draw its own conclusion citing the case of **Shah vs. Aguto (1970) 1 EA 263**.

I have dispassionately considered the rival submissions by the parties with regard to the grounds of appeal and the two issues raised by the respondent. I have opted to begin with the following two important issues on whether Madai No. 04 of 2019 was properly filed at the trial court? And whether the case that is subject to this appeal is res-judicata. I have assertively started with these issues since I believe that this may dispose the whole appeal if positively determined. The appellant at the trial court filed a claim against the Respondent praying

for the trial court to order the respondent to return the remaining 9 herds of cattle that belongs to his deceased father. It is vividly true that the appellant sued the respondent on behalf of his father who died sometimes in 2018. The proper procedure was to sue as the administrator of the estate of his deceased father.

The said two courts went on to determine the matter without considering on whether the appellant has locus to sue the respondent. I will agree with the learned counsel for the Respondent that the issue of locus standi is in fact a matter of law and has so far been entertained by courts of law as a legal issue. This stance was taken in the case of **Bruno Wenceslaus Nyalifa vs. The Permanent Secretary, Ministry of Home Affairs and the Honorable Attorney General (supra)**. In another case, **Bahati J in East African Development Bank vs. Godes Limited [1989] TZHC 28, 1989 T.L.R (https://tanzlii.org/tz/judgment/high-court tanzania/1989/28122)** where the issue of locus standi was well conversed.

There are forest of court decisions regarding locus standi. In the case of **Godbless Jonathan Lema vs. Musa Hamis and Two others**, Civil Appeal No. 47 of 2012, Court of Appeal of Tanzania at Arusha, provided the test for locus standi. It held that:

"Locus Standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say unless he stands in a sufficient dose relation to it so as to give a right which requires prosecution or infringement of which he brings the action."

The same stance was also taken by our neighboring jurisdiction in **The Attorney General vs. The Malawi Congress Party and another**, Civil Appeal No. 22 of 1996.

Again, in the case of **Lujuna Shubi Ballonzi Senior vs. Registered Trustees of Chama Cha Mapinduzi [1995] TZHC 11, 1996 T.L.R 2013 (TZHC)** it was stated that:

*"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also **that he is entitled to bring the matter before the court.**"*
[Emphasis is mine].

In the matter at hand, the appellant pitches his missile to the two-lower courts that the matter was decided in favor of the respondent while his evidence was strong enough to prove his case. After having gone through the trial court records, there is no objection that the appellant filed his suit claiming for what is said to be his deceased father cattle's that were entrusted to the Respondent for safe keeping. It is unfortunate that the issue of locus stand was not considered by the said

subordinate courts. The two courts were required to ascertain whether the appellant sued the respondent in the capacity as the administrator of his diseased fathers' estate before determining the suit.

I am alive that the **Fifth Schedule to the MCA (Cap 11 RE 2002)** as read here under provides for the powers of the administrator.

"An administrator appointed by a primary court shall, with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or for the purposes entitled thereto and, in carrying out his duties, shall give effect to the directions of the primary court".

Innumerable authorities have elaborated the duties as per above quoted provision, some being **Naftari Joseph Kalalu vs. Angela Mashirima**, PC Civil Appeal No. 145 of 2001 High Court at Dar es Salaam, (unreported) and **Hadija Said Matika vs. Awesa Said Matika**, PC Civil Appeal No. 02/2016, High Court of Tanzania at Mtwara (Unreported).

Separately from the duty of collecting and distributing the deceased estate as well as paying debts left by the deceased, the administrator also has the power to sue but also, he may be sued. This

court in **Ibrahimu Kusaga vs. Emanuel Mweta (1986) T.L.R 26**

High Court stated that:

"There may be cases where the property of deceased person may be in dispute. In such cases all those interested in determination of the dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish a claim of deceased property".

From the wordings of the cited case above, there is no dispute that the appellant had no locus to sue since in the case filed at the trial court, Madai No. 04 of 2019, he did not sue as the administrator of the estate of his late father instead he filed the case against the respondent in his personal capacity. It was wrong for the first trial court to conclude that the appellant has failed to prove his claim and that the claim was time barred without first ascertaining on whether the appellant has locus standi to sue.

Coming to the second issue raised by the court and also subject to the appellant ground of appeal, the records of the first appellate court at page 3 ad 4 of the typed judgment speaks loudly that the trial Magistrate in dismissing the appellants appeal stated that:

It is from the above reasons this court find that the Appeal No. 03 of 2019 (this case) fits all ingredients of Res

Judicata, and therefore this court do hereby dismiss this appeal with cost.

Without being detained much on this issue, there is no where on the record that the appellant has filed another appeal that has been full determined by the District Court or any other court. There is no any document submitted by the respondent to show that the appellant has another appeal of the same grounds with the same parties that has been heard and determined by any appellate court. In his written judgment at page 4, the trial magistrate at the first appellate court stated that he took trouble to find the case file No. 1 of 2018 and Civil Case No. 02/2018 at Vwawa Primary Court and noted that the appellant was claiming 6 cows the same claimed in Civil Case No. 3 of 2019.

There is no gainsaying that the appellate magistrate stepped into the shoes of the respondent by his self-explanation that he took trouble in looking for the existence of the alleged cases at two different trial court. With due respect that is not his duty but rather it was the duty of the respondent to prove his allegations that the matter is res-judicata. He was therefore wrong to hold that Appeal No. 03/2019 is res-judicata. It was the duty of the respondent to satisfy the court that the alleged cases do exist and the same has been determined by the trial court to its finality. In addition to that Res Judicata is only provided under

Section 9 of the Civil Procedure Code, Cap 33 R.E 2019, it does not apply for matters originating from primary Court. Section 2 of Civil Procedure Code provides for the application of the Civil procedure Act it states as follows:

Subject to the express provisions of any written law, the provisions of this Code shall apply to all proceedings in the High Court of the United Republic, courts of resident magistrates and district courts.

The trial appellate court wrongly invoked the principal of res judicata in a matter that has its origin from the primary court. The proper law to be applied was the Magistrate Courts (Civil Procedure in Primary Courts) Rules 11.

According to the **Magistrates Courts (Civil Procedure in Primary Courts) Rules Rule 11** clearly provides that:

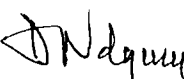
"where in any proceedings before a court, the court is satisfied that any issue between the parties has already been decided by the court or by any other court of competent jurisdiction in another proceedings between the same parties, the court shall not try the issue but shall try the other issues, if any, involved in the proceedings".

Since the trial magistrate wrongly invoked this doctrine in a matter that originates from the primary court, and since the appellant sued the respondent in his personal capacity, I find that the appeal has crumbled.

In the event, I subscribe to the above two legal issues and proceed to knock out the appellants explanation pegged under the umbrella of being the deceased son. Be as it may be, as pointed above, there is no room for this court to entertain the Appellants ground of appeal. In view thereof, the appeal is bound to fail.

Most importantly as already pointed out, the Appellant has no locus standi to sue the Respondent in his personal capacity but as the Administrator of his father's estate. In the event thereof, I accordingly dismiss this appeal. Due to anomalies committed by the lower courts, I also quash the proceedings of the trial court and of the appellate court. I will not order cost to this appeal, instead each to bear the same. The appellant may wish to file a fresh claim at the lower court as the administrator of his deceased father subject to the Law of Limitation Act. It is so ordered. Right for further appeal detailed.




D. B. NDUNGURU
JUDGE
13/07/2020

Date: 13/07/2020

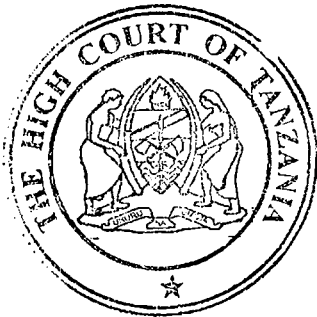
Coram: D. B. Ndunguru, J


Appellant: Present

Respondent: Present

B/C: Gaudensia

Court: The matter is for judgment today, judgment is delivered in the presence of the appellant and respondent who have appeared in person.




D. B. NDUNGURU
JUDGE
13/07/2020

Right of Appeal explained.