

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND APPEAL NO 16 OF 2020

FELICIAN MUHERE _____ APPELLANT

VERSUS

DAVID MLAY _____ RESPONDENT

(Arising from the decision and orders of the district land and housing tribunal for Mara at Musoma, Hon. Masao Chairperson, in land application No. 275 of 2016 dated 29.09.2017)

JUDGEMENT

(Amended under Section 96 of the Civil Procedure Code [Cap 33 RE 2019])

Date of last order; 08.06.2020

Date of Judgment; 26.06.2020

GALEBA, J.

The issue in this appeal is somewhat straight forward although, the appeal itself is preceded by a twisted chain of litigations that has come to this court many times with more than 4 judges having had to attend to various offshoots of the dispute between the parties. The present appeal was filed to challenge the ruling of the district land and housing tribunal for Mara in land application no. 275 of 2016 which was delivered on 29.09.2017. The ruling decided that the matter before it was **res judicata** land application no. 11 of 2007 which the appellant had lost on 21.10.2011 before the same tribunal. Following the dismissal of that application (no 11 of 2007), the

appellant filed land appeal no 75 of 2011 to challenge the dismissal but that appeal like the application was dismissed in April 2017 by this court, Hon. Mruma J. After the dismissal of his appeal in Mwanza, the appellant filed land application no. 275 of 2016 which was dismissed as stated above on grounds that the complaint of the appellant in that case had been litigated upon in the previous two matters and closed. The appeal before this court seeks to investigate whether that ruling in land application no. 275 of 2016 is lawful.

Before getting to the exact issue presented in this appeal, it is appropriate to navigate through the relevant background to the issue in the present appeal. On 20.02.2007 the present appellant filed land application no 11 of 2007 claiming two substantive prayers; rent of Tshs 1,050,000/= and recovery of vacant possession of the premises comprised in **Plot no. 16 Block "A" Industrial Area Nyakato**. The case was filed against the present respondent and also another person called **MR. ANIL KUMAR SHAH** as a third party. The issues that were framed in that first application were these;

"1. Who owns the suit premises between the applicant and the 2nd respondent.

2. Who leased the suit premises to the 1st respondent.

3. Reliefs if any."

The 1st issue was resolved in favour of a third party, **MR. ANIL KUMAR SHAH** who was declared the lawful owner of the suit premises and the application was, on that score, dismissed with costs. The present

appellant appealed to this court at its Mwanza registry and as stated above, he filed land appeal no 75 of 2011. I had indicated earlier that that appeal, was dismissed upholding the decision of the district land and housing tribunal for Mara in land application no. 11 of 2007. To be specific the high court held that the appellant who is the appellant before this court, failed to prove how he acquired the land in dispute that is why the decision of the tribunal was upheld.

It is not clear if the decision of the high court aggrieved the appellant but what we are certain of is that he did not appeal to the Court of Appeal to challenge it. Instead what he did following that second dismissal of his matter in the high court in 2014, on 23.12.2016, the appellant filed land application no. 275 of 2016 in the district land and housing tribunal indicating at clause 6(a)(i) that the cause of action or brief facts constituting the claim to be;

"6(a) Cause of action/ brief statements of facts constituting the claim

- (i) This honourable tribunal be pleased to declare that the applicant is the legal owner of the land in dispute, and the respondent who is a tenant be evicted from the land disputed."***

In that case the prayers are contained at clause 7, but the prayer relevant to this case is a relief prayed at clause 7(a), which has the following prayer.

"7. Relief Claimed.

- (i) That, the Applicant is legal owner of the land in dispute PLOT NO 16 BLOCK A NYAKATO AREA MUSOMA municipality as the same was allocated to him by the Government, via Musoma Municipal, which***

also issue the certificate of right of occupancy in the Applicant name, title No. 20603 LO. NO 159724, LD NO MTC/LD6873."

The above cause of action and relief are what the district land and housing tribunal dismisses as ***res judicata*** the two matters one before the very tribunal no 11 of 2007 and land appeal no 75 of 2011 before the high court. In this appeal, the appellant wants this court to fault the decision of the district land and housing tribunal for having decided as such. The appellant filed 4 grounds of appeal as follows;

"1. That the Hon. Chairman misdirected himself in law and fact in holding that the application no 275 of 2016 is res judicata to an application no 11/2007 and H/C appeal no 75/2011 while the same had different subject matter (sic).

2. That the Hon. Chairman misdirected himself in law and fact in holding that the principle of res judicata applied on two different subject matters.

3. That the Hon. Chairman misdirected himself in law and fact in analyzing the principles of res judicata and therefore wrongly entered ruling in favour of the respondent.

4. That the ruling for extension of time was delivered on 13/03/2020 and it has granted 14 days hence this appeal is well within time. "

When this appeal came up for hearing on 08.06.2020, the appellant appeared in person whereas the respondent was appearing by Mr. Baraka Makowe learned advocate. In his submission to support the appeal Mr. Muhere was brief and he raised three points; ***first***, that parties in the cases are not the same. He submitted that in the former matters there were two respondents, **MR. DAVID MLAY** and

MR. ANIL KUMAR SHAH while in land application no 275 of 2016 there was one respondent, **MR. DAVID MLAY**, *secondly*, he submitted that land application no 11 of 2007 he was claiming rent but in land application no 275 of 2016 he was claiming ownership of the land. *Thirdly*, he submitted that the judge in land appeal no. 75 of 2011 was dealing with **Plot 16 Block "A" Nyasho** which is different from **Plot 16 Block A Nyakato**, the subject matter. He moved the court to hold that the principle of *res judicata* was not available to the district land and housing tribunal in land application no 275 of 2016, and that this court be please to order that that application be tried *de novo*.

In reply, Mr. Makowe submitted that the land which has all along been litigated upon is **Plot 16 Block "A" Nyakato** and that is the land that the applicant has been claiming in all matters. As for issue of land and rent Mr. Makowe submitted that the applicant would not have claimed rent without claiming ownership. He submitted that the judgment of Hon. Mruma J, ruled that the land belongs to **MR. IDD MAGESA** and the issue of **Plot 16 Block "A" Nyasho or Nyakato** was a matter to rectified by the Court of Appeal if the appellant was of the view that the high court ruled on the land he was not complaining about. In rejoinder the appellant stated that Hon. Mruma J, did not rule that the land belongs **MR. ANIL KUMAR SHAH** and in any event, he added, **MR. SHAH** is English by nationality and foreigners are not permitted to own land in this country.

With the above information from both the relevant historical background of the dispute and submissions of parties this court is confident that it can now proceed to make some headway towards termination of the appeal as presented.

As it can be noted, the fourth ground is not a complaint against the decision of the district land and housing tribunal in land application no 275 of 2016 and also the appellant did not submit anything on it. In the circumstances, that ground is struck out for being frivolous. The rest of the grounds cannot not be determined separately, so in this case this court will treat them as one single ground in determining the issue;

"whether the dismissal of land application no 275 of 2016 based on the principle of res judicata was a lawful decision."

In this appeal there is one common thread running through all the three matters I want each stake holder in this dispute to note. I will also employ the commonest language that I will deem the simplest to understand, especially to the appellant who is unrepresented, and it is in circumstances obtaining in cases like the present appeal where one thinks of Kiswahili to be codified as the language of the court for both the proceedings and also for the record. That is so because more often than not, the court desires to convey the message in its judgment direct to both litigants instead of telling them to go elsewhere and seek services for interpretation of a judgment he has in his hands. Anyway here we go;

In land application no 11 of 2007 the issue was not only rent but also it was recovery of possession of the land and that is why the issue on ownership was framed and resolved that the owner of the land was **MR. ANIL KUMAR SHAH**, the 2nd respondent in that application.

In land appeal no 75 of 2011, ownership of the land to **MR. ANIL KUMAR SHAH**, was confirmed by the dismissal of the appellant's appeal.

In land application no 275 of 2016 the appellant knowing the existence of the two previous decisions one of the same tribunal and another of the high court comes on the issue of ownership, files the same case, claiming ownership of **Plot 16 Block "A" Nyakato** whose ownership he knows was vested by court to **MR. ANIL KUMAR SHAH**.

The point is that the high court did not disturb the decision of the tribunal in land application no 11 of 2007, it confirmed it, it stated that the appellant failed to prove that he was owner. The point that this court wants the appellant to understand, and possibly the most important of all points is that, this court cannot order the district land and housing tribunal to go and determine an issue of ownership of land whose owner was confirmed by the high court in Mwanza 6 years ago in land appeal no 75 of 2011, that, this court shall never do. If this matter is to be sent to the tribunal for determination of the substantive points, that tribunal will have to determine the following issue;

"Who owns the suit premises between the applicant and the respondent."

But, we stated already that that issue was framed and resolved in the same tribunal and an appeal to the high court did not change its decision. That is the reason why this court cannot permit the same tribunal to go and frame the same issue which has been resolved already. To aggravate the matter even **MR. ANIL KUMAR SHAH** who is the lawful owner the land according to the first two decisions, was left out in the case whose decision is being challenged before this court.

There are other two more points that the appellant submitted upon. One was the fact that the high court ruled on **Plot 16 Block "A" Nyasho** and not **Plot 16 Block "A" Nyakato**. That point may be addressed interrogatively; *viz*, which plot did the appellant go to the high court complaining about? If he went to the high court complaining about **Plot 16 Block "A" Nyasho** the judgment was on that plot but if he went complaining on **Plot 16 Block "A" Nyakato** the judgment related to the **Nyakato Plot**. The appellant appealed to the high court complaining that his land (**Plot 16 Block "A" Nyakato**) was wrongly declared to be owned by **MR. ANIL KUMAR SHAH**. The appellant cannot be taken seriously in arguing that the judgment land appeal no 75 of 2011 was concerning any other land other than the land he presented in that court. What the appellant submitted upon in this court was supposed to be the case he would put before the Court of Appeal complaining questing the validity of

the judgment which dealt with the land which he was not complaining about. Unfortunately, the appellant did not appeal against the judgment of the high court.

The other point was that in 2007 the appellant was suing for rent and in 2016 he was suing to recover ownership of land. That argument is not authentic. It may be taken seriously upon a superficial study of the documents in both matters. In land application no 11 of 2007, although one of the claims was rent, but also there was a prayer for orders to evict the respondent. In addition one of the issues framed in the 2007 case was who owns **Plot 16 Block "A" Nyakato**. In the subsequent matter, that is, land appeal no 275 of 2016 the appellant wanted to be declared owner of **Plot 16 Block "A" Nyakato**. In other words in both cases the appellant wanted the issue of ownership of land (**Plot 16 Block "A" Nyakato**) to be determined and this court cannot permit that to happen, the same issue to be determined in a subsequent matter while it was already determined in the first. That would be an unusual order to come from any court especially the high court.

In the final analysis, this court holds that the 1st, 2nd and 3rd grounds of appeal are dismissed because, the complaint in those grounds is that the cases (application no. 11 of 2007, appeal no 75 of 2011 and application no 275 of 2016) were dealing with different subject matters, but as abundantly demonstrated the subject matter was the same throughout the proceedings in all the three matters; it was

Plot 16 Block "A" Nyakato and none other. That is why the grounds have to go.

Now *res judicata*. Although the 2016 matter was not *res judicata* the previous two matters, still that does not improve the appellant's position because that fact cannot invalidate the dismissal order entered in land application no 275 of 2016.

It is true that **MR. ANIL KUMAR SHAH** is missing in land appeal no 275 of 2016 which makes *res judicata* to be an inappropriate defense. But what is clear is that the omission to sue him was deliberate and it was calculated to defeat that defense, and successfully have land application no. 11 of 2007 and appeal no 75 of 2011 reheard through the back door with an advantage of the court-declared owner of the land out of the picture. However in this jurisdiction, sensitive to justice as we are, one may defeat a potential defence of *res judicata* in advance, like what was done in this case by the appellant, but that cannot tilt the scales of justice to defeat it or to hinder its delivery. This is so because, the appellant know and he is privy to the fact that, in the previous two matters, the court did not hold that the land was **MR. DAVID MLAY's**, who was sued in 2016, the courts ruled that the owner of the land was **MR. ANIL KUMAR SHAH**. But now you have **MR. DAVID MLAY** being sued praying for orders of declaring the appellant as the registered owner of **Plot 16 Block "A" Nyakato**, and the ownership is "smartly" sought against **DAVID MLAY** who never claimed to be the owner of the land. If the omission to

implead **MR. ANIL KUMAR SHAH** in the subsequent land application in 2016 and suing **MR. DAVID MLAY** in his place is not trickery and deception, this court does not know what that deliberate omission could amount to. What the appellant wants to do in land application no 275 of 2016 is for that tribunal to sit in its own judgment which it passed in land application no 11 of 2007, and in case of appeal he would be demanding this court to sit in its own appeal which was passed in land appeal no 75 of 2011. The appropriate words to escort the appellant out of the court gates are those contained at page 11 of the decision of the Court of Appeal in **CRIMINAL APPLICATION NO 122/07 OF 2018; ISSA HASSANI UKI VERSUS THE REPUBLIC CA MTW (UNREPORTED)** quoting from **CRIMINAL APPEAL APPLICATION NO 8 OF 2011; PATRICK SANGA VERSUS REPUBLIC CA (UNREPORTED)**, where it said;

"...the applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality..."

In the circumstances, under the provisions of **section 43(1)(b) of the Land Disputes Courts Act [Cap 216 RE 2002]**, this court revises the decision of the district land and housing tribunal in land application no 275 of 2016 for dismissing the application for reasons that the matter was **res judicata**. However, the dismissal of that application is upheld because entertaining it would have amounted to a serious abuse of the court process.

Based on the above discussions and deliberations, this appeal is dismissed with costs for want of merit.

DATED at MUSOMA this 26th June 2020



Z. N. Galeba
JUDGE
26.06.2020

Court; This judgment has been delivered today the 26th of June 2020 in the absence of parties but with leave not to enter appearance following the medical warning to maintain social distance between individuals.

Order; Sufficient copies of this judgment be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.



Z. N. Galeba
JUDGE
26.06.2020