

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

LAND APPEAL NO 39 OF 2020

(Arising from Land Application No 140/2020 in Musoma District Land and Housing Tribunal)

**NYAMBARYA WARATI (Administrator of estate of late Warati
Nyambarya).....APPELLANT**

Versus

CHARLES KIRENGE RESPONDENT

JUDGMENT

17th August & 29th September, 2020

Kahyoza, J.

Nyambarya Warati (the administrator of the late Warati Nyambarya's estate) sued **Charles Kirenge** for trespass before the District Land and Housing Tribunal for Musoma at Musoma. **Charles Kirenge** won the case on the ground that the matter instituted in the District Land and Housing Tribunal (the **DLHT**) was *res judicata* due to the reason that, **Charles Kirenge** had previously locked horns with **Nyambarya Warati** in his personal capacity in Application No. 20/2014 before Kukirango Ward Tribunal (WT). **Charles Kirenge** won the battle.

After losing the suit before the WT, **Nyambarya Warati** applied for letters of administration of late Warati Nyambarya's estate. The primary court appointed him to administer the deceased's estate. He instituted claims as the administrator of the deceased's estate. The land in dispute

belonged to his late father Warati Nyambarya. He is arguing that the DLHT erred to hold that the current suit (application) is *res judicata*.

There is only one issue whether the current suit/application is *res judicata* to the earlier suit where the respondent sued the appellant in his personal capacity.

Is the current matter *res judicata*?

The facts are very simply that **Charles Kirenge**, the respondent, sued the **Nyambarya Warati**, before the ward tribunal for trespass to his land. **Nyambarya Warati** lost on the ground that there was ample evidence to establish that the disputed land belonged to the respondent. The WT gave its decision on the 8th December, 2014. **Nyambarya Warati** did not appeal. He decided to apply for letters of administration of late Warati Nyambarya's estate. After a long battle, which I see no need to narrate, **Nyambarya Warati** got valid letters of administration of late Warati Nyambarya's estate.

After **Nyambarya Warati** obtained letters of administration of late Warati Nyambarya's estate, he sued the respondent before the DLHT over the same land for trespass. **Nyambarya Warati** sued as the administrator of late Warati Nyambarya's estate. The DLHT dismissed his claim on the ground that it was *res judicata*.

Nyambarya Warati, the administrator of late Warati Nyambarya's estate appealed to this Court raising three grounds of appeal which boil down to one ground of appeal that the respondent in the earlier matter before WT was **Nyamarya Warati** is different from **Nyambarya Warati**, the administrator of late Warati Nyambarya's estate, a claimant/applicant in the current suit/application before the **DLHT**.

The **Nyambarya Warati**, the administrator of late Warati

Nyambarya's estate (the appellant) had nothing substantive to add when the matter came for hearing. He adopted the grounds of appeal and narrated what moved him to institute the claims.

Mr. Makowe advocate represented the respondent during the hearing of the appeal. He vehemently opposed the appeal. He submitted the DLHT was proper to hold that the appellant's application was *res judicata*. He referred this Court to section 9 of the **Civil Procedure Code** [CAP 33 R.E 2019] (the **CPA**), which embodies the principle of *res judicata*. It stipulates that-

" S.9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit on which such issue has been subsequently raised and has been heard and finally decided by such court."

The respondent's advocate Mr. Makowe submitted articulately regarding the elements of *res judicata*. He referred to a number of authorities such as **George Shambwe Versus Tanzania Italian Petroleum Company Ltd** [1995] TLR 21, **Zaruki Mbokemize v. Shaib Omary** [1988] TLR. 160, **Marato s/o Matimu v. Wankyo Sanawa** [1987] TLR 196 and **Gerald Chuchuba v. Rector, Itaga Seminary** [2002] TLR 213.

It is settled law and leading authorities are at one, that in order for the plea of *res judicata* to operate, the following conditions must be proved, namely:

- (i) The former suit must have been between the same litigating parties or between parties under whom they or any of them claim under the same title;
- (ii) The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively;
- (iii) The party in the subsequent suit must have litigated under the same title in the former suit;
- (iv) The matter must have been heard and finally decided;
- (v) That the former suit must have been decided by a court of competent jurisdiction.

The Court held in **George Shambwe Versus Tanzania Italian Petroleum Company Ltd** [1995] TLR 21, that-

*"For **res judicata** to apply not only it must be shown that the matter directly and substantially in issue in the contemplated suit is the same parties but also it must be shown that the matter was finally heard and determined by a competent court".*

The position in **George Shambwe's** case was taken in another case cited by the respondent's advocate of **In Gerald Chuchuba v. Rector, Itaga Seminary** the Court held that-

*"Before the doctrine of **res judicata** is applied the following essential elements must be shown to exist: that the judicial decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, that the judicial decision*

was final, and that it was in respect of the same parties litigating under same title;"

The appellant's contention is that he is suing in the current case as **Nyambarya Warati**, the administrator of late **Warati Nyambarya's** estate a different person from **Nyambarya Warati**, whom the respondent sued in the previous application (i.e. Application No 20/2014). Thus, the current application is not *res judicata*. The respondent's advocate briefly contends that the currently application is *res judicata* as all elements establishing the principle of *res judicata* do exists.

I concur with the respondent's advocate that the following elements of the principle of *res judicata* existed; **One**, subject matter directly and substantially in issue in the subsequent suit was the same matter which was directly and subsequently in issue in the former suit. In both application, the subject matter is actually the same piece of land; **Two**, the former application was heard and finally decided; **Three**, Kukirango Ward Tribunal, which heard and decided the former application was a competent tribunal. However, unlike the respondent's advocate, I do not find one of the elements of *res judicata* to exists.

The respondent's advocate advanced that the appellant is the same person in both applications. There is no doubt that the respondent sued the appellant in the former application (suit) in his person capacity. And in the current application (suit), the appellant sues as the administrator of the late **Warati Nyambarya's** estate. Although, the same person appeared physically in both applications, the law recognizes him as a different person in each case. Thus, although **Nyambarya Warati** was the same person

physically present in both applications, did not **litigate under the same title** in both applications. **Nyambarya Warati**, in the former application litigated in personal capacity whereas in the current application he is litigating in the capacity of the administrator of the deceased's estate.

The Court of Appeal confronted the issue whether it was proper to sue the administrator in her personal capacity in **Abdullatif Mohamed Hamis V. Mehboob Yusuf Osman & Fatuma Mohamed**, Civ. Rev., No. 06/2017. It held that-

*When all is said and applied to the situation at hand, as already mentioned, it is beyond question that the 2nd respondent was, at all material times, the administratrix of the deceased's estate. The life of her legal representation with respect to the estate was still subsisting at the time of her transaction with the 1st respondent just as the suit land was vested in her in her capacity as the legal administratrix. **But, as we have also hinted upon, the 2nd respondent was not sued in that capacity. Instead, the 1st respondent sued her in her personal capacity and, for that matter, no executable relief could be granted as against her personally with respect to the suit land which, as it turns out, was vested in her other capacity as the legal representative.** (emphasis added)*

It should not escape our mind that if a property in dispute forms part of the deceased person's estate, it is the administrator who is competent to sue or be sued. See the case of **Ibrahimu Kusaga versus Emanuel Mweta** [1986] TLR 26 (at page 30) where the Court state that-

"I appreciate that there may be cases where the property of a

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 claim of deceased's property."

In the upshot, I find that **Nyamarya Warati**, the appellant, is litigating in the current **under the different title** from that in former application. In the former application, the respondent sued the appellant in his personal capacity as **Nyambarya Warati** and in the current application the appellant is litigating in his capacity as the administrator of late **Warati Nyambarya's** estate. Consequently, the principle of *res judicata* cannot apply. Therefore, I allow the appeal and remit the case to the trial tribunal to hear and determine the application.

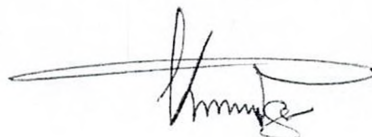
Costs shall be in due course.

It is ordered accordingly.



J. R. Kahyoza J.
29/9/2020

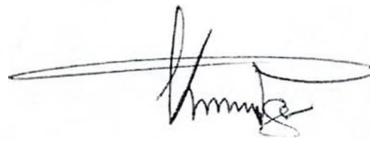
Court: Judgment delivered in the presence of the parties through video link. B/C Catherine Tenga present physically.



J. R. Kahyoza, J.
29/9/2020

Court: Following the respondent's informal application, I grant leave to

appeal to the Court of Appeal under section 47(2) of the **Land Disputes Courts Act**, [Cap. 216 R. E. 2019] read together with rule 45 (a) of the Court of Appeal Rules, **G.N. No. 368/2009**.

A handwritten signature in black ink, appearing to be 'J. R. Kahyoza, J.', with a long horizontal stroke extending to the left.

J. R. Kahyoza, J.

29/9/2020