

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 32 OF 2019

*(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land
Application No. 13 of 2019.)*

NASIBU BAHATI MWASOTE (Administrator of the
Estate of the Late Mbush N. Mwangwale).....**APPELLANT**

VERSUS

OBITE ULENJE.....**1ST RESPONDENT**

CHARLES WILLIUM.....**2ND RESPONDENT**

ROSEMARY WILLIUM.....**3RD RESPONDENT**

JUDGEMENT

Date of Last Order : 10/12/2019
Date of Judgement: 26/02/2020

MONGELLA, J.

Dissatisfied with the decision of the District Land and Housing Tribunal for Mbeya (Tribunal), the Appellant has appealed to this Court on two grounds of appeal. These are:

1. *That the trial Tribunal erred in law and fact when in the absence of proof ruled out that there was res judicata without comprehending that the Respondents were trespassers in the suit land.*

2. *That the trial Tribunal erred in law and fact when it struck out the application with costs.*

Both parties appeared in person and the appeal was argued by written submissions.

The brief facts of this case are as follows: the Appellant is the appointed administrator of the late Mbushi Mwangwale, his grandmother. He claims that among the things his grandmother left is the land in dispute located at Mbawi Village, Ilembo Ward in Mbeya region. He sued the Respondents over that land in Land Application No. 13 of 2019 before the District Land and Housing Tribunal for Mbeya. In the Tribunal he claimed that the Respondents had unlawfully invaded the land in dispute and maliciously destroyed crops and trees. However, during the hearing of the matter the Respondents raised a preliminary objection to the effect that the suit was *res judicata*.

The Appellant argued on the first ground that the Hon. Chairman sustained the preliminary objection while the Respondents failed to prove that the matter was really *res judicata*. He argued that the matter at hand has never been a subject of litigation between him and the Respondents for it to be termed *res judicata*. He added that the Tribunal never satisfied itself if there was any suit prior to the one at hand. He stated that the land in dispute resulted into a criminal case filed by his deceased grandmother (but was prosecuted by the Republic) against the Respondents' father one William Ulenje. This was Criminal Case No. 28 of 1989 before Ilembo Primary Court and thereafter into Criminal Appeal No. 67 of 1990. He

claimed that in both criminal cases the said Willium Ulenje was held liable for criminal trespass and in 2014 he surrendered the land in dispute to the Appellant.

Responding to the Appellant's submissions the Respondents first of all raised a legal issue to the effect that the Appellant has attached annexures on his submission thereby making his written submissions defective. However, they went ahead and argued that it is undisputed that in 1982 the said Mbushi Mwangwale and Willium Ulenje had a dispute over the land in question, but Willium Ulenje won the case and became the owner of the disputed land whereby he eventually handed it to his son Charles Willium, the 2nd Respondent. Charles Willium then on 24/04/2017 acquired a customary right of occupancy on the disputed property.

They argued that surprisingly on 22/01/2019 the Appellant filed Land Application 13 of 2019 in the District Land and Housing Tribunal for Mbeya claiming that the land belongs to him. The Respondents then raised a preliminary objection on the suit to the effect that it was res judicata which was sustained by the Hon. Chairman of the Tribunal. They argued that the elements of res judicata as envisaged under section 9 of the Civil Procedure Code, Cap 33, R. E. 2002 were met. They argued that the issue of ownership of the disputed property had already been determined as between Mbushi Mwangwale (deceased) and Willium Ulenje in 1982 and thus it could not be re litigated as it could lead into having two judgments over the same subject matter.

After considering the submissions from both parties, I find that it is only the first ground of appeal that calls for determination as the second ground shall automatically be disposed while dealing with the first ground. Starting with the issue of annexures attached to the submissions by the Appellant, I in fact agree with Respondents that it being a summary of arguments and not evidence, annexures which are part of evidence cannot be attached. I shall therefore disregard them and stick to the submissions of parties.

The issue thus remains as to whether it was correct for the Hon. Chairman to strike out the Appellant's suit for being res judicata. I have gone through the record of the Tribunal, and the submissions of the parties in this Court. What I gather from there is that there is no dispute that the land in dispute was once in the 1980s a subject of court case between one Mbushi Mwangwale and Willium Ulenje. The point in dispute is as to whom among the two was declared the rightful owner. This becomes the point in dispute because the Appellant claims that Mbushi Mwangwale won that case and after her demise he was appointed the administrator of her estate and the Respondents have committed a fresh trespass like their father Willium Ulenje did in the 1980s. On the other hand the Respondents, particularly the 2nd Respondent claim that Willium Ulenje won the case and handed the same to him.

In my considered opinion, the Tribunal Chairman ought to have made a finding on these allegations because if Mbushi had won the case then the Respondents would have been new trespassers and if Willium had won the case then the matter would have been res judicata. However, the

ascertainment of these allegations would have necessitated calling for evidence, particularly documentary evidence by providing the judgment in question.

Preliminary objections however, are not to be resolved by resorting to evidence; they are supposed to be confined to pleadings only. I have gone through the application and Written Statement of Defense filed in the Tribunal and found no single paragraph mentioning the case in 1980s or giving details of such case. Therefore, as I have already stated, it would have necessitated further evidence which is prohibited in determination of preliminary objections. In the case of ***The Soitsambu Village Council v. Tanzania Breweries Ltd and Tanzania Conservation Ltd***, Civil Appeal No. 105 of 2011 (Unreported) the Court of Appeal stated:


"A preliminary objection should be free from facts calling for proof or requiring evidences to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as preliminary objection on a point of law. The court must therefore insist on the adoption of proper procedure for entertaining application for preliminary objections. It will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to affidavit or other documents accompanying the pleadings to support the objection such as exhibits."

Under the circumstances, I find it was incorrect for the Tribunal Chairman to omit making a finding on the truth of the matter. Since he would not be able to call for evidence while determining the preliminary objection, the only option available was to overrule the preliminary objection and allow the matter to proceed to hearing whereby they would be able to present

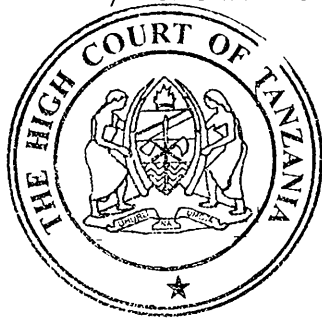
evidence proving the matter was res judicata or not. Then he would have resolved the issue in the course of determining the case on merits. I therefore allow the appeal, quash the decision and proceedings of the Tribunal and order the matter to be tried on merits before another chairman and a new set of assessors. I make no orders as to costs.


It is so ordered.

Dated at Mbeya this 26th day of February 2020


L. M. MONGELLA
JUDGE
26/02/2020

Court: Judgement delivered in Mbeya in Chambers on this 26th day of February 2020 in the presence of both parties appearing in person.




L. M. MONGELLA
JUDGE
26/02/2020