

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**LAND APPEAL NO.03 OF 2020**

*(Arising from the decision of the District Land and Housing Tribunal of  
Mwanza in Land Application No. 135 of 2019)*

**ZAMDA TWAHA ..... APPELLANT**

**VERSUS**

**1. MARIA DINA**

**2. O.M KASHOKE**

} ..... **RESPONDENTS**

**JUDGMENT**

*Last Order: 21.05.2020*

*Judgment Date: 27.05.2020*

**A.Z.MGEYEKWA, J**

The Appellant ZAMDA TWAHA is aggrieved by the Ruling of the District Land and Housing Tribunal for Mwanza in Land Application No. 135 of 2019 dated 27<sup>th</sup> December, 2019.

For the purpose of understanding the gist of the appeal, it is necessary to give a brief background of the appeal as obtained from the District Land and Housing Tribunal record. The appellant instituted an application before the District Land and Housing Tribunal claiming ownership on suit property, which is situated in an unregistered plot at Nyasaka, Ilemela area in Mwanza Region. Before hearing the application the respondents filed a preliminary objection which contained two points of objection; that the application is Res Judicata after first application being determined on merit which was decided by Pasiansi Ward Tribunal on 8<sup>th</sup> February, 2016 and that the District Land and Housing Tribunal lacks jurisdiction to entertain the application.

The District Land and Housing Tribunal of Mwanza decided the matter in favour of the respondent. Dissatisfied the appellant decided to lodge the instant appeal based on one ground of appeal as follows: -

- 1. The trial Chairman misdirected himself in law and fact in upholding the respondent's objection and ruling out that the*

*Land Application No. 135 of 2019 is Res judicata while failing to construe that neither the applicant nor the respondent therein was not a party in the decision from Pasiansi Ward Tribunal with Ref. No. 007/BK/KAW/2016 dated 8<sup>th</sup> February, 2016.*

When the matter was called for hearing, the applicant afforded the service of Mr. Mahmoud Mwangia, learned counsel and the 1<sup>st</sup> respondent appeared in person. The matter before this court proceeded ex parte against the 2<sup>nd</sup> respondent who was duly being served, all means of service was exhausted by he yet appeared before this court.

In supporting the appeal, Mr. Mahmoud submitted that the appellant is dissatisfied with the decision of the District Land and Housing Tribunal of Mwanza in Land Application No. 135 of 2019. Mr. Mahmoud faulted the trial tribunal for deciding the matter without satisfying itself that the matter was Res Judicata. He referred this court to section 9 of the Civil Procedure Code Cap.33 [R.E2019] that court of law is not allowed to determine a case that involved the same parties, the same cause of action and it was before a court

which had jurisdiction. Mr. Mahmoud fortified his submission by referring this court to the case of **Esther Egnas Luhambano v Adriano Jedam Kipalile**, Civil Appeal No.91 of 2014 (unreported) and added that the Court of Appeal listed five elements for the court to satisfy itself if the case was Res Judicata or not.

It was Mr. Mahmoud further submission that the case with Reg. No. 0007/BK/KAW/2016 before the Ward Tribunal of Pasiansi which was decided on 8<sup>th</sup> February, 2016 was between Maridina Eliuf v Jusufu Rajabu while the case before Nyamagana District Land and Housing Tribunal in Land Application No. 135 of 2019 is between Zamda Twaha v Maria D/O Dina and O.M Kashoke. He went on to submit that these are two different parties and different cases, thus the instant application is not Res Judicata because it did not meet the standard of being rendered as Res Judicata. Mr. Mahmoud lamented that the respondents forged the Ward Tribunal case to read Maria Dina v Zamda Twaha, Land Case No. 0007/BK/KAW/2016 dated 8<sup>th</sup> February, 2016. He further argued that the appellant made a follow up at the Ward Tribunal of Pansiansi and the tribunal issued

a letter dated 20<sup>th</sup> January, 2016 that there was no such a case at the Ward Tribunal.

He continued to argue that the letter was not tendered at the District Land and Housing Tribunal because the appellant was not aware of the forged letter. The learned counsel for the appellant prayed for this court to admit a new document as an exhibit, a letter dated 20<sup>th</sup> January, 2016 from the Ward Tribunal of Kawekamo to the District Land and Housing Tribunal of Mwanza. He referred this court to the case of Ismail Rashid v Mariam Msasi, Civil Appeal No. 75 of 2015 (unreported).

In conclusion, he urged this court to quash the District Land and Housing Tribunal decision with respect to Land Application No, 135 of 2016 dated 27<sup>th</sup> December, 2019, and order the tribunal to proceed with determining the case on merit. He prays this court to allow the appeal with costs.

Responding, the 1<sup>st</sup> respondent had not much to say, she conceded with the appellant's Advocate submission to remit the case before the District Land and Housing Tribunal of Mwanza to

proceed with hearing since she is in court corridors for five years thus she wishes the matter to come to an end.

In his rejoinder, Mr. Mahmoud reiterated his submission in chief and urged this court to decide upon the matter.

I have given careful deliberation to the arguments for the application herein advanced by the learned counsel for the respondent and that of the Counsel for the applicant on the preliminary objection so raised. I find the central issue for consideration and determination is *whether this application in Land Application No. 135 of 2019 instituted before the District land and Housing Tribunal of Mwanza was Res Judicata.*

As rightly argued by the learned counsel for the appellant that the Doctrine of Res Judicata is provided under section 9 of the Civil Procedure Code Cap.33 [R.E 2019] which state that: -

*" 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 under whom they or any of them claim to litigate under the same title in a court competent to try such subsequent suit or the suit in which such issue has been*

*subsequently raised and has been heard and finally decided by such court".*

In the case of **Peniel Lotta v Gabriel Tanaki & Another**, Civil Appeal No. 61 of 1999 the Court of Appeal set out five conditions of res judicata arising from the scheme of section 9 which when coexistent, bars a subsequent suit. The conditions are: (i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the Court which decided the previous suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally settled; in the former suit.

Following the above listed elements of the principle of res judicata, and on the determination of the issue at hand as to whether the suit is Res Judicata, I, therefore, venture on the records as to whether the three elements has a stand in this application. I

have found that the DLHT Chairman in his Judgment reached his decision that the matter was res judicata after noting the annexure which accompanied the 1<sup>st</sup> respondent the preliminary objection. However, the said case which was before the Ward Tribunal of Pasiansi dated 8<sup>th</sup> February, 2016 with S.No. 007/BK/PAS/2016 involved different parties; Meliadina Elijius (the Plaintiff) Zamda Twaha (the Defendant) and parties before the District Land and Housing Tribunal in Land Application No. 135 of 2019 were Zamda Twaha v Maria Dina and O.M Kashoke.

Moreover, I could not find any document which was tendered by the 1<sup>st</sup> respondent to prove that the case was before the Ward Tribunal of Pasians. However, the 1<sup>st</sup> respondent filed a Preliminary Objection which was accompanied by three annexures; Sale Agreement (Annexure 1), a document written Ward Tribunal of Pasiansi dated 8<sup>th</sup> February, 2016 with S.No. 007/BK/PAS/2016, parties were Meliadina Elijius (the Plaintiff) Zamda Twaha (the Defendant) and another document written Ward Tribunal of Pasiansi dated 8<sup>th</sup> February, 2016 with S. No. 007/BK/KAW/2016 parties were Meliadina Elijius (the Plaintiff) Yusufu Rajabu (the Defendant).



After examining the documents, I have found that the parties are not the same as in the Land Application No. 135 of 2019 parties were Zamda Twaha (applicant) against Mari Dina (1<sup>st</sup> respondent) and O.M Kashoke (2<sup>nd</sup> respondent) the respondents' names were not the same as appeared in the S.No. 007/BK/PAS/2016 at the Ward Tribunal of Pasiansi. Therefore, the first element was not proved.

On the second element so far, in determination as to *whether there was a final judgment on the earlier suit* on the same issue decided on merit, to qualify to sustain the preliminary objection, I perused the court records and found that the Ward Tribunal of Pasians issued a final judgment which involved the **Meliadina Elijus** (the Plaintiff) and *Zamda Twaha* (the Defendant), who were not the same parties before the Ward Tribunal of Pasians. Therefore the final judgment although was decided on merit but it involved different parties.

The respondent in her submission conceded the submission made by the learned counsel for the appellants that the matter be remitted back to the District Land and Housing Tribunal for Mwanza

to proceed with hearing the case on merit. Therefore in my view, with the confusion raised by the learned counsel for the appellant, it is prudently to remit back the file to the DLHT.

Given the above analysis and the position of the law, I quash the decision and proceedings of the of District Land and Housing Tribunal of Mwanza with respect to Land Application No.135 of 2019 and I remit back the file to be determined before another competent Chairman. The appeal is allowed without costs.

Order accordingly.

Dated at Mwanza on this 27<sup>th</sup> May, 2020.



A.Z.MGEYEKWA

**JUDGE**

27.05.2020

Judgment delivered in the chamber this on this 27<sup>th</sup> May, 2020 via audio teleconference, and both parties were remotely present.

A.Z.MGEYEKWA

**JUDGE**

27.05.2020