

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND CASE NO. 10 OF 2020

COSMAS KIFARU PLAINTIFF

VERSUS

JOHN BUDEBA 1ST DEFENDANT

GABRIEL PETER MFOYI 2ND DEFENDANT

RULING

Date of last Order: 04.03.2021

Date of Ruling: 08.03.2021

A.Z.MGEYEKWA, J

On 08th September, 2020 Cosmas Kifaru, the Plaintiff herein, instituted this suit against the John Budeba, 1st defendant and Gabriel Peter Mfoyi, 2nd Defendant seeking seven reliefs.

The Plaintiff lodged this application by the way of Complaint and the 2nd Defendant filed a Written Submission Defence and also raised two points of Preliminary Objection as follows:-

1. *That this court, by exercising original jurisdiction has no power to set aside the decision of the District Land and Housing Tribunal for Mwanza between the same parties in Application Review No. 27 of 2015 dated 16.10.2015 by which the 2nd Defendant was declared as the lawful owner of the landed property in dispute.*
2. *That this case is “ an abuse of the process of the court” or res judicata on account that the 2nd Defendant has already been declared as the lawful owner of the landed property in dispute by the District Land and Housing Tribunal for Mwanza between the same parties in Application Review No. 27 of 2015.*

When the appeal was placed before me for hearing on 22nd February, 2021, both parties agreed to argue the appeal by way of written submissions whereas the 2nd Defendant filed his submission in chief on 25th February, 2020. The Plaintiff filed his reply on 01st March, 2021 and a rejoinder was filed on 03rd March, 2021. Both parties complied with the court order.

In the written submission of the appellants, the learned counsel for the appellant started his onslaught by seeking to abandon the third ground and maintained the first and two points. Submitting on the first point, Mr. Mutalemwa argued that in 2012 the present Plaintiff filed in the District Land and Housing Tribunal for Mwanza the Application No. 27 of 2012

against the present 1st and 2nd Defendant in which the sale of the suit premise was nullified and restored to the present Plaintiff.

The learned counsel for the 2nd Defendant went on to argue that in 2015 the present Defendant filed in the same District Land and Housing Tribunal for Mwanza the Application for Review No. 27 of 2015 against the Plaintiff and the present 1st Defendant moving the Tribunal to review its Application No. 27 of 2012 whereby the District Land and Housing Tribunal admitted the certificate of Title No. 50477 Plot No. 197, Block 'D' located at Nyegezi and formed a basis of its judgment showing that the suit land is owned by the present 2nd Defendant and he was declared a lawful owner of the suit land, which the same matter is the subject of the Land Case No. 10 of 2020.

It was Mr. Mutalemwa's further submission that in the present Land Case No. 10 of 2020, the Plaintiff prays for a declaration that the land now Plot No. 197 Block D, Nyegezi, Mwanza was and he is the lawful owner. He further submitted that this court in exercise of its original jurisdiction cannot by a way of a suit set aside the relief granted in another subordinate court or tribunal and grant afresh ownership over the same suit land to the Plaintiff. He added that being, the Plaintiff could have approached this court by way of appeal or revision and not to institute a fresh suit.

Submitting on the second point, Mr. Mutalemwa submitted that in expounding the 2nd objection, they submit that the ownership over the suit premises as comprised of Plot No. 197 Block D, Nyegezi at Mwanza has already been litigated between the same parties and determined by the District Land and Housing Tribunal for Mwanza in Application Review No. 27 of 2015. To fortify his position he referred this court to page 7 of the District Land and Housing Tribunal Judgment in Application for Review No. 27 of 2015. He went on to submit that the five conditions justifying the invocation of the principle of *res judicata* are stated in the case of **Masumbuko Kwolesya Mtabazi v Dotto Salum Chande Mbega**, Civil Appeal No. 44 of 2013 Dar Es Salaam (unreported).

Mr. Mutalemwa did not end there, he submitted that the principle of *res judicate* is stipulated under section 9 of the Civil Procedure Code, Cap. 33 [R.E 2019], he argued that the section refers to the word 'suit' but equally the same principle applies to an application. To support his submission he referred this court to section 2 of the Civil Procedure Code, Cap. 33 [R.E 2019] which state that:-

" Subject to the express provision of written law the provisions of this Code shall apply to all proceeding in the High Court of the United Republic, Courts of Resident Magistrates and District Court."

Mr. Mutalemwa submitted that guided by the above position, he submitted that the issue of ownership of suit premises was litigated between the same parties and finally determined by the District Land and Housing Tribunal in Application Review No. 27 of 2015 thus this Land Case No. 10 of 2020 cannot be litigated between the same parties. On the strength of the above submission, Mr. Mutalemwa beckoned upon this court to uphold the first and second points of preliminary objection and struck out the Land Case No. 10 of 2020 with costs.

Mr. Njelwa for the Plaintiff resisted the preliminary objections with some force. Submitting on the first point, he contended that the learned counsel for the 2nd Defendant alleges that by exercising original jurisdiction this court lacks powers to set aside the decision of the lower tribunal in Application No. 27 of 2015 between the same parties. Mr. Njelwa argued that the learned counsel for the 2nd Defendant is misleading this court since this court has all power to entertain the same in its original capacity. He did not object that the 2nd Defendant in 2015 successfully filed an Application for review challenging the decision of the District Land and Housing Tribunal in Land Application No. 27 of 2012 on which the Plaintiff was declared the lawful owner of the disputed land.

Mr. Njelwa went on to argue that the Plaintiff had other alternatives including instituting a fresh suit as in the instant case and the court using

its inherent power under section 95 of the Civil Procedure Code Cap.33 [R.E 2019] can entertain it. He also referred this court to section 2 (1) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2019] which state that:-

“ Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters.”

Mr. Njelwa went on to argue that in the instant suit specifically number 2 and 3 of the Plaint the Plaintiff is seeking for an order to nullify the allocation of Plot No. 197, Block D, Nyegezi and the contents of paragraphs 9 and 11 of the Plaint this court has full power to grant the reliefs sought for it is the only court empowered to do so as per provision of section 99 (1) (d) of the Land Registration Act, Cap. 334 [R.E 2010]. He further argued that since there is an allegation of fraud that the certificate of occupancy of Plot No. 197, Block D, Nyegezi was obtained by fraud and the Plaintiff wants to prove with evidence in the course of hearing the case. He insisted that this court is vested with original jurisdiction to determine the suit thus this point is devoid of merit.

Arguing for the second point, Mr. Njelwa contended that the instant suit is not *res judicate* because it is not fit in the ambits of the provision 9 of the Civil Procedure Code Cap.33 [R.E 2019] and does not meet the five conditions provided for in the cited case above. To support his submission

he cited the Mitra's Legal & Commercial Dictionary 5th Ed, 1990 by A.N Saha page 673 which defined a suit to mean:-

" Every suit shall be instituted by the presentation of a Complaint or in such manner as may be prescribed. The suit does not include an appeal or an application."

Mr. Njeluwa also referred this court to section 78 of the Civil Procedure Code, Cap.33 [R.E 2019] and argued that a review is an application as opposed to a suit and therefore the two are different. He distinguished the cited case of **Masumbuko Kowolesya** (supra) for the reason that both were suits which is different from the circumstances of the instant case.

On the strength of the above submissions, Mr. Njeluwa beckoned this court to dismiss the preliminary objection for being short of merit.

In his rejoinder, Mr. Mutalemwa reiterated his submission in chief. Insisting, Mr. Mutalemwa submitted that the proper avenue for vacating the District Land and Housing Tribunal decision in Application for Review No. 27 of 2015 was by way of either an appeal or revision not by instituting a fresh suit. To support his submission he referred this court to section 41 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The learned counsel for the second Defendant went on arguing that section 95 of Civil Procedure Code Cap.33 [R.E 2019] does not confer any jurisdiction to this court to bypass the mandatory legal avenues as envisaged under section

41 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. Mr. Mutalemwa fortified his submission by referring this court to the case of **Oysterbay Properties Ltd & Another v Kinondoni Municipal Council & Patrick Rutabanzibwa & 2 Others**, Civil Revision No.4 of 2011, Dar es Salaam (unreported). It was his view that for the aforesaid reasons the Plaintiff cannot invoke section 95 of Civil Procedure Code Cap.33 [R.E 2019].

Mr. Mutalemwa insisted that the issue of ownership over the suit land between the same properties was finally determined by the District Land and Housing Tribunal. He lamented that to bring the same issue before this court is an abuse of the court process.

On the issue of res judicata, Mr. Mutalemwa insisted that the res judicata applies to suits and applications as both actions are construed as proceedings. To bolster his position he referred this court to the case of **Eastern African Development Bank v Blueline Enterprises Limited**, Civil Appeal No. 101 of 2009 Dar es Salaam (unreported).

On the strength of the above argumentation, Mr. Mutalemwa urged this court to dismiss the suit for being res judicata and that the act of the Plaintiff brings chaos in the administration of justice and amounts to abuse of the court process. The learned counsel for the respondent beckoned upon this court to dismiss the suit with costs.

Having heard the submission of both learned counsel for and against the preliminary objections, I have to say that the issue for determination is *whether the preliminary objections are meritorious*.

I will start examining the first point. The learned counsel for the defendant stated that this court by original jurisdiction has no power to set aside the decision of the District Land and Housing Tribunal in Application for Review No. 27 of 2015 whereby the second Defendant was declared a lawful owner of the disputed laded property. It is not disputed by both learned counsels for the Plaintiff and Defendant that the Plaintiff filed an Application No. 27 of 2012 at the District Land and Housing Tribunal in respect to land ownership which was decided in favour of the Plaintiff.

It is also undisputed fact that the second Defendant filed an Application for Review No. 27 of 2015 before the same District Land and Housing Tribunal in respect to land ownership whereby the second respondent discovered new evidence and to prove his ownership. The second Defendant tendered a Certificate of Title No. 50477 Plot No. 197, Block 'D' located at Nyegezi whereby the District Land and Housing Tribunal admitted the certificate of Title No. 50477 Plot No. 197, Block 'D' located at Nyegezi and through a memorandum of review to determine the issue of the lawful owner and decided the matter in favour of the second Defendant. I have perused the Plaint and found that the Plaintiff

urged this court to nullify the Certificate of Occupancy in respect to Plot No. 197 Block D, Nyegezi, Mwanza, claiming that the Certificate of Title No. 50477 in the name of the first Defendant was illegally obtained.

It is my considered view that was the same subject matter involved in this suit and in Application No. 27 of 2015 before the District Land and Housing Tribunal for Mwanza. The matter was already been determined by the District Land and Housing Tribunal and the second Defendant was declared a lawful owner of the disputed landed property. As rightly pointed out by the learned counsel for the second Defendant this court can only determine the matter if it is brought by way of appeal or revision. Therefore this point of preliminary objection is sustained.

On the second point, the second Defendant Advocate claims that the suit is *res judicata*. The doctrine of *res judicata* is part of our laws and is embodied in section 9 of the Civil Procedure Code, Cap. 33 [R.E 2019]. For ease of reference, I find it apt to reproduce the section hereunder. It reads:-

"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 in which

such issue has been subsequently raised and has been heard and finally decided by such court.” [Emphasis supplied].

The principle was well articulated by the Court in **Yohana Dismas Nyakibari and Another v. Lushoto Tea Company Limited and 2 Others**, Civil Appeal No. 90 of 2008 (unreported) in which it was held:

“There are five conditions which must co-exist before the doctrine of res judicata can be invoked. These 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 former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

Guided by the above principle, there is no gainsaying that the parties to Application No. 27 of 2015 at the District Land and Housing Tribunal were the same in Land Case suit No. 10 of 2020. The matter was decided to its finality and the tribunal was competent to try the application. What is in dispute is that the matter before the tribunal was an application while in the instant application is in relation to a suit.

In addressing this issue I find it prudent first to define the word *res judicata*. In the **Black's Law Dictionary 9th Edition**, the term suit is defined as:-

"Any proceeding by a party or parties against another in a court of law."

Applying the above definition, suits and application are construed as proceedings. Likewise, the principle of *res judicata* under section 9 of the Civil Procedure Code Cap. 33 [R.E 2019] applies to suits and applications since both are construed as proceedings.

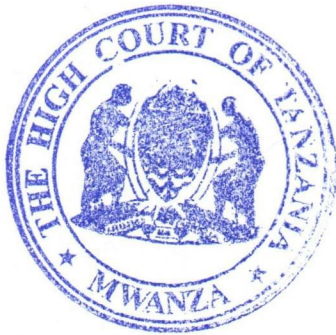
Nevertheless, as rightly pointed out by the learned counsel for the 2nd Defendant the principle of *res judicata* applies to the application by virtue of section 2 of the Civil Procedure Code Cap.33 [R.E 2019] that the provisions of the Civil Procedure Code apply in all proceedings in the High Court of the United Republic, Courts of Resident Magistrate and District Court. See the case of **Eastern African Development Bank** (supra).

In my observation on records, I share the views with Mr. Mutalemwa, learned counsel for the second defendant that the matter before this court is *res judicata* in accordance to section 9 of the Civil Procedure Code Cap.33 [R.E 2019] since all five elements of principle of *res judicata* were met.

For the aforesaid reasons, I proceed to uphold the preliminary objections and dismiss the Land Case No.10 of 2020 for being *res judicata* without costs.

Order accordingly.

DATED at Mwanza this 08th March, 2021.




A.Z.MGEYEKWA

JUDGE

08.03.2021

Ruling delivered on this 08th March, 2021 via audio teleconference and both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

08.03.2021