IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO 41 OF 2020

(Originating from Land Case No. 178 of 2019 District Land and Housing Tribunal for Moshi and Miscellaneous Application No 31 of 2020 High Court District Registry of Moshi)

HARRISON SILA MARIKI..... APPELLANT

VERSUS

FREDRICK MAKISA TEMU..... RESPONDENT

JUDGEMENT

MUTUNGI .J.

Before the District Land and Housing Tribunal of Moshi the appellant herein filed an application against Fredrick Makisa Temu (the respondent) claiming for a piece of land located at Chilio Hamlet, Holili Ward, Rombo District.

Before the commencement of the hearing, the Respondent's advocate raised a Preliminary Objection premised on a legal point that, the matter is res judicata. Upon hearing of the Preliminary Objection, the Hon. Chairman was ultimately satisfied that, the matter is res

judicata. Aggrieved by the said ruling, the Appellant has appealed to this court on the following ground: -

> *"The honorable Chairman erred in law and in fact by holding that the said application No. 178 of 2019 was res judicata while there was no proof to that effect."*

When the matter came for hearing the parties agreed to proceed by way of written submissions. The Appellant was represented by Mr. Phillip Njau learned advocate and the Respondent enjoyed the services of Mr. J. M. Itemba learned Advocate.

In support of the appeal the appellant's advocate submitted, the doctrine of res judicata is envisaged by **section 9 of the Civil Procedure Code, CAP 33 RE 2019**. The counsel proceeded to argue that, the Chairman was wrong to hold the application was res judicata while the application has never been heard to its finality by any court. Further, the application was between the same parties but on different pieces of land in dispute. To this he clarified, the previous one (No. 74/2008) was 2 acres situate at Makida Ward while the present one is of 3.5 acres situated at Holili Ward. In view thereof, the present matter was subject of two different locations which does not fit the test provided for in the cited provision of law.

The advocate further referred the court to the holding in the case of **Gerald Chuchuba vs rector, Itiga Seminary [2002] TLR 213 HC** in support thereof. To beef up his stance the learned advocate listed down the essential ingredients of the doctrine as hereunder: -

1. *That the judicial decision was pronounced by a court of competent jurisdiction.*
2. *That the subject matter and the issue decided are the same, or substantially the same as the issue in the subsequent suit.*
3. *That the judicial decision was final and*
4. *That it was in respect of the same parties litigating under the same title."*

The counsel called upon the court to find the application which was declared res judicata does not fit in the above quoted components, ***first,*** the size of the subject matter is different and ***second,*** the locations of the stated pieces of land are different.

He further submitted, it would seem once the appellant had admitted that he was a party in land case No. 74 of 2008, the trial Chairman was consequently convinced the present case was res judicata to the former case. In the counsel's firm view this was an error for the reason that

indeed at paragraph 6(ii)(iii)(iv)(v)(vi)(vii) the Appellant had admitted to have been sued by the respondent in land case No. 74 of 2008 for trespass over a piece of land measuring 2 acres located in Makida Ward Rombo District. The matter had proceeded in the same pleadings ex-parte hence he was not aware and neither was he served with summons. Following the ex-parte judgment the respondent trespassed unto the appellant's 3.5 acres located at Holili Ward on the pretext that he had an order from land case No 74 of 2008.

The learned advocate submitted that in land application No 178/2019 under para 6(iv)(v) and (vi) of the application, the appellant had made it crystal clear that the respondent was claiming for a piece of land measuring two acres located at Holili Makinda Ward and not 3 acres located at Holili Ward.

In that regard the appellant's pleadings speak for themselves and parties are bound by their pleadings. The learned advocate cited the case of **Shilinde Limited vs Attorney General land case No. 10 of 2017 HC Mwanza [2020] TZ HC 2341 Tanzlii (25 August 2020)** where the court referred to the case of **Yara Tanzania Limited vs Charles Aloyce Msemwa, Junior Agravet & 2others, Commercial**

case No 5 of 2013 HC in which the Supreme Court of Nigeria in the case of **Mojeed Suara Yusuph vs Madan Idiatu Adegoke** had the same findings on pleadings filed in court.

Following the above, the respondent was bound by the pleadings of land case no. 74 of 2008 where the respondent referred to land measuring to 2 acres located at Makida Ward, Rombo District. The counsel further contended in light of the foregoing this court has a noble duty to pass through the pleadings to satisfy itself on the facts deponed in Land Case No. 74/2008. He referred to the case of **Yasin Ramadhan Chang'a vs Republic 1999 TLR 489 CA** in support thereof, which highlighted the appellate court can differ from the trial court if its opinion is not supported by the evidence and the right inferences.

In conclusion, the learned advocate was of a firm view that, the trial Chairman's findings were not supported by facts stated in Land Application 178/2019 which refers to land measuring 3.5 acres located at Holili Ward.

Reacting to the appellant's submission, the respondent's advocate submitted, first there was no evidence adduced in the trial Tribunal since Preliminary Objections are proved by legal arguments. What actually transpired in the trial

tribunal is that, the appellant's counsel conceded to the preliminary objection as observed at page 2 of the ruling. The learned advocate further argued that, in the long submission by the Appellant, the counsel did not mention the fact that, the application was dismissed after he conceded to the objection. He was of a settled view since the ruling was based on admission, all the cases cited by the Appellant's advocate are irrelevant to the present case in which the appellant's advocate had admitted the matter was res-judicata.

Second, Mr. Itemba averred what the learned advocate had done is to raise matters on appeal which were not canvased before the trial tribunal. The appellate court deals only with the matters transacted before the trial tribunal. It follows the contents of the pleadings in Land Application No. 74 of 2008 and land Application No. 179 of 2019 as discussed by the Appellant before this court were not argued in the trial tribunal nor raised by the Appellant in the said tribunal. He called upon this court to ignore what the appellant's counsel was advocating in this appeal. In his opinion, the Appellant is trying to set aside the ex-parte judgment which is the bedrock of the res judicata.

Third, the counsel submitted, Land Application No. 74 of 2008 was heard to finality, an Ex-parte judgment delivered, and it has already been executed in the respondent's favour.

Fourth, the learned advocate further explained, the appellant had no right to appeal against a judgment/decision on admission. To put salt to the wound, the trial chairman did not put the words *"Right of Appeal explained in the ruling"*.

In conclusion, the learned advocate held a view, the only way to challenge such judgement is by way of review in the same tribunal or by instituting a fresh case in the tribunal. In the like manner, this appeal has no merit and prayed the court proceeds to dismiss the same with costs.

In Rejoinder, the Appellant's advocate raised the issue of the legality of the Respondent's advocate. He submitted that after passing through the judiciary "website" which provides for records of advocates, he noticed the respondent's advocate was inactive. In view thereof the submission made by him has no value. It was made by an unqualified person. To cement his stance, he cited the case of **Wellworth Hotels and Lodge v African Canvas Co Ltd and 4 Others Commericial Case No. 5 of 2020** which

cited with approval the case of **Baraka Owawa vs Tanzania Teachers Union Misc Labour Application No. 6 of 2020 HC Musoma (unreported)** and the case of **Edson Oswald Mbogoro vs Emanuel Nchimbi and other Civil Appeal No. 140 of 2006 CAT DSM (Unreported)**. He concluded by submitting the submission by such advocate has no legal validity and he prayed the same be disregarded.

On a further reply, the learned advocate quoted Regulation 12(3)(a) of The Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 which provides for the procedure to draw a judgment on admission. In that there must be a record of the words that constituted the admission as per the holding in the case of **Ramadhan Majebu vs Kunisa Chamriho Nyamsha [19-05-2020] [TANZLII] Mwanza**. Even though the admission must be clear and must be recorded. In this case the recorded admission was that of the advocate while the appellant was before the tribunal and he should have been recorded on the same.

Furthermore it was submitted there were five issues which needed to be cleared by the appellant himself which are ***first***, whether the suit was res judicata on the ground

advanced by respondent's advocate, ***second,*** whether there was a previous suit between the parties which was decided to its finality. ***Third***, whether in the previous suit the appellant used the names Harrison Sila Moshi, ***fourth,*** whether the name of Harrison Sila Mariki was now used by the Appellant to sue over the same suit previously decided upon and ***fifth***, whether the present suit is different from the previous decided one between the same parties.

Glaring through the above questions, it was submitted, these call for recorded interrogations or evidence. To the contrary what we have is just a simple explanation from the appellant's advocate who conceded to the preliminary objection after passing through the documents of the case. The trial tribunal did not direct its mind to the adjournment prayer made on the first day of the hearing.

Having gone through both parties' submission and record, the only issue is ***whether the holding in Application No. 178/2019 was proper in law without proof.***

The brief facts giving rise to this appeal are that, the Appellant instituted Land Application No. 178/2019 against Fedrick Makisa Temu (the respondent herein) claiming for a piece of land located at Chilio Hamlet, Holili Ward,

Rombo District measuring 3.5 acres seeking for the following orders;

1. *A declaration that respondent is a trespasser on the disputed suit land which is the lawful property of the Appellant.*
2. *Eviction of the Respondent from the suit land,*
3. *Permanent injunction against the Respondent his relatives associates and agents from further trespass onto the suit land,*
4. *Respondent pay costs of this suit.*

Before hearing from the respondent, he raised a preliminary objection to the effect, the matter was res judicata, the application is bad in law as it is brought in a fictions name, the application does not disclose any cause of action and it is time barred. On 20.01.2020 after the Respondent's advocate submission, the advocate representing the appellant who is now representing him in this appeal prayed the matter be adjourned to another date so that the Appellant could appear and shed light on the Preliminary Objection raised. The prayer was readily granted by the Hon. Chairman who adjourned the case to 2.3.2020. On that date, the appellant's advocate

conceded to the preliminary Objection in the sense that, he had consulted the Appellant who admitted to have used the name of Harrison Sila Moshi in the former case and further the subject matter was the same as is the current case before the tribunal. He concluded thus the matter was re-judicata. Following this admission the Honourable Chairman made a ruling thereafter, that the matter was res judicata. It would seem the appellant was aggrieved by this ruling hence this appeal.

Before entertaining the issue of res judicata, I find it worth to discuss ***whether this appeal has legs to stand.***

It is common ground a preliminary objection is based on matters of law only, on this I identify myself with the most celebrated principle found in the case of **Mukisa Biscuit Manufacturing Co. LTD vs West End Distributors ltd 1969 E.A 696**. The record is as clear as a crystal that, after the appellant's advocate was granted an adjournment and upon consultations with his client, he conceded to the preliminary objection. I am hereunder quoting the words of the learned advocate as found at page 5 of the tribunal typed proceedings: -

> *"I took time to read the documents in respect to this case after the preliminary objection being*

raised that, this dispute was determined to the finality by the competent court. it is true that after asking the applicant if he ***used the name of HARRISON SILA MOSHI*** *in the previous cases, he admitted and further* ***he said the subject matter is the same.*** *I do concede with preliminary objection."(Emphasis mine).*

Since the advocate who was representing the Appellant declared the matter was res judicata, it is now surprising to see the same advocate appearing and contesting that which he conceded to. He is in other words swallowing his own words with a long and detailed submission which does not take him off the hook of the doctrine of Res-judicata. The trial Chairman while making his ruling had material from the two rival sides before him which moved him accordingly, unlike what is being suggested by the appellant in the appeal. It is upon such finding, this court cannot go out of the way to consider extraneous matters that were not put before the trial tribunal. Doing so, will be opening the pandora's box to the advantage of the appellant who through his counsel had conceded that the matter was Res-judicata among other issues raised. It follows as day follows night that, the appeal lacks merits and is accordingly dismissed with costs.

Before I pen off, the appellant's counsel had brought to light in the re-joinder that the respondent's advocate is not qualified to address the court since he is not lawfully registered as an active advocate. On this it is the settled view of the court that the issue was brought up in re-joinder and was not raised at all in the submission in chief nor in the re-ply submission. Bringing it as did the appellant's advocate was taking the respondent's counsel by surprise and had no avenue to respond thereto. The assertion is thus disregarded.

B. R. MUTUNGI
JUDGE
27/5/2021

Judgment read this day of 27/5/2021 in presence of both parties, Mr. Urilick Shayo holding Mr. Philip Njau brief for the Appellant and Mr. Jonas Itemba the Respondent's Advocate.

B. R. MUTUNGI
JUDGE
27/5/2021

RIGHT OF APPEAL EXPLAINED.