

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL NO. 25 OF 2020

(Arising from Land Application No. 27/2016 from the District Land and Housing Tribunal for Chato)

PASCHAL MALIYATABU APPELLANT

VERSUS

EMMANUEL MARCO RESPONDENT

JUDGMENT

4th & 18th May, 2021

RUMANYIKA, J.:

The appeal is against judgment and decree against Paschal Maliyatabu (the appellant) of Chato District Land and Housing Tribunal (the DLHT). It therefore goes without more words that Emmanuel Marco (the respondent) won the war and battle.

The 2 grounds of appeal revolved only around one point essentially. That pursuant to exparte judgment and decree dated 06/10/2010 of the DLHT the matter was res judicata since.

Messrs. S. Kitare and A. Nasimire learned counsel appeared for the appellant and respondent. By way of audio teleconferencing I heard them

on 04/05/2021 through mobile numbers 075722258 and 0754389820 respectively.

Having had combined the two points, but very briefly, Mr. S. Kitare learned counsel submitted that through Land Application No. 51 of 2009 the DLHT having had decided it in favour of the administrator of the estate, directed him to do the needful and subsequently set aside the exparte judgment, the latter was done therefore the matter was now res judicata that in order to avoid unnecessary multiplication of suits, Land Application No. 27 of 2016 it should not have been admitted in the first place (case of **Peniel Lotta v. Gabriel Tanaki & Another** (2003) TLR 312).

In reply, Mr. A. Nasimire learned counsel submitted that the appeal lacked merits as the doctrine of res judicata was inapplicable under the circumstances. Exparte judgment yes, but through Misc. Land Application No. 53B of 2010 the judgment was long ago i.e. on 22/02/2012 set aside but subsequently and successfully the respondent instituted Land Application No. 27 of 2016 hence the instant appeal.

Second, that contrary to provisions of Order XXXIX Rule 1 (1) of the Civil Procedure Code Cap 33 R.E. 2019 no copy of the impugned decree

was appended to the memorandum of appeal. We pray that the improperly filed appeal be struck out with costs. Mr. Nasimire learned counsel submitted.

On rejoinder, Mr. S. Kitare learned counsel submitted that, if at all the exparte judgment was ever set aside from where they had ended the parties were obliged to have had pursued it further not as he did the respondent instituting a fresh matter. If anything, the latter should have therein filed a counter claim. That is all.

The central issue is whether with respect to the exparte judgment the matter was res judicata. The answer is no. The appellant may have not been notified of it, therefore according to records unaware of the ruling dated 22/02/2012 say 1³/₁₂ years later setting aside the exparte judgment yes, but that one was law and fact much as the exparte judgment no longer existed. Now that Mr. S. Kitare was aware of it either he may wish to accordingly challenge the decision or go back to the DLHT and pursue the matter from where they had ended before exparte orders were made. Therefore with greatest respect the issue of res judicata it should not have been raised. It is very unfortunate that even 8 years later the appellant

pretends having had not been aware of it all. The ground of appeal is dismissed.

However, now that rightly or wrongly by its order of 22/02/2012 the DLHT's exparte judgment was set aside, that one was improper and I think abuse of the court process in disguise on the same subject matter and between them the respondent to institute a fresh matter instead of, as any prudent party may have had ordinarily done going back to the DLHT with a view to further pursuing the said Original Land Application No. 51 of 2009 (from where they had ended just before an order of exparte proof was made) in which case therefore, like Mr. S. Kitare argued, if anything the respondent should have raised a counter claim or something suffices the unprecedented procedural acrobatics to dispose of the purported appeal.

Now that for all the above stated reasons the purported appeal is in fact struck out, the parties are, with immediate effect directed to go back to the DLHT and revive the said Original Land Application No. 51 of 2009 so that from where the exparte order(s) were made parties may pursue it any further. The proceedings and decision in Land Application No. 27 of 2016 are, for avoidance of doubts nullified, quashed and set aside respectively. It is so ordered.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

06/05/2021

The judgment delivered under my hand and seal of the court in chambers this 18/05/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

18/05/2021