

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA**

LAND APPEAL NO 90 OF 2020

*(Originating from Land Application No. 56/2018 of the District Land and Housing Tribunal for
Tarime at Tarime)*

NYABICHUNE VILLAGE COUNCILAPPELLANT

VERSUS

MARWA MANG'ERA KESONGORESPONDENT

JUDGMENT

31st May & 22nd July 2021

Kahyoza, J

Nyabichume Village Council (the Village) instituted a claim against Marwa Mang'era Kesongo in District Land and Housing Tribunal for a declaration that:-

- a) The suit land is located at Nyabichume Village Council;
- b) The execution against the applicant who was not party of (sic) application No. 39/2015 was not as decided by the Tribunal;
- c) Nyabichume Village Land Committee has the authority, power and right to allocate and re allocate the land within its boundaries;
- d) Costs of this application be borne by the respondent.

Marwa Mang'era Kesongo the respondent raise a preliminary objection that the suit was un-maintainable in law as it was *res-judicata*.

The District Land and Housing (**the DLHT**) upheld the preliminary objection and dismissed the application as being *res-judicata*. Aggrieved, the Village appealed to this Court raising seven grounds of appeal that –

1. That, the learned trial Tribunal Chairman erred in law in dismissing the suit in Application NO. 56/2018 against the Appellant as *Res judicata* without any lawful justification. The copy of the trial judgment and decree / drawn order are appended herein as Annextures "A" and "B" respectively and the Appellant craves leave of this honorable court to form part of her petition of Appeal.
2. That, the learned trial Tribunal Chairman erred in law in pronouncing judgment thereby denying the Appellant a right to be heard in Land Application No. 56 of 2018 henceforth the judgment and decree pronounced is unfounded. The copy of the trial decree is appended here with and marked as Annexure "B" and the appellant crave leave of this honorable court to form part of her petition of Appeal.
3. That, the trial tribunal Chairman erred in law in ruling that Land Application No. 56 of 2018 is *res judicata* in light of Land Application No. 39 of 2015 before Mayeye SM Hon Chairman as the Appellant was not part in Land Application No. 39 of 2015.
4. That, the trial tribunal erred in law and misdirected himself in fact by forming an opinion that Nyabichune Village Council does not have power of allocation and reallocation of the land which the owner of that land is known before the right of that land had been distinguished.

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5. That, the learned trial Chairman erred in law and misdirected himself in fact when the trial tribunal agreed with the respondent's submission that by the respondent declared lawful owner of the suit land through land application 39/2015 then the land application 56/2018 became *RES JUDICATA*.
6. That, the learned trial Chairman erred law by holding that the land application No. 56/2018 was *res judicata* without taking into account requisite criterion for *res judicata*.
7. That, the learned trial tribunal Chairman erred in law and misdirected in fact in ignoring the fact that the first Appellant was established on the 22nd day of August, 2014 by virtue of Government Notice N. 301 of 2014 following division of Nyangoto village to form Nyabichune and Mjini Kati Village Councils which acquired of the former properties like land which the suit land is located within the jurisdiction of the Appellant and not the Nyangoto Village Council henceforth the judgment pronounced is unfounded.

The background is that in 2013 Nyangoto Village Council intimated its intention to evict the Marwa Mang'era Kesoro and demolish his house. Dissatisfied Marwa sued Tarime District Council vide Land Application No.72/2013 in the DLHT. On the 20/4/2018 Marwa withdraw the application with leave to refile it. On the 22/6/2015, Marwa filed application No. 39/2015 against Nyangoto Village Council. Marwa served Nyangoto Village Council appeared once and resolved not to file the Written Statement of Defence (the **WSD**). The DLHT decided the matter *ex parte*

giants Nyangoto Village council. It decided in favour Marwa that he was the owner of the suit land.

Nyangoto Village Council filed Misc. Application No. 26/2016 on the 5/2/2016 seeking the DLHT to vacate its order to proceed *ex-parte* and extend time for her to file the WSD. The application which Nyangoto Village withdrew on the 19/4/20216 with leave to file an application to set aside the *ex-parte* order.

Marwa filed an application for execution. It was Misc Application No. 89/2016. The DLHT ordered the judgment debtor, Nyangoto Village Council to vacate after the expiry of 14 days and if there was no objection. 14 days started running from 27/5/2016.

The village (Nyabichune Village Council) instituted Misc. Application No. 46/2016 praying the attached land to be released. The DLHT dismissed the application on the 6/1/2017 for want of appearance. Later, the village applied to set aside the dismissal order in Misc. Application No. 46/2016. The DLHT dismissed the application on the 9/3/2017. Determined the Village on the 30/4/2018 filed the application which precipitated the current appeal.

It is on record undisputed that before 2014, Nyabichune Village was one of the hamlets of Nyangoto village. On the 22/8/2014 Nyabichune Village Council was registered and came into existence vide G. N. 301/2014. It is beyond dispute that in 2013 when Nyangoto Village Council issued a notice to Marwa, requiring him to vacate, Nyabichune Village was not in existence. However, on the date Marwa instituted Land Application

No. 39/2015 through which the DLHT declared him the owner of the suit land, Nyabichume Village was existence.

I considered the Villages' seven grounds of appeal and found that they raise only one issue whether it was proper for the DLHT to determine that Application NO. 56/2018 between Nyabichume Village Council against Marwa Mang'era Kesongo was *res-judicata*, on the ground that there was previous instituted and decided Land Application No. 39/2015 between Marwa Mang'era Kesongo Vs. Nyangoto Village Council.

Mr. Maganiko, State Attorney represented the Village and Ms. Vumilia advocate represented Mr. Marwa, the respondent. The appellant's State Attorney argued the first up to sixth ground of appeals jointly and the seventh ground separately. He submitted that the appellant was aggrieved by the decision of the DLHT that the suit filed by the appellant was *res judicata*. He contended that the earlier suit was between the respondent and Nyangoto Village Council while the current one was between Nyabichume Village Council and the respondent. He referred this Court to section 9 of Civil Procedure Code and the case of **Ester I Lwambano V. Adriano G. Kipalile** Civil. Appeal No. 91/2014.

He submitted that one of the conditions of *res-judicata* is that parties must be the same. Parties in the earlier suit and the current suit are different.

He submitted further that before 2014 the appellant was one of the hamlet of Nyangoto Village. It was registered on the 22/4/2014 by GN. 301/2014 Referring to section 27(2) of the Local Government (District

Authorities) Act, Cap. 287 contended once a certificate is issued to the Village Council, it becomes a body corporate. Thus, from 22/8/2014 the appellant was a body corporate capable of suing and being sued. He contended that the appellant was denied the right to be heard.

The respondent's advocate Ms. Vumilia replied that Nyabichune Village was registered after Nyangoto Village was subdivided. They both belong to the same family. In land appeal No. 88/2016 **Shabani Mussa Mtani (Administrator of the Estate of the Late Mussa Shante Mtambulingi V. Juma Shante Mwera** Court of Appeal encountered a similar situation. She contended that Nyangoto Village Council and Nyabichune Village Council are just the same person suing using different names over the same subject matter.

She added that it is the requirement of section 6 of **the Land Acquisition Act**, [Cap 118 R.E. 2019] that there shall be issued a notice to the person in possession of the land. She added that the respondent received a notice from Nyangoto and nothing from the appellant. If the appellant was the owner of the suit land would have served the notice to the respondent. She contended that Nyabichune Village Council was part of the Nyangoto Village Council that is why it relied on the notice Nyangoto Village Council issued to the respondent.

The respondent's advocate submitted that the appellant's complaint that the appellant was denied the right to be heard was baseless as the DLHT was not required to determine a matter that was already determined. To buttress her argument, she cited the case of **Cambridge**

V. Official Committee of Unsecured Creditors of Navigator Holding PLC and others (2006) UK PC 26 where the Court held that once there is a judgment *in rem* (a declaration of ownership of property on the said land) you cannot have another case of ownership on the same. There cannot be two judgments on the same courts or different courts or judicial tribunal of whatever rank in hierarch declaring ownership of or otherwise of the same property. She contended that the appellant has not been denied the right to be heard but it is the principle of law that no one can be tried twice over the same subject matter. She contended that the aim is not to deny any one the right to be heard but to cut down the flood gate of litigations. She referred this Court to the case of **Lotta V. Tanaki & Others** (2003) 2 EA 556 at page 551.

The respondent's advocate submitted further, that the DLHT did not declare that the appellant has no mandate to allocate land, rather it decided that the appellant had no power to re allocate land whose owner is known. To support her submission, she cited the case **Village Chairman KCU Mateka V. Anthony Hyera [1988] HDD** where it was held that the village cannot allocate land within its jurisdiction which is under possession of another villager who is developing it. The lawful owner was declared by the tribunal and he had developed it by building seven houses and he planted temporary and permanent crops.

In his rejoinder, the appellant's State Attorney submitted that the suit between the respondent and Nyangoto Village Council was instituted after

Nyabichune Village was registered. He added that Nyabichune Village Council was different from Nyangoto Village Council.

There is one basic issue as pointed above, that is whether the suit between Nyabichune Village Council and Marwa is *res-judicata*. Both learned friends do agree regarding the law and factors which must be proved to establish the principle of *res-judicata*. I do agree with them and in fact the law is settled as to what factors constitute *res-judicata*. In the case cited by the respondents' advocate of **Peniel Lotta V. Gabriel Tanaki and Others** Civil Appeal No. 61/99 the Court of Appeal stated that-

"The doctrine of res judicata is provided for in Section 9 of the CPC, 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of S. 9 therefore, contemplates five conditions which, when co-existent, will bar 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 former suit must have been competent to try the subsequent suit and, (v) The matter in issue must have been

heard and finally decide in the form suit (b) Civil Appeal No. 2/02 – Nelson Mrema and 413 Others V. Kilimanjaro Textile Corporation and another CAT at Dar- Principles of res-judicata – S. 9 of the CPC, 1996- W e are satisfied that the ingredients of res- judicata have been satisfied which is to say, the present case is re-judicata."

I also agree with the respondent's advocate that it is in the interest of the state that litigations must come to an end. Section 9 of the **CPC**, which encompasses the principle of *res judicata*. It provides-

"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 on which such issue has been subsequently raised and has been heard and finally decided by such court."

It is well settled law and leading authorities are at one, that in order for the plea of *res judicata* to operate, the five conditions stated in **Peniel Lotta V. Gabriel Tanaki and Others** (supra) must be proved. See the cases of **Umoja Garage v. National Bank of Commerce Holding Corporation [2003] TLR 339**, **Kamunye and Others v. the Pioneer General Assurance Society Ltd (1971) EA 263**,

In the case under consideration, there is no dispute that the subject matter in former suit is the same the same in the current suit, that is the

piece of land occupied by the respondent. The issue is whether the parties are the same or are claiming under the same title. The respondent's advocate submitted that they are the same. She contended that Nyangoto village was subdivided into two villages Nyangoto village and Nyabichune village. I agree with her that Nyangoto village was subdivided and the appellant also does not dispute that. It is established beyond dispute that Nyabichune was one of the hamlets of Nyangoto village. It is on record that Nyangoto village council issued a notice to Marwa, the respondents in 2013 of its intention to evict him and demolish his houses. At that time Nyangoto Village was yet subdivide.

I pointed out above that Marwa sued the District Council of Tarime in 2013. He withdrew the suit in 2015 and sued Nyangoto village Council. It is unfortunate, that at the time Marwa sued Nyangoto village Council on the 22/6/2015, Nyangoto had been subdivided into two villages or more. Nyabichune Village was registered from Nyangoto Village on the 22/8/2014 vide G.N. No. 301/2014 as submitted by the state attorney. The appellant's state attorney submitted that once a village is issued with certificate it becomes a body corporate. Section 26 of the Local Government (District Authorities) Act, Cap. 287 provides that once the village Council is furnished with a certificate of incorporation it becomes a body corporate. It stipulates that-

26. Village council to be body corporate

(1) As soon as may be practicable after the election of the first village council following the registration of a village, the Registrar shall furnish to the village council a certificate of incorporation in

the prescribed form, and also a copy of that certificate to the appropriate Director.

(2) Upon the issue of a certificate of incorporation in relation to a village, the village council of the village in question shall, with effect from the date of that certificate, be a body corporate, and shall–

(a) have perpetual succession and an official seal;

(b) in its corporate name be capable of suing or being sued;

(c) subject to this Act, be capable of holding and purchasing, or acquiring in any other way, and disposing of any movable or immovable property.

It is clear that on the 22/6/2015 when Marwa instituted Land Application No. 39/2015 before the DLHT, Nyabichune village was already in existence having been registered on the 22/8/2014. Thus, Nyangoto village Council and Nyabichune village Council were two different legal bodies, capable of suing and being sued.

I am unable to buy the respondent's contention that Nyangoto village Council and Nyabichune village Council are the same person or persons claiming under the same title or persons of the same family. He cited the case of **Shabani Mussa Mtani (Administrator of the Estate of the Late Mussa Shante Mtambulungi V. Juma Shante Mwera**. That case is distinguishable from the facts of this case. In **Shaban Mussa Mtani's** case the previous case was between **Juma Shamte Mwera v Jafari Mussa Mtambulange** while the subsequent suit was between **the legal representative of Jafari Mussa Mtambulange and Juma Shamte Mwera**. In law, legal representative steps into the shoes of the person, he

or she represents. The legal representative claims title from the person he or she represents.

In the current case, Nyangoto village Council and Nyabichune village Council were in 2015 two different legal bodies, capable of suing and being sued. In 2013 Nyabuchune village council was not in existence as it was one the hamlets of Nyangoto village. It was proper for the Nyangoto to issue a notice of the intention to sue Marwa Mang'era Kesongo. After the Registrar issued Nyabuchune village Council with the certificate of incorporation, Nyabuchune village Council took the management of the land in dispute, then Nyangoto village Council's jurisdiction over it ceased. Nyangoto village Council could not in law, **institute a suit to claim or be sued in relation to** the disputed land, which was under the management of the Nyabuchune village council. Thus, in 2015 when Marwa, the respondent sued Nyangoto village Council over the land which was under the management of the Nyabuchune village council, sued the wrong party.

The respondent's advocate's argument that Nyangoto village Council and Nyabichune village Council are claiming under the same title or are members of the same family, would have hold water, if, Marwa sued Nyangoto village Council before Nyabichune village Council was in existence. After the existence of Nyabichune village Council, it was wrong to sue Nyangoto village Council, over the land found with Nyabichune village. In law, they were two distinct legal persons.

I know no law which allows a person to be sued on behalf of another. The law allows one person to represent a party to the suit and not

to be sued or sue on behalf of another. As pointed above, Nyangoto village Council and Nyabichune village Council were in 2015 two distinct legal bodies, capable of suing and being sued. For that reason, it was not lawful to sue Nyangoto village Council on behave of Nyabichune village Council.

In the upshot, I find that one of the elements of *res judicata* that is the *former suit must have been between the same litigating parties or between parties under whom they are privy*, was not established. Consequently, Land Application 56/2018 was not *res judicata*. I allow the appeal, quash the order of the DLHT dismissing the application for being *res judicata* and order Land Application No. 56/2018 to be heard on merit.

It is so ordered.

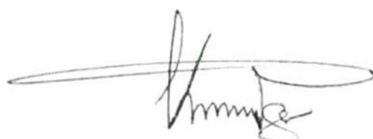


J. R. Kahyoza

JUDGE

22/7/2021

Court: Judgment delivered in the absence of the parties with leave of absence. Copies to be sent to the parties via Tarime District Court. B/C Mr. Makunja present.



J. R. Kahyoza, J.

22/7/2021