IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE APPEAL No. 04 OF 2020
(Originating from Land Application No. 42/2016 of Bukoba DLHT)

THEONEST KAMUHABWA.....APPELLANT
VERSUS
DIOCLES KAMUHABWA ..... RESPONDENT

JUDGMENT

Kilekamajenga, J.

The appellant and respondent have been battling over the ownership of a piece of land. The information contained in the court file shows that the appellant and respondent's father had a case over the same land at Karabagaine Primary court vide Civil Case No. 8 of 1993. The appellant lost the case hence appealed to the district Court vide Civil appeal No. 16 of 1995 where the appellant won the case. The respondent's father appealed to this court vide PC Civil Appeal No. 134 of 1995. Later, on 1st November 2013 before Hon. Mjemmas, J, the appeal was withdrawn with leave to refile. Since that time, the appellant made several attempts to execute the decree of the District Court but without success. The last attempt was made in 2016, which prompted the respondent to file a suit against the appellant before the district Land and Housing tribunal for Bukoba at Bukoba. In that case the respondent alleged that the disputed land was given to him by his father in 1989. The trial tribunal believed that the respondent's case was heavier than that of the appellant hence decided in favour of the respondent.

The appellant thereafter appealed to this court armed with five grounds of appeal which were coached thus:-

1. *That, the trial tribunal erred in law. It had no jurisdiction. That, the Application No. 42/2016 and its judgment of 30/01/2020 in favour of the respondent is* ***RES SUBJUDICE*** *to Karabagaine Primary Court Civil Case No. 08/1993 and its appeal in (PC) Civil Appeal No. 134/1995. And execution application by Hon. Mwangesi, J on 27/01/2016 in favour of the applicant.*

2. *That, the trial tribunal erred in law. It is not seized with jurisdiction. That, the land application No. 42/2016 is estoppel per* ***res judicatum (res judicata)*** *to (PC) Civil Appeal No. 134/1995 in favour of the applicant on 29/10/2019 by Hon. N. N. Kilekamajenga, J.*

3. *That, the trial tribunal made a non direction in law. The respondent claim and interference was statutorily time barred. It is judicially noticed in (PC) Civil Appeal No. 134/1995 that, the applicant inherited the suit premises in 1987 from his late father PHILIPO KAMUHABWA KUTAGA while the respondent purports to inherit same suit 1989 as testified by his four witness in the trial tribunal from his late father SOSTHENES KAMUHABWA the latter was the judgment debtor in (PC) Civil Appeal No. 134/1995. He had no good title to pass to the respondent.*

4. *That, the trial tribunal offended the law by admitting proceeding and deciding on a matter after the lapse of twelve years (12 years) the matter was*

*decided by a competent Court in Civil Appeal No. 16/1995 – Bukoba District Court before Hon. Mwarija RM and Hon. Mwangesi, J without seeking and obtaining leave to appeal out of time on 27/01/2016 in Land Application No. 42/2016 in response DEOCLES (respondent) and EUGINE on 17/12/2015 and Civil Application No. 12/2015 before UISO – RM (**Annexed hereto, is annexture collectively marked TK – being a copy of the judgments, order and letter are attached).***

5. *That, the trial tribunal misdirected itself in law. The respondent had no LOCUS STANDI IN JUDICIO in the suit premises.*

The parties appeared before me to argue the appeal. The appellant was accompanied by the representation of the learned Advocates, Messrs, E. Bengesi, Joel Ruhinga and Ms. Joanitha Jonathan. On the other hand, the respondent was present in person and represented by the learned advocate, Mr. Alli Chamani. The counsel for appellant informed the court on the existence of the previous suit which invited the application of the doctrine of res-judicata. The counsel averred that the same land was previously decided by the Primary Court in Civil Case No. 08 of 1993 which finally reached this court and was withdrawn with leave to refile.

Mr. Bengesi further argued that when Application No. 42 of 2016 was filed before the District Land and Housing Tribunal, the respondent alleged that the land was given to him in 1989.

However, the appellant sued the respondent's father in 1993. Therefore, the respondent's father could not have given the land to the respondent because his father had no good title to pass. Therefore, the trial tribunal was not supposed to entertain this matter.

Mr. Bengesi further challenged the respondent's *locus standi* in this case because he is not an administrator of estate. He referred the court to the case of **John Petro vs Peter Chipata,** PC. Civil Appeal No. 81 of 1996, HC at Mwanza. The Counsel further blamed the trial tribunal for failure to obey the order of this court which ordered the tribunal to determine points of objection before hearing. To cement his argument, he referred the court to the case of **Berena Banoba vs. Ferdinand Banoba,** Misc. Criminal Revision No. 2 of 2016. Also, Hon. Mwangesi, J. (as he then was) ordered the execution of this matter but the trial tribunal proceeded with hearing. Therefore, the proceedings of the District Land and Housing Tribunal violated the law. He finally urged the court to allow the appeal with costs.

When prompted for the response, the counsel for the respondent, Mr. Chamani argued that the parties in the decision of 1995 were different because the respondent's father did not act on behalf of his son. He invited the court consider the case of **Paniel Lota V. Gabriel Tamaki and Others** [2003] TLR 312 at page 315. Furthermore, the decision of the District Court of 1995 did not declare the appellant as the owner of the disputed land. The same decision merely reversed the decision of the Primary Court. On this point, Mr. Chamani cited the

case of **Maulid Makame Ali vs. Kesi Khamis Vuai,** Civil appeal No. 100 of 2004.

Furthermore, Mr. Chamani refuted the allegation of time limitation because the appellant encroached into the disputed land in 2016. Hence the point of time limitation has no merit. He further objected the allegation that the respondent was not an administrator of estate because the respondent was given the land by his father where he currently lives. Mr. Chamani addressed the court on the case of **Rujuna Shubi Balonzi vs Registered Trustees of CCM** [1996] TLR 203 where the question of *locus standi* was explained. Mr. Chamani believed that the respondent's case was heavier than that of the appellant. He urged the court to dismiss the appeal.

When rejoining, the counsel for the appellant reiterated the consequences of not obeying the previous orders of this court. Also, the decision of the district court of 1995 presents the point of res-judicata; though the parties were different but have the same interest.

He insisted that the appellant has the right over the disputed land because the respondent failed to show how the land was divided after the death of his father. he stressed further that the respondent has no *locus standi* in this matter.

In this appeal, the determination of the 2nd ground of appeal may dispose of this matter.

On the second ground the appellant objected the respondent's case on the point of res judicata. Also, in the oral submission and other information contained in the file, it is crystal clear that the appellant sued the respondent's father at Karabagaine Primary Court in 1993 vide Civil Case No. 08 of 1993. The respondent's father had a good case against the appellant hence the Primary court decided in favour of the respondents father (Sostenes Kamuhabwa).

The appellant appealed to the district Court of Bukoba vide Civil appeal No. 16 of 1995 where the decision of the Primary court was reversed. The respondent's father appealed to this court vide PC. Civil Appeal No. 134 of 1995 but on 1st November, 2013, the case was withdrawn with leave to refile.

Thereafter, the appeal was never refiled until the respondent sued the appellant at the District Land and Housing Tribunal vide Application No. 42 of 2016. In short, the dispute concerning the same piece of land has been bouncing in courts since 1993 until now. Record shows that the appellant made several attempts to execute the decree of the District Court of 1995 but failed.

In fact, all the documents of the previous case were annexed by the respondent in his application to the District Land and Housing Tribunal. There is dearth of evidence to suggest that the disputed land is different from the one contested in 1993. Though the parties are different, the dispute invites the application of the doctrine of res-judicata. In our laws, the doctrine of res-judicata in provided under Section 9 of the Civil Procedure code, cap. 33 RE: 2019 thus:-

"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."

The above provision of the law is in pari materia with Section 11 of the Indian civil Procedure Code. C.K. Takwami "Civil Procedure with Limitation Act, 1963, Eastern Book Company, 7th Ed. 2015 at Page 81, lists the conditions for application of Res-judicata that:

1. *The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively.*

2. *The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.*

3. *Such parties must have been litigating under the same title in the former suit.*

4. *The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.*

5. *The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.*

The rationale for the operation of the doctrine of res-judicata is hinged on three aspects/principles. **First**, no man should be punished twice for the same cause. **Second**, it is in the interest of the state that there should be an end to a litigation. **Third**, a judicial decision must be accepted as correct. See, the case of **Onesmo Olengurumwa v. A.G.** Misc. Civil Cause No. 36 of 2019.

The above doctrine has been expounded in a number of court decision. In the case of **Atyadhyan Ghosal V. Deorjin Debi** AIR 1960 SC 941 which was quoted in the case of **Onesmo Olengurumwa (supra**) the court in India stated that;

> *"When a matter, whether on a question of fact or law, has been decided between two parties in one suit and decision if final, either because no appeal was taken to the higher court, or no appeal his in such case, neither party will be allowed in the future suit between the same parties to canvass the matter again".*

In the case **of Lotta V. Tanaki and Others** [2003] 2 EA 556, the court of East Africa expanded further the rationale of the doctrine of res-judicata thus:

"The object of the principle of res-judicata 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 the court of competent jurisdiction in the subject matter of the suit."

In the instant case, as earlier stated, the respondent's father commenced a case in his name on the same piece of land which was decided in 1993 and 1995. At the District Land and Housing Tribunal, the respondent argued that the land was given to him as a gift in 1989. However, his allegation contradicts the documents attached to his application which clearly show that his father, Sosthenes Kamuhabwa was litigating with the appellant over the same piece of land in 1993. If the land was already given to the respondent in 1989, he could have stepped into the dispute to fend for his rights over the land.

As rightly argued by the counsel for the appellant, the Application No. 42 of 2016 was actually barred by the application of the doctrine of res-judicata. I hereby allow the appeal. No order as to costs.

Order accordingly.

THE HIGH COURT OF TANZANIA
BUKOBA

N. N. Kilekamajenga
JUDGE
11/06/2021