

- 521417A -

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**MISCELLANEOUS LAND CASE APPEAL NO. 21 OF 2019**

*(From District Land and Housing Tribunal of Arusha appeal No.41 of 2016,  
Originating from Moivo Ward Tribunal Application No. 15 of 2016)*

**ANGELINA ALLY SAMWEL..... APPELLANT**

**Versus**

**GRACE ALLY SAMWEL..... RESPONDENT**

**JUDGMENT**

27<sup>th</sup> July & 6 August, 2021

**MZUNA, J.:**

Angelina and Grace are the wives of the late Ally Samwel Makirita, among the four wives. One passed away. The said Ally Samwel Makirita passed away intestate in 1992. Angelina and Grace are disputing over ownership of a piece of land measuring 14 footsteps (length) x 22 footsteps (Western side) x 15 footsteps (width) located at Oloresho street, Sanawari Arusha.

The background story shows, after the death of Ally Samwel, three administrators were appointed to administer his estate before Enaboishu Primary court, vides Probate cause No. 10/2008 namely Grace Samwel, the respondent herein, Estomih Ally Samwel and Godfrey Issack. The landed property, the subject of this appeal, was found to fall in the deceased estate because it belonged to the late Ally Samwel Makirita.

Sometimes back in the year 2012, the respondent had a case in the Ward tribunal of moivo with one Marry Fredrick also of the same household of the late Ally Samwel Makirita and wife of Fredrick. The claim was for rentals for four rooms. In that Land Application No. 50 of 2012 the case was decided in favour of the respondent, though ex parte. There was another case for a nine rooms house (on the same suit plot) whereby Angelina (the appellant) successfully preferred it against Grace (the respondent herein), before the same Ward tribunal of moivo through Land Application No. 15 of 2016. Angelina said was staying there after death of their late husband and used to collect rent from that house with 9 rooms (a mud house built thereon).

Dissatisfied with that decision of the Ward tribunal, the respondent successfully appealed to the District Land and Housing tribunal of Arusha. The District Land Tribunal found that Application No. 15 of 2016 filed at Moivo Ward Tribunal which was adjudged in favour of Angelina, the respondent herein, was res judicata because the matter had already been determined in Application No. 50 of 2012 filed at the same Ward Tribunal which was determined in favour of Grace, the appellant in that District Tribunal, to which Angelina never appealed. The appellant preferred the present appeal.

During hearing of this appeal, the appellant had the service of Ombeni C. Kimaro, advocate while the respondent appeared in person after Mr. George Mnzava and Vincent Stewart who were representing her under legal aid, withdrew from defending her for lack of instructions. With the leave of the

Court, this appeal was ordered to be heard by way of written submission. Good enough, Mr. Richard Evance Manyota, Advocate from Legal and Human Rights Centre drafted the respondent's submissions *gratis*.

There are four ground in the petition of appeal as hereunder;

- 1. That, the appellate Tribunal erred in law and in fact in holding that the case was res judicata while the proceedings of the tribunal in application No. 106 of 2012 (sic) was quashed and set aside and the case was ordered to start afresh.*
- 2. That, the appellate tribunal erred in law and in fact by deciding the appeal in favour of the respondent herein while the appellant was not given a right to be heard in the trial tribunal*
- 3. That the learned Tribunal chairperson erred in law and fact in holding that the case was already heard while the party sued was a wrong party.*
- 4. That, the learned Tribunal chairperson erred in law and fact for failing to analyse the evidence on record and thus came up with unfair decision.*

Reading from the filed submissions and the above grounds of appeal, this court is invited to determine on four issues:- First, whether the District Land and Housing Tribunal chairperson was legally right in concluding and deciding the case on the basis of res judicata. If the first issue is answered in the affirmative, Second, whether parties were condemned unheard. Three, whether the evidence was properly scrutinized. Lastly, what is the fate of this appeal?



Let me start with the first issue, on the findings that the case was *res judicata*. In his submission in chief, Ombeni C. Kimaro, the learned advocate argued that parties in the cases which the learned Chairperson of the Tribunal based her decision are different and therefore, cannot form the basis of the principle of *res judicata*. He adds that, in Application No. 50 of 2012 parties where Grace Samwel vs Marry Fredrick while in Application No. 15 of 2016 parties were Angelina Ally Samwel vs Grace Ally Samwel.

The second point put forward by the learned counsel is that even the cause of action in two applications are different. He says, in Land Application No. 50 of 2012 the cause of action was about a claim for rent arrears while in Application No. 15/2016 the cause of action was about ownership of the land in dispute. To cement his argument the learned counsel, cited to me the cases of **George Shambwe vs Tanzania Italian Petroleum Co. Ltd** [1995] TLR 20 and **Village Chairperson-K.C.U Mateka vs Antony Hyera** [1988] TLR 188 and **The Registered Trustees of Chama cha Mapinduzi vs Mohamed Ibrahim Versi and Sons**, Civil Appeal No. 16 of 2008. For that reason, the learned counsel says, the principle of *res judicata* under section 9 of the Civil Procedure Code, [Cap. 33 R.E 2019] is inapplicable. He therefore prayed for this court to allow this first ground of appeal.

In his reply on the issue of *Res Judicata*, Mr. Richard Evance Manyota argued that, the matter between parties was already heard and determined to its finality. To buttress his point, he cited section 9 of the Civil Procedure Code



(supra). Mr. Manyota adds that, the matter in issue is directly and substantially the same which had been already litigated by the parties in the former suit. That, the argument that parties in the former and subsequent suit are not the same is misconceived because under section 9 of the Civil Procedure Code (supra) it is clear that the suit must be between parties under whom they or any of them claiming and litigating under the same title in a court of competent jurisdiction. The learned counsel cited to me the case of **George Shambwe** (supra) to support his submissions.

When reading the records of the Moivo ward tribunal in Land Application No. 15 of 2016 or as otherwise written by the Ward Tribunal KUMB. 15/03/KATA between Anjelina Ally Samwel vs Grace Ally Samwel, it is clear that though the said Anjelina was claiming for rent which she used to collect from that house which had been demolished, Mr. Sevenstine Ally Samwel (SM2) said that they were disputing on inheriting the deceased's properties which however, had been divided to the heirs. Among the witnesses who testified were Jofrey Issack Makirit (SM3), one of the appointed administrators of the deceased's estate. He was categorical that indeed, the properties had been divided to the heirs including the disputed plot. He further said that other co-administrators were Grace, the respondent in this case and Estomih. However, Grace was removed from among the administrators after she had sold two acres' farm at Njiro, illegally. She never appealed.

In its verdict, the Ward Tribunal found that the suit plot had been included in the probate matter whereby the inventory and accounts of estate had been filed. The tribunal further found that the probate matter was not brought to the attention of the first tribunal which found that Grace (the present respondent) was a winner otherwise could have noted that the suit plot had already been given to Angelina and her children based on the decision in the Enaboishu Probate case No. 10/2008 and the proceedings which were availed to the Tribunal.

Now, can it be said that it was res judicata to Application No. 50 of 2012 of Moivo Ward Tribunal? The second question to pose is, can parties claim ownership on the property falling in the deceased's estate which had already been distributed to the heirs? The judgment in Appeal No. 41 of 2016 at page 2 reads:-

*"...Therefore as long as the Moivo Tribunal has (sic) already delivered a decision over the very same land on a previous decision they can not in any way entertain another application over the very same land..."*

The Tribunal then held that the first ground of appeal is allowed.

This decision was made in ignorance of the fact that the issue in Application No. 50 of 2012 was not between same parties and even the subject matter is not the same. Even the appellant Grace, before the District Land and Housing Tribunal, purported to say that she was a winner in a land matter Application No. 50 of 2012 in the same Moivo Ward Tribunal while it concerned

issue of rent collection in the four rooms which are no longer there. The house was demolished and the land where it was built fell within the deceased's estate.

Now, the question is, was the matter res judicata? This principle of res judicata is well stated under section 9 of the CPC. That provision 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".*

The court of Appeal in interpreting that provision, in the case of **Bandugu Ginning Co. LTD vs CRDB Bank PLC and 2 others**, Civil Appeal No. 265 of 2019 CAT at Mwanza, it quoted with approval the cases of **Ester Ignas Luambano vs Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014 and **Peniel Lotta vs Gabriel Tamaki and Two Others**, Civil Appeal No. 61 of 1999 (both unreported) where it was held that:

*"The scheme of section 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 have litigated under the same title in the former suit.*
- (iv) *The court which decided the former suit been competent to try the subsequent suit*
- (v) *The matter in issue must have been heard and finally decided in the former suit."*

That said, there was no issue of res judicata. It was wrong to mix the two cases of Moivo Ward Tribunal. The first one was for, I quote:- *"Kinachodaiwa: Kodi ya vyumba 4. Kodi zinazopokelewa na Marry Fredrick."* While the second case was for:- *"Shauri hili limewasilishwa na mlalamikaji, akimlalamikia mlalamikiwa, kuwa anamwingilia katika ardhi yake, iliyopo katika mtaa wa Oloresho ambapo Baraza hili lina mamlaka ya kusikiliza."*

The validity of Ward Land Application No. 15/2016 is based on the fact that the respondent Grace was trespassing on the land which was allocated to Angelina after the division of the deceased's estate. I am aware and the record is clear that Marry (referred in Application No. 50/2012) is the wife of Fredrick now deceased. Fredrick is the son of Agelina, the appellant.

Grace admitted during hearing in Application No. 15/2016, that it was not her land. In her evidence, Grace Ally Samwel Makirita (SU1) admitted that the disputed plot where she used to collect rent belonged to the late Ally Samwel Makirita and never lodged any objection that it should not be included in the decease's estate. The tribunal visited the suit plot and had chance to hear evidence from neighbous. The evidence of Angelina, I dare say, was heavier than that of Grace. It cannot be overturned as Grace wanted to do. Since the



property fell in the deceased's estate, it must be governed under the Probate and Administration of Estate, Cap 352 RE 2019 and the Rules made thereunder. I am fortified to this view by the decision of the Court of Appeal in the case of **Mr. Anjum Vicar Saleem Abdi v. Mrs Naseem Akhtar Zangie**, Civil Appeal No. 73 of 2003, CAT at Arusha (unreported), page 14-15 that:-

*"... **the suit land** or the matrimonial home or property...**formed part of the estate of the deceased following his death.** Whether the deceased died testate or intestate, its distribution to its beneficiary or beneficiaries, provided it was not disposed of by the deceased **inter vivos**, was governed by the laws on probate and administration of deceased estate. **It was therefore wrong on the part of the learned trial judge to pick out only this property and give it to the respondent** ..."* (Underscoring mine).

For that reason, the decision in Application No. 15/2016 must be restored.

The second issue touches on whether parties were not afforded an opportunity of being heard in the Trial tribunal. Mr. Ombeni seems to say even assuming that the trial Chairperson was right to find as she did, still parties were not accorded the right to be heard on the issue of res judicata. That, it was not raised by either party in the proceeding. He relied on the proviso of Order XXXIX rule 2 of the of the Civil Procedure Code (supra) which says that, the court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. Mr Ombeni further cited the case of **Kumbwandumi**

**Ndemfoo vs Mtei Bus Service Limited**, Civil Appeal No. 257 of 2018 where the Court of Appeal of Tanzania held that contravention of the right to be heard is fatal and the omission amounts to fundamental procedural error which occasions a miscarriage of justice to the parties.

As opposed to that view, Mr. Manyota learned advocate submitted that parties were given an opportunity of being heard and to address on the raised issue which the appellate Tribunal based its decision.

This point should not take much of my time. The appeal by Grace definitely brought in the Application No.50 of 2012 while the appeal was against Application No. 15 of 2016. This meant that indirectly she was raising issue of *res judicata*. Ordinarily, every lawyer ought to have taken cognizance of the existence of *res judicata*, which however was wrongly construed by the learned Chairperson. The cited case of **Kumbwandumi Ndemfoo Ndossi versus Mtei Bus Services Limited**, (supra) insisted that:-

*"Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court".*

With due respect to Mr. Ombeni, this case does not fall on new issues purported to have been raised by the chairperson, as alleged. It featured in the first and second grounds of appeal in the said Appeal tribunal. The second issue is bound

to fail, though on a different footing because the decision of the District Land and Housing Tribunal in Appeal No. 41 of 2016 was based on wrong interpretation of the applicable law.

This takes me to the third issue on analysis of the evidence. The decision of the District Land and Housing Tribunal never analysed the evidence and therefore came to the wrong conclusion. Had the tribunal analysed it, it could have found that indeed Grace admitted the suit plot fell in the deceased's estate. It was not her plot. That would mean a decision in Land Application No. 50/2012 (Execution No. 106/2012) never conferred title to her. It was issue of claim for rentals not ownership.

Lastly, on the merits of the appeal. The Moivo Ward Tribunal judgment in Application No. 15 of 2016 which was based on the division of the deceased's estate in the Probate case No. 10/2008 Enaboishu Primary court, to which the proceedings were also availed, is restored. The suit property cannot be redistributed, after the appointed administrators had filed the inventory and accounts of estate. The suit land belongs to the appellant Angelina, the appellant.

Appeal allowed with costs.

**M. G. MZUNA,**  
**JUDGE.**  
**6/08/2021.**

