

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**LAND CASE No. 05 OF 2021**

**BETWEEN**

**PENDO YOHANA MAJIGILE (The Administratrix of  
the late MARIAM HAMISI YONA.....PLAINTIFF**

**VERSUS**

**THE REGISTRAR OF TITLES.....1<sup>ST</sup> DEFENDANT  
MWANZA CITY COUNCIL .....2<sup>ND</sup> DEFENDANT  
THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT  
EMMANUEL JOSEPH MASHINI (Former Administrator  
of the estate of the late JOSEPH MASHINI .....4<sup>TH</sup> DEFENDANT  
KORONELI SOMA..... 5<sup>TH</sup> DEFENDANT  
JOHN CHIMILE LUBAMBE.....6<sup>TH</sup> DEFENDANT  
S. L. ISANGI AUCTION MART & COURT BROKER.....7<sup>TH</sup> DEFENDANT**

**RULING**

12<sup>th</sup> August & 13<sup>th</sup> September, 2021

**TIGANGA, J.**

This Ruling is in respect of the preliminary objection raised in the written statement of defence filed by the 6<sup>th</sup> defendant John Chimile Rubambe and the 7<sup>th</sup> defendant S. L. Isangi Auction Mart & Court Broker. The 6<sup>th</sup> defendant raised two points of objection that;

- a) In view of the annexure JCL - 1 the present suit is Res judicata
- b) That this suit is time barred.

While the 7<sup>th</sup> defendant also one point similar to the second point of raised by the 6<sup>th</sup> defendant that the suit is time barred.

With leave of the Court the preliminary objections were argued by way of written submissions. The preliminary objections were argued in the order of list above.

Arguing the first point which raises a point that the suit is res Judicata, the counsel for the 6<sup>th</sup> defendant submitted that; the suit land was once a subject of the dispute in Land Application No. 160 of 2013, before the District Land and Housing Tribunal for Mwanza, and in its judgment dated on 21<sup>st</sup> April, 2020 in which the ownership of the said land was in issue between the 6<sup>th</sup> defendant and the plaintiff and was conclusively determined by the tribunal.

He also submitted that, it was also a subject of appeal in Land Appeal No. 27/2020 High Court of Tanzania - Mwanza, in which the judgment dated 17/03/2021, affirmed the Judgment and Decree of the District Land and Housing Tribunal, Land Application No. 160 of 2013.

He went further and submitted that the suit land was also the subject of the ruling in Land Case No. 03/2014 dated 09/09/2020 where the claim was held to be substantially the same as those in the present case, therefore declared to be res judicata and dismissed. The 6<sup>th</sup> defendant further contended that this case was filed on 09/04/2021 immediately after the plaintiff had lost Land Appeal No. 27/2020. Therefore the 6<sup>th</sup> defendant considers the filing of this case as an abuse of the Court process.

Further to that, it was submitted that, the claim of illegality of the transfer of the right of occupancy over the suit land from 5<sup>th</sup> defendant to 6<sup>th</sup> defendant was supposed to be raised by way of counter claim in Land Application No. 160/2013 before the District Land and Housing Tribunal which would have formed part of appeal in Land Appeal No. 27/2020.

He submitted that as the issue of ownership has already been determined conclusively by the District Land and Housing Tribunal and the High Court, the plaintiff prayers regarding such ownership has already been overtaken by event, it is therefore Res Judicata in terms of Section 9 of the Civil Procedure Code [Cap 33 R.E 2019] as the same was directly and substantially in issue in the former suit and appeal between the same parties.

Regarding the second objection which is on time bar, the 6<sup>th</sup> defendant submitted that he acquired the suit land on 24/07/2006 that means that was when the cause of action arose, while the suit at hand was filed on 09/04/2021, about 15 years after the cause of action. He submitted that the same is against Part I item number 22 of the schedule to the Law of Limitation Act [Cap 89 R.E 2019], which provides that the limitation period in land matter is 12 years after the accrual of the right of action.

He also reminded the Court that the late **Mariam Mashine Yona** is said to have died on 20/10/1990 and that by virtue of Section 35 of the Act, the period of limitation takes back to her death which is now 31 years down the road.

He asked the Court to be obliged to dismiss the proceedings that are time barred, and supported his proposition by citing the case of **Joseph Mapunda (Minor) vs. Shirika la Usafiri Dar es Salaam** [1982] TLR 218.

On that very point the 7<sup>th</sup> defendant basing on the 11<sup>th</sup> paragraph in the plaint which avers that, on 20/05/2005 the 7<sup>th</sup> defendant evicted the occupants from the house, he submitted that the case against the 7<sup>th</sup>

defendant is probably grounded on tort in respect of which the limitation period is 3 years as to per Part I items number 6 of the schedule to the Law of Limitation Act (supra) and if not grounded on tort then it must be 6 years falling in the category of cases for which no period of limitation is provided as to per part I item number 24 of the said schedule to the said Act. He therefore submitted that computing from that date, then the suit is time barred the consequence of which are under section 3 of the Law of Limitations Act, (supra) as interpreted by the case of **Joseph Mapunda (minor) vs Shirika la Usafiri Dar es Salaam** (supra).

He submitted and prayed that since the case against the 7<sup>th</sup> defendant is clearly time barred, he prayed for the suit against the 7<sup>th</sup> defendant to be dismissed with costs.

The plaintiff reply in respect of the preliminary objection raised by the 6<sup>th</sup> defendant was that, through Mirathi No. 149 of 2020 of Mwanza Urban Primary Court, the plaintiff was appointed as administratrix of the estate of the late Mariam Hamisi Yona, and in her capacity as administratrix of the Estate of the deceased, she filed this suit among other things claiming against fraudulent transfer of the deceased's property located at Plot No. 1 Block "S" Rufiji Street in Mwanza City.

Responding to the first ground of appeal, the counsel for the plaintiff submitted that, the cause of action in Land Application No. 160/2013 before the District Land and Housing Tribunal for Mwanza involved John Chimile Lubambe, the 6<sup>th</sup> defendant (who was the applicant) against Pendo Yona Majigile, plaintiff (who was the respondent) and who was sued in her personal capacity (not as administratrix) because she was not yet been appointed as such. That was unlike in this suit in which she was suing as administratrix of the estate. Further distinguishing the two cases, he submitted that the cause of action in that former case was trespass, while in this case she is suing as administratrix and the cause of action is fraudulent transfer of the estate of the deceased Mariam Hamis Yona.

In his submission, the counsel argued the Court to find that trespass to land is a tort, with its cause of action different from that of fraudulent transfer, with the cause of action arising from Section 99 of the Land Registration Act [Cap 114 R.E 2019].

He submitted that since the decision in Land Application No. 160/2013 is a judgment in person as opposed to the judgment in rem which binds the whole world and since she is now suing as administratrix of the estate, she is a different person all together. Also that since the

cause of action is fraudulent transfer of the right of occupancy then the same cannot be said to be the same cause of action with trespass to land which was the cause of action in the previous case, despite the fact that both relates to one property, that is a land in Plot No. 1 Block "S" Rufiji Street in Mwanza City. The counsel asked the preliminary objection to be dismissed with costs.

Regarding the second point from which an issue as to whether this suit is time barred or not needs to be resolved? On that, he submitted that, according to Section 26 (a) and 26 (c) of the Law of Limitation Act [Cap 89 R.E 2019] which provides that in the proceedings where the issue is fraud, time starts to run after the discovery of the alleged fraud.

He submitted that, in this case Mariam Hamis Yona demised on 20/10/1990, and according to the provision time starts to run after discovery of fraud, and the plaintiff was in the position to discover the said fraud after she was appointed to be administratrix of the estate of the late Mariam Hamisi Yona, the deceased on 20/10/2020 via Mirathi No. 149/2020 before Mwanza Urban Primary Court. Therefore the time started to run against her after she was so appointed. The counsel submitted that, the authority in **Joseph Mapunda (minor) vs. Shirika la Usafiri Dar es**

**Salaam** (supra) is distinguishable with the present case as the case did not deal with fraudulent transfer.

He submitted that section 9 (1), 35 and Part 1 Rule 22 of the Law of Limitation Act [Cap 89 R.E 2019] which provides that in case of the allegation involves fraud or mistake must be read together with Section 26 (a) (b) (c) of the same Act. He in the end asked the Court to dismiss both point of objection raised by the 6<sup>th</sup> defendant.

Regarding the preliminary objection raised by the 7<sup>th</sup> defendant, he submitted that the claim against the 7<sup>th</sup> defendant is not based on tort, but is based on fraudulently execution of Misc. Civil Cause No. 72/2005 which involved the 4<sup>th</sup> and 5<sup>th</sup> defendants.

On that point he similarly relied on section 26 (a) and (c) of the Law of Limitation Act, (supra) regarding on when the limitation start to count in cases involving fraud. Basing on the argument raised in respect of the second ground of preliminary objection raised by the 6<sup>th</sup> defendant, he asked the preliminary objection to be dismissed with costs.

In rejoinder submission, the 6<sup>th</sup> defendant, submitted that the appointment of the plaintiff as the administratrix save a purely academic

purpose in view of the fact that, there are two concurrent judgments of the District Land and Housing Tribunal and that of the High Court which declared the 6<sup>th</sup> defendant the lawful owner of the suit premises. In other words, the appointment as administratrix has already been overtaken by events.

He informed the Court that, in Land Case No. 03 of 2014 which was dismissed by the High Court, Hon. Rumanyika, J, on 09/09/2020, in which the plaintiff claimed to be Administratrix of the estate of the late Yona Majigile who died intestate on the 26/01/2002. The counsel referred to paragraph 7 of the plaint where she suggested that, the suit premises belonged to the late Yona Majigile, while in the present case, the same person is suggesting that, the suit premises belongs to her mother Mariam Hamis Yona.

The counsel for the 6<sup>th</sup> defendant submitted further that, it is trite law that parties are bound by their pleadings, therefore the plaintiff is bound by what he previously pleaded in Land Case No. 03/2014 where she attributed the ownership of the suit premises to the late Yona Majigile. Given the circumstances, she is now stopped from attributing ownership of the premises of Mariam Hamis Yona.

According to him, the allegation of fraud do not meet the threshold contemplated under Order VI Rule 4 of the Civil Procedure Code [Cap 33 R.E 2019] which among other things requires the specification relating to particulars of fraud with dates and items. The plaintiff in the case at hand does not mention or indicate the date when she became aware of the alleged fraud to enable the Court to calculate the period of limitation.

He also said the plaintiff has been litigating since 2005, citing examples of Land Case No. 25 of 2005 resulting into an order dated on 29/10/2013. Having been so litigating over the same subject matter she cannot be heard now that, she was not aware of the alleged fraud. Regarding the prayers by the plaintiff to have the land register rectified, he submitted that is out of context as the Court has already determined the owner of the suit premises the case is res judicata and cannot be re-opened on flimsy ground of fraud. He asked the suit to be dismissed with costs.

The counsel for the 7<sup>th</sup> defendant submitted in rejoinder that, the argument by the counsel for the plaintiff that the complaint against the 7<sup>th</sup> defendant is based on fraud or mistake is farfetched. He referred this Court to paragraph 11 of the plaint which bases on the falseful eviction of

family members of Mariam Hamis Yona, and demolition of the same without lawful cause. In the course of execution of order of Misc. Civil Cause No. 72 of 2005 before the Resident Magistrate Court of Mwanza.

He said paragraph 11 does not in any way disclose fraud or mistake it discloses trespass committed on 20/05/2005. That being a tort cause of action, its period of limitation is three years, which ended in 2008. He insisted that the matter be dismissed for being time barred.

From the above exposition of facts as deciphered from the record and the submissions filed in support and against the preliminary objection, the first preliminary objection is built on the doctrine of res judicata, which is based on section 9 of the Civil Procedure Code [Cap 33 R.E 2019].

Under this provision, courts are prohibited to 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.

Now the issue is whether the matter in this case has once been in issue either directly or substantially in any case instituted and decided prior this suit by the court of competent jurisdiction? If yes, the second issue become whether, it involved the same parties, or between parties or any of them claiming to be litigating under the same title. If yes, the third issue becomes, whether the same was decided to its finality?

In this case the subject matter of litigation is the land located on Plot No. 1 Block "S" Rufiji Street in Mwanza City. The 6<sup>th</sup> defendant has alleged that this plot has been a subject of litigation in Land Application No.160/2013 before the District Land and Housing Tribunal, in which, the 6<sup>th</sup> defendant was the applicant and the current plaintiff was the defendant/respondent. He also alleges that the same was decided by the said District Land and Housing Tribunal in the favour of 6<sup>th</sup> defendant.

According to him, that decision of the Tribunal was appealed against before the High Court that is, Land Appeal No. 27/2020, which was also decided in the favour of the 6<sup>th</sup> defendant. These facts have been proved by the attachment to the WSD annexure JCL-1 collectively, and the same have not been disputed by the plaintiff. What the plaintiff said is that, in those two cases, she was being sued in her personal capacity, while in this

case she is suing as administratrix of the estate of the late **Mariam Hamisi Yona** (the deceased) who passed away way back in 1990.

The line of defence is that, in the former case, the cause of action was trespass to land, while in this case the cause of action is fraudulent transfer of the deceased's property to the 4<sup>th</sup> defendant.

The plaintiff has not disputed the fact that, in Land Application No. 160 of 2013, the 6<sup>th</sup> defendant was declared the lawful owner of the plot in dispute, and that decree has been confirmed by the High Court, in Land Appeal No. 27/2020.

This means, there is a conclusive judgment of the High Court which declares the 6<sup>th</sup> defendant the lawful owner of the land Plot No. 1 Block "S" Rufiji Street in Mwanza City as against the plaintiff. It has not been said that the plaintiff at any point in time has ever owned the said land in her names, which means she all the time has been litigating under the title of the said deceased.

It should also be noted that in Land Case No.03/2014 which was decided on 09/09/2020, this Court, Hon. Rumanyika, J, held the matter to be res subjudice following the presence of Land Appeal No 27/2020 before

Hon. Mgeyekwa, J, which was still pending, consequence of which, the said Land Case No. 03/2014 was dismissed for being res subjudice.

For that reason, I find the subject matter in this case is the same with the subject matter which was in issue in Land Application No. 160/2013, and Land Appeal No. 27/2020. I also find parties to be the same, as though the plaintiff was sued in her personal capacity but, she was holding the land fetching the title from the person she is currently suing for in the capacity of administratrix of the estate in this case.

Regarding the defence she raised that the cause of actions are different, in that while in the former suit, it was trespass, and in this case is fraudulent transfer of the property, I entirely agree with the counsel for the 6<sup>th</sup> defendant that had she been determined, she would have raised this cause of action as the counter claim in Land Application No.160/2013.

The base upon which I agree with the counsel for the 6<sup>th</sup> defendant is that, explanation IV to Section 9 of the CPC, provides that:-

**"Explanation IV:** *Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit"*

That said, I find that had the plaintiff been determined she would have raised the said complaint showing that the transfer of land was fraudulently, something which the trial District Land and Housing Tribunal would have considered and decided.

That being the state of affair, failure to raise it render the said issue to be deemed raised and determined by the former court, and therefore to be substantively (though not direct) in issue in the Land Application No. 160/2013 and land Appeal No. 27/2020 in terms of explanation IV to section 9 of the Civil Procedure Code (supra).

In the fine, I find the preliminary objection in the first point to be meritorious. The first point being able to dispose the suit, I find going to the second point to be more of academic value as the real dispute has already been resolved. For saving this Court's previous time, I will not go to the rest of the points of preliminary objection which I consider to have died naturally. It is thus upheld consequence of which the suit at hand is dismissed with costs for being res judicata.

It is accordingly ordered.

**DATED at MWANZA, this 13<sup>th</sup> day of September 2021.**

**J. C. TIGANGA**

**JUDGE**

**13/09/2021**

This ruling delivered in the presence of Mr.Molandi, learned Counsel for the applicant, and Ms Mwandambo, SSA and Mr. Nasimire, learned counsel for the respondent on line vides audio teleconference.



**J. C. TIGANGA**

**JUDGE**

**13/09/2021**