

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

MISC. LAND APEAL NO. 39 OF 2021

*(Originating from Misc Land Case No. 32 of 2020 HC Bukoba and Original Land Application
No. 70 of 2016 of DLHT-Karagwe)*

ELIAS KAMOKYO..... APPELLANT

VERSUS

JASSON KASAZI.....1ST RESPONDENT

THEODOZIA KASAZI.....2ND RESPONDENT

NELSON JASSON3RD RESPONDENT

JUDGMENT

01/09/2021 & 01/10/2021

NGIGWANA, J.

This appeal emanates from the order of District Land and Housing Tribunal for Karagwe at Karagwe in Land Application No. 70 of 2016 delivered on 25th day of January 2018.

Briefly, the facts that gave rise to this appeal are that; sometimes in 2016, the appellant who was the applicant in DLHT sued the respondents claiming for ownership of a parcel of land located at Ishaka Village, Isigiro Ward in Kyerwa District, estimated at TZS 6,000,000/= . On 20/10/2017 the issues for determination were framed and agreed upon by the parties whereas the hearing date was scheduled to wit; 15/12/2017, but the

hearing did not commence as scheduled. On 25 /01/2018, the Hon. Chairman, Mr. Assey raised suomotu the issue of Res judicata, hence ended dismissing the application with costs.

The applicant could not appeal within time, as a result, he lodged application No.32 of 2020 before this court for extension of time within which to file an appeal out of time. The same was granted on the ground of illegality which was apparent in the tribunal's records, hence preferred appeal before this court on the following two grounds: -

1. That, the trial tribunal erred in law to raise and discuss **SUO MOTU** the aspect of Res-judicata without according the appellant the right to be heard
2. That the trial tribunal erred in law to dismiss the case basing on res-judicata

Wherefore, the appellant prays to this court to allow this appeal with costs; quash the proceedings and set aside the tribunal's order.

The Respondents in reply to the memorandum of appeal disputed the grounds of appeal hence pray for the dismissal of the appeal with costs.

When this appeal was called on for hearing, the appellant had the services Mr. Samwel Angelo, learned counsel while the respondent had the services of Mr. Christian Byamungu

Arguing the 1st and 2nd grounds of appeal, Mr. Angelo submitted that the Hon. Chairman erred in law for determining the dispute on the issue of res-judicata which he raised **suomotu** without inviting the parties to address that question and that rendered the order a nullity. He referred the court to

the case of **Festomih Ephraimu Urio versus Katani Ltd**, Land Appeal No.31 HC Tanga to emphasize on the right to be heard.

Though the respondents in their joint reply to memorandum of appeal strongly disputed the grounds of appeal, the situation has changed when the matter is called on for hearing whereas Mr. Byamungu, learned counsel for the respondents conceded that the parties to this were not afforded an opportunity to address the question of res-judicata after being raised by the Hon. Chairman **suo motu**. He also conceded that the decision or order obtained in violation of the right to be heard is a nullity. He added that, since the irregularity was not caused by the parties, it is not fair to condemn them to pay costs.

In brief rejoinder, Mr Angelo submitted that they have incurred costs, however, he conceded that the mistake was not caused by the parties to the case.

Now, the main duty of the court is whether issue of res judicata raised **suo moto** has abrogated the parties' right to be heard before a judicial decision is taken.

As properly submitted by Mr. Angelo, learned counsel for the appellant and conceded by Mr. Byamungu, learned counsel for the respondents, the Hon. Chairman, Mr. Assey raised suomotu the issue of Res judicata, and eventually ended dismissing the application with costs without affording the parties the right to address the court on that issue. Let the record speak for itself;

“Tribunal: I have gone through the records; this matter is res-judicata to former case between Nelson Jason and Joakim Johansen. The matter was concluded on merit and executed. The documents on evidence and execution report are tendered. The applicant is trying to circumvent the ends of justice, he cannot claim to be owner until the execution is done. This is a delay of justice.

Sgd. R. Assey

Chairman

25/01/2018

Order: This application is hereby dismissed with costs for being res-judicata to civil case No.49 of 2016 and Misc. Application No.66 of 2016. It is so ordered

Sgd R. E. Assey

Chairman

25/01/2018 ”

The Court of appeal of Tanzania in the case of **Deo Shirima and Two Others v. Scandinavian Express Services Limited**, Civil Application No. 34 of 2008 (unreported) had this to say;

“The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same

decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge"

In the case of **Deo Shirima** (Supra) the Court of Appeal found that High Court formed the opinion at the time of composing the judgment that it lacked jurisdiction to entertain the matter. Having so realized, did not accord the parties the right to be heard on that point. The Court of Appeal reacted as follows;

*"We have already shown that the order of 8th June, 2007 was made **suo motu**. None of the parties had pressed for that order. None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected*

*the plaintiffs in the suit and subsequently the current applicants who were the agents/servants of the former. **It is established law that any judicial order made in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is made in good faith"** See also the case **Abbas Sherally and Another v. Abdul S.H. M. Fazalboy**, Civil Application No. 33 of 2002.*

In our case, as already pointed out, the issue of res-judicata was raised suomotu in the sense that none of the parties had pressed for that order, and worse enough, none of the parties was heard at all before the order was made. Therefore, being guided by the decision of the Court of Appeal in the case the case of **Deo Shirima**, I have we found myself constrained

to rule that the order of District Land and Housing Tribunal dated 25/01/2018 was bad in law and therefore a nullity. Consequently, proceedings, dismissal order and order for costs all dated 25/01/2018 are hereby quashed. Save for the proceedings and orders dated 25/01/2018, the rest of the proceedings remain undisturbed thus, I order that the record be remitted to the trial tribunal for hearing before another competent Hon. Chairman sitting with a different set of assessors. Since the anomaly was not caused by the parties each party shall bear its own costs.

It is so ordered

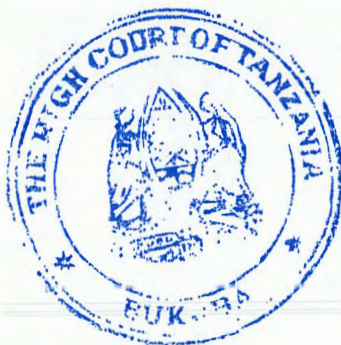



E. L. Ngigwana

JUDGE

01/10/2021

Judgment delivered this 1st day of October, 2021 in the presence for the 1st respondent in person, Mr. E.M. Kamaleki, Judges' Law Assistant, Gosbert Rugaika, B/C but in the absence of the appellant, 2nd and 3rd respondents.




E. L. Ngigwana

JUDGE

01/10/2021