THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO. 65 OF 2020
(Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 204 of 2018)

NKUMBU DAUD NGANDO.....APPELLANT

VERSUS

AMBAKISYE A. MWASAMPETA.....1ST RESPONDENT
CHARLES THOMAS.....2ND RESPONDENT

JUDGEMENT

Date of Last Order : 26/08/2021
Date of Judgement: 15/10/2021

MONGELLA, J.

The appellant sued the respondents in the District Land and Housing Tribunal for Mbeya at Mbeya (the Tribunal) in Land Application No. 204 of 2018. He sued as an administrator of the estate of his deceased father one Daudi Ngando, who passed away in 2005. In the suit, he claimed two acres of a farm land located at Utengule Usongwe village in Mbeya Rural district. He claimed to be the lawful owner of the suit land and that the respondents had invaded the land. That, the 1st respondent, in what he termed as illegal sale, sold the suit land to the 2nd respondent. He claimed

that the suit land was given to UWUMU Association by his late father Daudi Ngando for temporary use.

On their part, the respondents disputed the claims. They first pleaded that the suit was *res judicata* having being litigated before the Tribunal in Land Appeal Case No. 66 of 2009 between the same parties and same subject matter. The 1st plaintiff categorically denied to have sold the suit land to the 2nd respondent. He claimed that the suit land, which initially belonged to the said Daudi Ngando, was sold by Daudi Ngando to UWUMU Association. He tendered a sale agreement to that effect, which was admitted as exhibit D3. He defended further that the suit land was thereafter sold to the 2nd respondent by UWUMU Association. This testimony was corroborated by the 2nd respondent who testified to have bought the suit land from UWUMU Association. To this effect he tendered the sale agreement which was admitted at exhibit D5.

In the end the Tribunal declared the 2nd respondent the rightful owner of the suit land on the ground that the respondents proved that the late Daudi Ngando sold the land to UWUMU Association and UWUMU Association sold the same to the 2nd respondent. The Tribunal also ruled that the suit was res judicata and was time barred. Aggrieved by the decision, the appellant through their learned counsel Mr. Benedict Sahwi, filed this appeal on six grounds, to wit:

1. *That the District Land and Housing Tribunal grossly erred in law and fact for holding that the disputable land was sold by Daudi Ngando to UWUMU Association.*

2. *That the District Land and Housing Tribunal grossly erred in law and fact for holding that the disputable land was sold by UWUMU to the 2nd respondent.*

3. *That the District Land and Housing Tribunal grossly erred in law and fact for holding that the late Daudi Ngando never claimed the suit land from UWUMU.*

4. *That the District Land and Housing Tribunal grossly erred in law and fact for holding that the suit was res judicata.*

5. *That the District Land and Housing Tribunal grossly erred in law and fact for holding that the suit was filed out of time.*

6. *That the District Land and Housing Tribunal grossly erred in law and fact for failure to consider and or analyse the evidence tendered by the appellant hence reached wrong decision that the suit land belongs to the 2nd respondent.*

To this point I prefer to first deal with the 4th and 5th grounds. This is because they are legal grounds pertaining time limitation and or whether the suit was *res judicata*. I shall deal with the rest of the grounds if these grounds are upheld.

In his written submission on the 4th ground, Mr. Sahwi challenged the Tribunal findings that the suit is *res judicata*. Referring to the cases that the Tribunal considered in reaching its findings, he argued that the said cases speak something different. He said that the case was between Israel

Daudi Ngando against Angolwisye Mwasampeta, Case No. 12 of 2009. That, the case was conducted before Utengule Usongwe Village Council, and thereafter Umoja wa Wakulima na Utunzaji Mazingira Utengule Mbeya, who was not a party at the Village Council appealed to the Ward Tribunal, which held in his favour. He proceeded that, then Israel Daudi Ngando appealed against the Ward Tribunal decision to the District Land and Housing Tribunal. He referred the court to exhibits P-4 collectively and argued that if one looks at the exhibits, he would see that the parties were different thus having no effect to the matter at hand. He had a stance that the Tribunal thus erred in considering the said case in ruling that the suit was *res judicata*. He invited the court to consider the provisions of section 9 of the Civil Procedure Code, Cap 33 R.E. 2019.

Replying to this ground, Ms. Mary Mgaya, learned advocate for the respondents supported the Tribunal decision that the suit was *res judicata*. Referring to the case of ***Peniel Lotta v. Gabriel Tanaki & Others*** [2003] TLR 312, she argued that all the ingredients of *res judicata* are present in the matter at hand because the suit was between the 1st respondent and the said Israel Daudi Ngando, as the administrator of the estate of the late Daudi Ngando. She insisted that the dispute concerned the same subject matter, which is the land in dispute, and it was determined to finality by a competent Tribunal. She was of the view that the matter at hand that has been preferred by Nkumbu Daudi is a second attempt after the said Israel Daudi lost in the first case, but both are litigating under the same title.

With regard to the fifth ground, Mr. Sahwi challenged the Tribunal holding that the suit was time barred. Referring to the appellant's claim that

UWUMU was an invitee to the land in dispute in 1996, he contended that the issue of time limitation does not apply. Referring to the case of ***Samson Mwambene v. Edson James Mwanyingili*** [2001] TLR 1 he argued further that an invitee cannot exclude the host's right no matter the length of his occupation. He added that the efforts to get back the land started even when the late Daudi Ngando was still alive.

In her reply to this 5th ground, Ms. Mgaya contended that Mr. Sahwi's argument is misplaced as there is no evidence on record suggesting that UWUMU was an invitee to the land in dispute. She insisted that UWUMU was the owner of the land in dispute having purchased the same from Daudi Ngando. She added that there is clear evidence on record that the land in dispute was purchased in 1994, while the suit purporting to challenge the sale was filed in 2018, which is after 24 years. He added that even the previous suit filed by Israel in 2009 was also time barred as the 12 years' time limit had already elapsed.

After considering the arguments of both counsels on the grounds of appeal as presented above, I proceed to deliberate on the same.

Considering the issue on whether the suit is *res judicata* I wish first to revisit the provisions of the law as enshrined under **section 9 of the Civil Procedure Code**, which guides on the application of the doctrine of *res judicata*. For ease of reference, I find it pertinent to reproduce the provision as hereunder:

"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."*

In ***Ester Ignas Luambano v. Adriano Gedam Kipalile***, Civil Appeal No. 91 of 2014, the CAT when elaborating section 6(1) of the Civil Procedure Decree, Cap 18 of the Laws of Zanzibar, which is in *parimateria* to section 9 of Cap 33 had this to say:

"The scheme of section 6 therefore contemplates five conditions 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.
v) The matter in issue must have been heard and finally decided in the former suit."

Also in ***Kamunye and Others v. The Pioneer General Assurance Society Limited*** (1971) EA 263 it was held:

"The test whether or not a suit is barred by res judicata seems to me to be –is the plaintiff in the second trying to bring before the court, in another way and in the form of a new cause of

action, a transaction which he has already put before the court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time...the subject matter in the previous suit must be covered by the previous suit, for res judicata to apply..."

From the provisions of section 9 of the Civil Procedure Code and the cases referred to above, for a matter to be *res judicata*, it has to be, among other thing, heard and finally determined by the court of competent jurisdiction and between the same parties or privies to those parties. In my view, if parties are different in the subsequent case, but would have benefited from the fruit of the decree, then the matter is barred by *res judicata*.

Mr. Sahwi's contention was only limited to the fact that the parties in Civil Case No. 12 of 2009 and subsequent appeal in the Tribunal in Land Appeal No. 66 of 2009, were Israel Daudi Ngando against Angolwisye Mwasampeta. It should be noted that in the matter at hand, the appellant sued on the land of Daudi Ngando, as the appointed administrator of the estate of the late Daudi Ngando.

It should be noted further that the appellant and the said Israel Daudi Ngando are siblings and thus both having the same interest in the land in dispute. The 1st respondent on the other hand has been the same party in Civil Case No. 12 of 2009 and subsequent appeal in Land Appeal No. 66

of 2009. Even if, as argued by Mr. Sahwi, that it was UWUMU that took the matter to the Ward Tribunal and later appealed to the District Land and Housing Tribunal, it is on record that the 1st respondent was a leader at UWUMU, thus sharing the same interest in the subject matter of the suit.

In the matter at hand, though the 2nd appellant was added, in my view, he shares the same interest with the 1st respondent who is claimed by the appellant to have sold the suit land to him. In the circumstances, I find that the parties in Civil Case No. 12 of 2009; Land Appeal No. 66 of 2009 and in the matter at hand litigated and are still litigating on the same title and issues. Given the situation I subscribe to the findings of the trial Tribunal that the matter at hand is *res judicata*.

With regard to time limitation, it is clearly stated under the law that the time limitation for a claim of land is 12 years from the date the dispute arose. See: **Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap 89 R.E. 2019**. While the respondents and the trial Tribunal counts the accrual of time limit from 1994 when the suit was allegedly sold to UWUMU by Daudi Ngando, the appellant, as argued by Mr. Sahwi, claims that the said UWUMU Association was invited into the land thus the issue of time limitation is inapplicable. Though Ms. Mgaya argued that this contention is nowhere provided on record, I find that PW1, the appellant, testified as such whereby he claimed that the suit land was given by his father Daudi Ngando to his brother Israel for it to be used for the NGO activities. He said that his brother was the founder of the NGO named UWUMU and he was given the land on condition that it would revert back to the family.

It is the settled position of the law that time starts to accrue when the cause of action arises. See: **section 5 of the Law of Limitation Act**. The cause of action arises when an act or omission is committed and the party complaining gets the notice whether actual, constructive or imputed.

The position of the law as to time limitation on claims on landed property of the deceased person is also 12 years. **Section 9 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019** provides:

> *"Where a person institutes a suit to recover land of the deceased's person, whether under a will or intestacy and the deceased person was, on the date of his death, in possession of the land and was the last person entitled to the land to be in possession of the land, the right of action shall be deemed to have accrued on the date of death."*

Section 35 of the Law of Limitation Act, which is to be read together with section 9 (1) provides:

> *"For the purposes of the provisions of this Act relating to suits for the recovery of land, an administrator of the estate of the deceased person shall be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration or, as the case may be, of the probate."*

In the matter at hand, it is on record that the said Daudi Ngando died on 26th August 2005. Considering the time limitation on suing upon the deceased's land, the matter at hand ought to have been filed in the Tribunal by 25th August 2017. Instead, the record shows that the matter

was filed in the Tribunal sometime in 2018. In addition, the appellant who testified as PW1 testified that he noted in 2005 that someone was erecting a building on the land in dispute. PW2, Israel Daudi Ngando, testified that the dispute started in 2002 when his father was still alive. In consideration of the testimonies of PW1 and PW2, it is clear that the appellant had knowledge of the dispute in 2005 or before that time. It is also clear that he slept on his right to sue on the land in dispute for more than 12 years provided under the law.

In the circumstances, though on a slightly different observation, I concur with the findings of the trial Tribunal that the matter was already time barred when instituted in the Tribunal.

In the upshot, the appeal is bound to fail and is hereby dismissed with costs. I find the deliberation I have made on these two grounds of appeal sufficient to dispose the whole appeal and thus shall not deliberate on the rest of the grounds.

Dated at Mbeya on this 15th day of October 2021.

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 15th day of October 2021 in the presence of the appellant and his counsel, Mr. Benedict Sahwi, and Ms. Rehema Mgeni for the respondent.

L. M. MONGELLA

JUDGE