IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 35 OF 2019

(C/F Appeal case No. 18 of 2019 in the District Land and Housing Tribunal for Kiteto at Kibaya, Originating from Bwagamoyo Ward Tribunal Land Case No. 18 of 2019)

OSCAR KUSARE MUNISI.....APPELLANT

VERSUS

DANIEL SINDILO (the administrator

of the Estate of the Late Sindilo Kisota) ..... RESPONDENT

JUDGMENT

13/9/2021 & 22/10/2021

ROBERT, J

This is an appeal against the decision of the District Land and Housing Tribunal (DLHT) of Kiteto at Kibaya in Land Appeal No. 18 of 2019 arising from Bwagamoyo Land Tribunal in Land Dispute No. 18/2019. Aggrieved with the decision of the DLHT, the appellant filed this appeal challenging the said decision.

Briefly stated, the land in dispute has experienced endless disputes over the years. Facts relevant to this appeal reveals that, the respondent sued the appellant in the Ward Tribunal of Bwagamoyo at Kiteto (trial

tribunal) in Land Dispute No. 18/2019 claiming trespass into his landed property measuring 1½ acres located at Jangwani area, Bwagamoyo ward, Kiteto District in Manyara Region. He alleged that the suit land was allocated to him by Jangwani village Government Authority in 1992. He also claimed to have been declared a winner of the suit land in a previous decision of the Ward Tribunal registered as Land Dispute No. 4/2014. On his part, the Appellant claimed to have bought the suit land from one Musa Omari Machaku on 14th day of October, 2014. At the end, the trial tribunal decided in favour of the appellant herein.

Aggrieved by the decision of the Ward Tribunal, the Respondent registered Land Appeal No. 18 of 2019 at the District Land and Housing Tribunal of Kiteto at Kibaya. The DLHT declared the matter *res judicata*, nullified the proceedings of the trial tribunal and quashed the judgment thereof. Further to that, the Tribunal ordered the appellant herein to provide vacant possession and pay costs of the appeal. Aggrieved, the appellant preferred this appeal armed with seven grounds of appeal which I take the liberty to reproduce as follows:-

(1) That the first appellate tribunal erred in law and fact, for not upholding the trial tribunal decision delivered in case No. 18 of 2019 to the extent that the respondent herein lodged a case in the Bwagamoyo ward tribunal while knowing it contravenes to (sic) the laws consequently

the resulted in the favour of appellant herein after trial Tribunal went carefully scrutinizing the evidence by appellant herein that was watertight compared to that of the respondent herein.

(2) *That, the first appellate tribunal erred in law and fact in faulting the decision of the trial ward tribunal which was properly heard and determined as per evidence adduced thereto.*

(3) *That the District Land and Housing Tribunal erred in its decision without considering that the contested land is lawfully owned by appellant herein who acquired it after successfully entering in a sale agreement that is confirmed through lawfully bought certificates tendered by appellant herein before the ward tribunal as proof of the sale transaction and that the said certificates has never been invalidated by responsible authorities.*

(4) *That the first appellate tribunal erred in its decision by basing its decision upon another case, that the appellant herein was not party to, the said land case No. 4 of 2014 and any other cases he is not concerned at.*

(5) *That the honourable the Kiteto District Land and Housing Tribunal ward tribunal in Land Case no. 18 of 2019 decided the matter in the favour of the respondent herein unjustifiably without considering that the respondent failed to adduce documents or certificates before the tribunal in support of his claims to have acquired it upon being allocated by village authorities which is untrue.*

(6) *That the first appellate tribunal erred in law and fact for quashing the decision of the ward tribunal in a case that was proceeded as required by the law, and that the trial tribunal made its decision in favour of appellant herein after carefully scrutinizing the evidence of both parties without leaving behind opinion of the tribunal members who opined.*

(7) *That, the first appellate tribunal erred in law and fact by deciding in favour of respondent herein in the disputed land that is lawfully owned by appellant which has been surveyed by Land surveyors from Kiteto District Land Office who demonstrated and registered the same as plot 90 blocks 1MG with taxpayer ID No. 201801918832. Together with Plots 91, 92 and 93 both are situated in Block H property of respondent herein, respondent has not in any way invaded land of respondent herein as claimed by respondent.*

When this appeal came up for hearing both parties were present in person without representation. At the request of parties, the Court ordered parties to argue the appeal by filing written submissions.

Supporting his appeal, on the first ground the applicant submitted that, the evidence at the trial tribunal is very clear that he bought the suit land and he has a sale agreement to prove the same. Thereafter, he used the same land for a number of years without any disturbance and the suit land has been surveyed and registered as Plots 91, 92 and 93 Block "H". Thus, he argued that based on the evidence adduced, he had proved his case on the balance of probabilities and his evidence was heavier compared to that of respondent. He cited the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113 to cement his arguments.

Coming to the second and sixth grounds of appeal, the appellant alleged that, the decision of the DLHT does not correspond with the

evidence on record. He faulted the DLHT for nullifying the decision of the trial tribunal in Land Dispute No. 18/2019 on grounds that the trial tribunal decided on the matter which was already decided by the same tribunal on the same cause of action by the same parties in Land Dispute No. 4 of 2014 and for declaring that execution in respect of that case was already done by DLHT via Execution No. 25 of 2015 and implementation was effected through a letter from the Tribunal with Ref. No. DHLT/KT/M/S/SC.25/15/01 to the office of the District Commissioner dated 17/01/2018. He maintained that the appellant was not a party to Land Dispute No. 4 of 2014 and the size of land involved in that case was 1.5 acres which is different from this case involving 2.363 acres of land.

Regarding the third and fourth grounds, he alleged that, the DLHT decided in favour of the respondent unjustifiably having observed at page 2 paragraph 2 of the impugned judgment that: "*we have carefully gone through the records, annextures, and the whole trial tribunal proceedings and the following is true that the appellant had been living and in occupation of the suitland as from 1992, the same was allocated to the appellant by the village government authority*".

He argued that, the decision of the DLHT did not make reference to any specific evidence relied on in making its decision, there was no any

witness from the village land authorities who testified that the village committee gave the suit land to the respondent. He maintained that the DLHT failed to consider that the appellant herein bought the disputed land lawfully and the sale agreement and certificates were brought to court as proof.

He argued further that, the wrongful nullification of the trial court proceedings by the DLHT in Land appeal No. 18 of 2019 on grounds of res judicata denied him the right to be heard on the merit of the case.

On the fifth ground of appeal, the appellant submitted that, the DLHT failed to scrutinize the evidence of the appellant which was water tight compared to what was submitted by the respondent. Further to that, he alleged that the respondent purported to be the administrator of the estate of the late Sindilo Kisota based on probate case No. 8 of 2020 which is still pending at Kiteto Primary Court as it has not been adjudicated to its finality as alleged. Thus, the respondent is not qualified to act as a legal representative of the late Sindilo Kisota.

Coming to the seventh ground of appeal, the appellant faulted the DLHT for delivering its judgment without giving reasons to reach the decision contrary to regulation 20 (1) of the **Land Disputes Courts (the District Land and Housing Tribunal) Regulations,** 2002 which

provides that a judgment needs to contain brief facts, finding on the issues, a decision and reasons for a decision. The said decision did not contain reasons for its decision.

Based on the reasons given, he prayed for this appeal to be allowed.

Opposing this appeal, the respondent argued the first to fourth grounds jointly and submitted that, he was declared a lawful owner of the disputed land having won in Land Case No. 29 of 2015 against one Musa Machaku at the DLHT of Kiteto. However, the said Musa Machako, with the aim of depriving the respondent his right to the suit land, proceeded to sale the disputed land to the appellant herein and the appellant bought the suit land without conducting any search on the ownership of the said land despite being warned by the respondent herein.

He maintained that the appellant cannot be allowed to benefit from the illegal selling of land by one Musa Machaku who lost the case against the respondent. He made reference to the case of **Juto Ally vs Lukas Komba and Another**, Civil Application No. 84 of 2017, CAT at Dar es Salaam in support of his argument.

Replying to the fifth ground, the respondent submitted that, the appellant is only consuming the time of this court since there is no relation between the submission in chief and the memorandum of appeal. Further,

he argued that, he was already appointed by the court as administrator of the estate of the late Sindilo Kisota, he has not yet filed an inventory as he is still in the process of collecting and distributing the properties of the deceased.

Responding to the sixth ground of appeal, he argued that, the respondent herein having won in Land Case No. 4 of 2014 against Musa Machaku who sold the suitland to the appellant herein, the appellant should have filed a case against the said Musa Machako who sold the said land to him instead of suing the respondent. He maintained that, even if the appellant has a sale agreement from Mr. Machaku it has no legal effect as it originates from illegal transaction (See **Jane Kimaro vs Vicky Adili (As an administratrix of the estate of the Late Adili Daniel Mande)**, Civil Appeal No. 212 of 2016, CAT (unreported). Thus, he prayed for the appeal to be dismissed with costs and the appellant to be ordered to vacate the suit land as soon as possible.

In his brief rejoinder, the appellant reiterated what he submitted in his submissions in chief, however he narrated the history of the matter and prayed before the court to give additional statement and evidence. He attached some documents supporting his history of the matter.

Having heard the rival submissions from both parties and the examined the records of this matter, I am now in a position to determine the merit of this appeal.

Since the determination of this matter at the DLHT was based solely on the question of res judicata, I wish to start with the fourth ground of appeal which I consider, for reasons to be revealed in due course, is capable of disposing of this matter. The fourth ground of appeal is faulting the DLHT for deciding that this matter was res judicata based on the previous case No. 4 of 2014 which the appellant herein was not a party to.

The doctrine of res judicata is provided for under section 9 of the Civil Procedure Code, Cap. 33 (R.E. 2019) which reads as follows:

> *"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."*

From the wording of the quoted provision, it seems to this Court that the spirit behind this provision is to put an end to litigation or bar

multiplicity of suits on a cause of action that has been finally determined between parties by a Court of competent jurisdiction.

In the case of **Peniel Lotta vs Gabriel Tanaki and two others,** Civil Appeal No. 61 of 1999 CAT (unreported) which is cited in approval in the Court of Appeal of Tanzania decision of **Ester Ignas Luambano vs Adriano Gedam Kipalile,** Civil Appeal No. 91 of 2014, CAT at Zanzibar it was stated 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 must have litigated under the same tittle 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.

Having revisited the records of the DLHT and Ward Tribunal, it is apparent that, while the matter in issue in Land Dispute No. 4/2014 was substantially in issue in Land Dispute No. 18/2019 and decided by the

competent Court to its finality, it was not litigated litigated between the same parties and obviously, not litigated by the parties under the same tittle. In the Land Dispute No. 4 of 2014 the parties were **Sindilo Kisota vs Musa Omari Machako** whereas in the present case the parties are **Sindilo Kisota vs Oscar Kusare Munisi**. Thus, the judgment in the previous matter cannot operate as res judicata in the subsequent action against a party who was not involved in the original case.

I have noted that, in determining the question of res judicata, the DLHT made a finding at page 2 and 3 of the impugned judgment that the size of land involved in the former and subsequent suits is 1½ acres and the appellant herein, though not a party in the former suit, was in one way or the other involved in the dispute between parties in the former suit. The words of the DLHT speaks as follows:

> *"in the year 2014 the same Ward Tribunal of Bwagamoyo entertained the matter between the appellant and one Musa Machaku the same size of land measuring 1½ acres was involved as land in dispute ...For the trial tribunal to re-determine the same matter is not only fatal but res-judicator (sic). There is good evidence that the respondent here was in one way or the other involved in the dispute between the appellant here and Musa Machaku. It goes therefore without saying that the whole trial tribunal proceeding is null and void and hereby nullify"*

However, the DLHT did not reveal the evidence which indicates that the appellant herein was involved in the former dispute or the nature of that involvement and how it led to the matter being res judicata. Further to that, although the appellant herein brought a claim of 1½ acres of land in Land Dispute No. 18/2019, the findings of the Ward Tribunal indicates that the size of land in dispute is 2 acres making it different from the size of land decided in the former suit.

In the circumstances, this Court finds that Land Dispute No. 4 of 2014 could not operate as res judicata against the appellant herein in Land Dispute No. 18/2019 and the subsequent appeals. As a consequence, I hereby quash and set aside the proceedings, judgment and decree of the DLHT and order further that this file be remitted back to the first appellate court for expeditious determination of the appeal on merit before another Chairperson.

It is so ordered.

K.N.ROBERT
JUDGE
22/10/2021