

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 2 OF 2020

(Originating from the District Land and Housing Tribunal for Kiteto at Kibaya in Land
Application No. 01 of 2019)

HUSSEIN MUSA.....APPELLANT

VERSUS

ANACILET BENEDICT MUNGA.....RESPONDENT

JUDGMENT

4/10/2021 & 10/12/2021

ROBERT, J:-

The appellant, Hussein Musa, filed a suit against the respondent, Anacilet Benedict Munga, at the District Land and Housing Tribunal (DLHT) for Kiteto claiming ownership of the suit land measuring 23 acres situated at Engirenyi area, Partimbo Village within Kiteto District which was trespassed by the respondent. The trial Tribunal decided that the suit land belongs to the respondent. Aggrieved, the appellant preferred this appeal.

The trial Tribunal framed and decided on two issues seeking to establish who the lawful owner of the disputed land is and whether the respondent is a trespasser to the disputed land. The applicant alleged to have acquired the disputed land in 1985 by clearing a piece of land having been permitted by the village authority. He then used the said land until 2018 when the respondent invaded. He reported the matter at the police station and at the office of the District Commissioner without any relief. On the other hand, the respondent claimed to have purchased the suit land from one Kibwendo Musa Hussein in the year 1998. The sale agreement was executed in witness of local authorities. After the hearing, the trial Tribunal made a finding that, the suit land was sold to the respondent by the son of the applicant but noted that the dispute in question was already placed before the Ward Tribunal and determined to finality. Consequently, the application was dismissed with costs. Aggrieved, the appellant preferred this appeal armed with two grounds:-

- 1. That the trial Tribunal erred in law and in fact in holding that the suit land was lawfully sold by one KIBWANDO HUSSEIN MUSA to the respondent*
- 2. That, the trial Tribunal erred in law and in fact in holding that the land dispute was res judicata.*

During the hearing of this appeal, which proceeded by way of written submissions, the appellant was represented by Mr. Felix Kapinga, learned counsel whereas the respondent was under the legal services of Ms. Judith Akinyi Reuben, learned counsel.

Amplifying on the first ground of appeal, Mr. Kapinga faulted the trial court for holding that the suit land was lawfully sold to the respondent by on Kibwando Hussein Mussa. He submitted that, the said Kibwando Hussein Mussa had no power to sale his father's land to the respondent. He supported his argument with a latin maxim "nemo dat quod non habet" meaning nobody can give what he does not have. Since Kibwando Hussein Mussa had no title to the land in question he could not pass title to the respondent. He cited the case of **Kassim Lema & Another vs Kelvin Atulwa Munisi**, Land Appeal No. 111 of 2017 (Reported at Tanzlii) to buttress his argument.

Responding to this ground, Ms. Akinyi submitted that, the appellant failed to prove that the disputed land belongs to him. At page 5 of the trial Tribunal proceedings he stated that he had no document issued by the village council to allocate him the disputed land. Further to that, at page 6 of the proceedings when asked by the Chairman for clarification, he stated that, he didn't know the size of the suitland and

denied to recognize to the description of the suit land or to have filed any document at the trial Tribunal in respect of the land with that description.

He maintained that, the appellant did not prove to be the owner but the sale agreement (exhibit D1) proved the owner to be the respondent who acquired the said land by way of purchase from one Kimbwando Hussein.

Coming to the second ground of appeal, Mr. Kapinga argued that, the trial tribunal was wrong to hold that, the matter was res judicata while the conditions set out under section 9 of the Civil Procedure Code (Cap 33 R.E 2019) were not fulfilled. He maintained that, parties at Partimbo Ward Tribunal were not the same, it was the respondent herein and one Kibwando Hussein Mussa. He argued that, since the appellant was not a party in the proceedings before the Ward Tribunal, the DLHT erred in holding that the matter was res judicata.

Responding to this ground, counsel for the respondent argued that, counsel for the appellant misconceived and misconstrued the wording in the impugned judgment of the District court. She maintained that, the issue of res judicata was just an opinion made by the Hon. Chairman at page 2 last paragraph of the said judgment and it was not one of the

reasons for the trial tribunal's decision that's why the trial Chairman proceeded to determine the application on merits.

Mr. Kapinga also raised another issue which was not part of the grounds of appeal. He argued that, there was a change of assessors during the hearing of the application at the trial tribunal which they think was a serious irregularity. He noted that, Mr. Msonde and Mr. Nagol acted as assessors during the testimony of PW1 and PW2 while another pair of assessors namely, Mr. Mainde and Mrs Ngobei heard the respondent's witnesses until the conclusion of the trial. He regarded this as a serious irregularity and made reference to the case of **Ameir Mbarak & Another vs Edgar Kahwili**, Civil Appeal No. 154 of 2015, CAT (unreported) where the Court of Appeal held that allowing an assessor who has not heard evidence makes the trial a nullity. Thus, he prayed for this court to invoke its revisional powers under section 36 of the Land Disputes Courts Act 9 Cap 216 R.E 2019) to declare the proceedings of the trial Tribunal a nullity and order a re-trial.

Responding to the issue of assessors, Ms. Akinyi submitted that, as the issue of the assessors was raised by the learned counsel on its motion without following a proper procedure, they will not submit on it and prayed for the court to disregard it as it was not part and parcel of

the memorandum of appeal. She maintained that the appellant is not allowed to raise new grounds of appeal at the stage of hearing without leave of the Court as that would amount to abuse of Court process. She regarded the newly raised ground as an afterthought.

In the light of the arguments herein, she urged the Court to dismiss this appeal with costs for lack of merit.

In a brief rejoinder, counsel for the appellant reiterated his submissions in chief. He argued further that, the issue of res judicata was not just an opinion of the chairman in the impugned judgment, it was the trial court's decision. As for the issue of assessors, he argued that it was a point of law which can be raised at any by the parties or by the court suo motto. To support his argument, he made reference to the case of **Marwa Mahende vs Republic**, [1998] TLR 249.

On the basis of the arguments made, he prayed for the appeal to be allowed and the re-trial be ordered.

Having considered the submissions made by parties for and against the current appeal, this court will now turn to discuss the merit of this appeal.

Starting with the first ground, the question for determination is whether the trial tribunal erred in holding that the suit land was lawfully sold to the Respondent by the Appellant's son one KIBWANDO HUSSEIN MUSA. The appellant maintained that the suit land belongs to him and he didn't give power to his son to sell the suit land. Unfortunately, the said Kibwando Hussein Musa was not joined as a party to this suit for resolving issues of ownership of the suit land and where it is established that ownership to the suit land belongs to the appellant he may be considered the party against whom any right to relief exists.

Therefore, to challenge the alleged sale of the suit land to the respondent, the appellant was required to establish that he is the lawful owner of the suit land and not the one who sold the said piece of land to the respondent. To prove ownership of the suit land, the appellant tendered exhibit P1 which was the letter from "Ofisi ya katibu Tarafa" which is only a letter allowing the appellant to continue to use his farm. The said exhibit was not considered by the trial tribunal as a concrete proof that the suit land belongs to the appellant as it lacks description of the suit land therefore it was hard to prove if it is the same land in dispute herein. Further to that, the respondent was able to submit a sale agreement dated 03/04/1998 which was not objected by the appellant

herein which proved that he bought the suit land from the appellant's son since 1998 and the sale was witnessed by the village authority. In the circumstances, this Court finds that the appellant failed to prove ownership of the suit land while the respondent managed to prove that the suit land was sold to him lawfully. Accordingly, I find no merit in the first ground of appeal.

Coming to the second ground of appeal, the appellant faulted the trial Court for holding that the suit was res judicata while parties in the present matter are not the same with parties in the application filed at the Ward Tribunal.

The doctrine of res judicata precludes a party or his proxy from instituting a further suit in respect of any particular cause of action which has been conclusively and finally determined prior to the suit in question before a court of competent jurisdiction. Both section 9 and 10 of the Civil Procedure Code amplify on the doctrine of res judicata.

In the present case, counsel for the respondent submitted that although the trial Tribunal gave an opinion on the doctrine of res judicata, it did not conclude the matter at hand on the basis of that doctrine. The fundamental question here is whether the trial Tribunal dismissed the case on the basis of res judicata.

The trial Tribunal touched on the doctrine of res judicata at page 2 and 3 of the impugned judgment. I will let the words the trial Chairman speak:-

"I am of the view that either the application before us is res judicata or else the applicant had an option to file a fresh suit suing both the purchaser and seller. Or and to file an objection proceedings before the trial tribunal. The applicant did not do either of the two. On the date the purported seller was called to testify before this tribunal he directly denied to have sold the suitland to the respondent but in the cross examination he seem to admit to have sold it. He further denied to be called Kibwando Hussein Mussa.

With the evidence adduced I concur with the wise assessors that the suitland was sold to the respondent by the son of the applicant and all the circumstance reveals that the applicant know the sale purchase transactions between the respondent and his son. DW5.

But again there is no dispute that the dispute was placed before the ward tribunal and determined on finality.

The application is hereby dismissed with costs"

It is apparent from the quotation above that the trial chairman was of the view that the matter before him was res judicata however he did not base his determination of the case on the doctrine of res judicata. He proceeded to consider the matter on merit. The question is whether the trial Chairman had, in his possession conclusive material to

invoke the doctrine of res judicata. I find no such material and I proceed to set aside the decision of the trial chairman on the question of res judicata. However, the final decision of the trial Chairman remains unaffected as it was not made on the basis of the doctrine of res judicata.

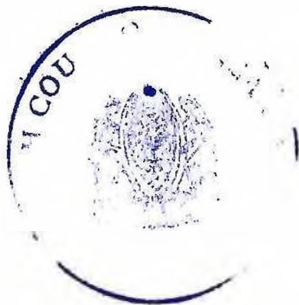
Regarding the issue of change of assessors, even if the issue raised by the appellant is not covered in the grounds of appeal and the appellant didn't seek leave of this court before raising it, this court is aware that where there is a pure question of law not dependent on the determination of any question of fact such a question may be allowed to be raised for the first time even at a later stage of the case. We agree with the appellant that, the respondent is not prejudiced in this issue as he had a chance to reply to the raised issue. However, having examined the proceedings of this case, this Court has observed that the issue raised is dependent on the determination of the question of facts and there is no sufficient material to make a determination on this matter.

In the proceedings, the trial Chairman did not indicate if there was a change of assessors and the individuals who served as assessors were not identified by their complete names at any particular moment which makes it difficult to determine if there were moments when reference

was made to their first names and moments when they were referred to by their surnames only. In the circumstances, this Court finds it unsafe to nullify the proceedings of the trial Tribunal based on inconclusive material facts.

For the reasons stated herein, this appeal is dismissed with costs for want of merit.

Ordered accordingly.



K.N.ROBERT
JUDGE
10/12/2021