THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND APPEAL NO. 24 OF 2021

(Originating from Land Application No. 67 of 2021, in the District Land and Housing Tribunal for Iringa, at Iringa).

BETWEEN

VICTORY YOTAM KIHAGA.....APPELLANT

VERSUS

GIDION ILOMO.....RESPONDENT

JUDGEMENT

31 March & 10th May, 2022.

UTAMWA, J.

The appellant, VICTORY YOTAM KIHAGA was aggrieved by the decision (impugned ruling) of the District Land and Housing Tribunal for Iringa, at Iringa (the DLHT) dated 5th November, 2021 in the Application

No. 67 of 2021. He is now appealing to this court. Before the DLHT, the appellant sued the respondent, GIDION ILOMO for among other things, recovery of a piece of land located at Itamba-Mgera, Mkwawa Ward, in Iringa Municipality within Iringa Region.

Upon a preliminary objection (the PO) being raised by the respondent against the application before the DLHT, which said PO was essentially on the ground of *res-judicata,* the DLHT upheld it through the impugned ruling.

Indeed, the impugned ruling shows that, the chairman of the DLHT believed that, there was a previous Application No. 86 of 2020 before the same DLHT which was for execution of a decision of the Ward Tribunal of Mkwawa in Iringa (the WT). I will hereinafter refer to this previous matter as the former case for easy of discussion in this ruling. The chairman also held that, the parties and the disputed land in the former case were the same as in the application which rose the appeal at hand (i.e. Application No. 67 of 2021). I will hereinafter brand this one, the subsequent case so as to differentiate it from the former case (mentioned above) for the same purposes of a convenient discussion in this ruling. The chairman thus, upheld he preliminary objection that the subsequent case was *res judiciata* since the respondent had won the case through the former case.

The chairman based his impugned ruling on section 9 of the Civil Procedure Code, Cap. 33 RE. 2019 (the CPC) and the case of **Gerald Chuchuba v. Rector, Itaga Seminary [2000] TLR 213.** He observed

that, the **Gerard Chuchuba case** enlisted the elements of the doctrine of res judicata as follows: that, the former decision might have been made by a competent court, the subject matter in the former suit must be the same as in the subsequent suit, the decision in the former suit might have been final and the parties in the former suit must be the same as in the subsequent suit. The chairman further held that, under the circumstances of the case, the appellant was enjoined to lodge objection proceedings against the attachment of his land if he was not party to the proceedings in the former case.

It is also worth noting that, the chairman entertained the PO after he had received the evidence adduced by the appellant in the trial. He thus, halted the trial, considered the PO and composed the impugned ruling in favour of the PO.

Aggrieved by impugned ruling, the appellant approached this court thought the appeal at hand. The appeal is based on the following three grounds which I reproduce for a quick reference:

1) That, the trial Tribunal erred both in law and fact by holding that, Application No. 67 of 2021 was *res judicata* as the appellant herein was not part in Land dispute No. 86 of 2020 against the Respondent.
2) That, the trial Tribunal erred both in law and fact by ruling out that, appellant herein was supposed to file objection proceeding instead of a fresh case while the subject in Land dispute No. 86/2020 was different meanwhile the same involved disputed

Land which measured 3 acres located at Itamba – Mgera, Mkwawa Ward, Iringa Municipality in Land Application No. 67/2021.

3) That, the trial Tribunal erred both in law and fact by holding that, parties in Land dispute No. 67/2021 were same in place of the appellant herein however was neither part in Land dispute No. 86/2020 against the Respondent.

Owing to the above grounds, the appellants pressed this court to grant him the following reliefs: the impugned ruling and orders of the DLHT be quashed and set aside, the application No. 67 of 2021 to be determined on merits and costs of this appeal to be granted.

The respondent resisted the appeal. The same was thus, argued by way of written submissions. In this squabble, the appellant was unrepresented. On the other side, the respondent enjoyed the services of Mr. Hafidhi Mbinyika, learned counsel.

In his submissions in chief which could, admittedly, be understood with difficulties, the appellant basically conceded to the elements of res judicata as highlighted in the **Gerard Chuchuba case** cited in the impugned ruling and in section 9 of the CPC. He however, contended that, he was not party to the former case. The suit land in the former case was also not the same as the one in the subsequent case. This was because, in the former case the suit land measured 2 acres while in the subsequent case it measures 3 acres. The subject matter which was directly and substantially at issue in the former suit is not thus, directly and substantially at issue in the subsequent case. The doctrine of res judicata

could not thus, apply in the subsequent case. He supported this particular contention by Mulla's Code of Civil Procedure, 13th Edition, at page 40 and the case of **Nduke v. Mthayo (1970) HCD n. 96.** He thus, reiterated the reliefs sought in his appeal as listed earlier.

On his part, the learned counsel for the respondent basically argued in his replying submissions regarding the first and third grounds of appeal related to res judicata as follows: that, section 9 of the CPC prohibits courts from entertaining a matter which is res judicata. He supported the elements of res judicata listed above according to section 9 of the CPC and the **Gerald Chuchuba case** (supra).

It was also his contention that, in the former case, the respondent (Gidion) instituted the matter before the WT against one Augustino Kihaga, who is the junior brother of the appellant (Victory). He (respondent) won the case and was declared owner of the land. The order of the WT was executed by the DLHT (vide the Application No. 86 of 2021). The appellant (Victory) admitted the existence of the former case before the DLHT when the PO was being heard. This trend thus, bars the subsequent case. He added that, the cause of action before the WT was the ownership of the suit land (2 acres). The same cause of action is involved in the subsequent case. The subject matter which was directly at issue in the former case is thus, also directly involved in the subsequent case, hence the applicability of the doctrine of res judicata.

The respondent's counsel further argued that, the appellant (Victory) and the said Augustino who was involved in the former case, are brothers who are claiming or litigating under the same title regarding the peace of

land at issue. That land was previously owned by their father, but later their late father sold it to the respondent (Gidion) in 1992 before he died. Augustino also witnesses the sale of the land by their father to the respondent by signing in the written sale agreement. The two brothers thus, share interests. This particular scenario attracts the applicability of the principle of res judicata in the subsequent case. He supported this particular contention by the book of Mulla's Code of Civil Procedure (supra) at page 77 and the decision by the Court of Appeal of Tanzania (the CAT) in the case of **Badugu Ginning Co. Ltd v. CRDB Bank PLC and 2 other, Civil Appeal No. 265 of 2019**.

It was a further contention by the respondent's counsel that, the WT which decided the former case was legally competent to try it since it was established under the Ward Tribunal Act No. 7 of 1985. This fact also constitutes an element of res judicata hence its applicability to the subsequent case.

The learned counsel for the respondent also argued that, under the circumstances of the case, if the appellant claims that he was not party to the former case and he is owner of the disputed land, he was enjoined to file objection proceedings before the DLHT when it was executing the decision of the WT made in the former case as rightly held by chairman in the impugned ruling. This is the procedure provided under Order XXI rule 57(1) of the CPC. He supported this contention by the case **of Katibu Mkuu Amani Fresh Sports Club v. Dodo Ubwa Mamboya and another [2004] TLR 326.**

In his rejoinder submissions, the appellant basically reiterated the contents of his submissions in chief. He added that, the former case did not make any decision against him.

I have considered the record, the grounds of appeal, the arguments by the parties and the law. I will now test the grounds of appeal. In my view, the first and third grounds of appeal can be tested cumulatively since they are related and they principally challenge the holding by the chairman that the subsequent case was res judicata. I will thus, discuss them together before I consider the second ground of appeal.

Regarding the first and third grounds of appeal, the major issue to be determined is *whether the chairman of the DLHT was justified in holding that the subsequent case was res judicata*. In my settled opinion, the answer to this issue can be obtained by consulting the record of both the former and the subsequent cases. This is because, the law is trite that, court records are presumed to be serious and genuine documents representing what happened in court unless there is evidence to the contrary; see the case of **Halfani Sudi v. Abieza Chichili [1998] TLR. 527.** The holding in the case of **Paulo Osinya v. Republic [1959] E.A 353** also supports this legal stance in respect of the significance of court records. They cannot thus, be easily impeached. In the case at hand, no scintilla of evidence has been adduced to impeach the record of the DLHT which has, in law, the status of court records. The squabble by the parties is only on the interpretation of the law basing on the facts on record. I will therefore, proceed to consider such records of the former and subsequent

cases as genuinely reflecting what had happened before the WT and the DLHT respectively.

In deciding the issue posed above I firstly agree with the holding in the impugned ruling and the submissions by the parties regarding the important elements of the doctrine of res judicata. The doctrine is in fact, conspicuously set under section 9 of the CPC as shown in the impugned ruling, the above cited precedents and as agreed by the parties. The provisions of section 9 read thus, and I quote them for a readymade reference:

> "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 The Civil Procedure Code [CAP. 33 R.E. 2019] 44 subsequently raised and has been heard and finally decided by such court."

Now, according to section 9 of the CPC and the precedents cited by the parties, it is clear that, for the doctrine of res judicata to apply in a particular case, its elements or conditions must be met cumulatively and not alternatively.

I will now firstly test if one of the elements of the doctrine of res judicata, which is mostly disputed by the parties, was met in the case at hand. This element is the one related to the parties. The law undisputedly guides that, one of the elements or condition of res judicata is that; the former suit/case might have been between the same parties as in the subsequent suit/case or that the subject matter in both cases must be

between the parties under whom they or any of them is claiming or litigating under the same title.

In the matter at hand, the chairman of the DLHT in the impugned ruling and the respondent's counsel in his replying submissions are trying to suggest that the parties in both the former and subsequent cases were the same, or that, the appellant (Victory) is claiming or litigating under the same title with his brother (Augustino) who was undisputedly involved in the former case. I am not ready to agree with this position taken by the chairman in the impugned ruling and supported by the learned counsel for the respondent.

My disagreement just mentioned above is based on the following grounds: in the first place, the record regarding the former case shows clearly that, before the WT the parties were only the respondent (Gidion) who was claiming against Augustino (brother to the appellant Victory). Of course, the WT declared the respondent (Gion) owner of the land against Augustino because he did not attend on the date set for hearing of the matter before the WT. The decision of the WT also went for execution against the same Augustino before the DLHT as application No. 86 of 2021. The record of that application which also contains the record of the WT were made part of the record of the subsequent suit. This court is thus, seized of the same. According to the records of the WT and the DLHT (in the said Application No. 86 of 2021) the appellant was neither party before the WT nor involved before the DLHT at the execution process.

Furthermore, before the WT, the said Augustino did not file any claim against the respondent (Gidion) in relation to any piece of land, let alone

the disputed land. Instead, the vice versa was applicable. It was the respondent (Gidion) who had instituted the claim against the said Augustino. The record of the WT further shows that, thought the WT declared the respondent (Gidion) owner of the suit land before it, his original claim, according to the statement which instituted the matter before it (the WT) dated 2nd September, 2020, did not show that his claim constituted a pure land dispute against the said Augustino. This was because, he was principally complaining that, the said Augustino had signed the sale agreement of the land between him (respondent Gidion himself) on one side and the late father of the said Augustino and the appellant (Victory), i. e. the late **Yotam Kihaga**, but he (Augustino) was denouncing that fact. The statement also shows that, it was the brother to the said Augustino (name not mentioned, but it is apparently the appellant, i. e. Victory) who had directed him (Gidion) not to cultivate into the suit land. He did not however, join the appellant (Victory) in that former case as co-defendant/respondent.

Indeed, even in his evidence adduce before the DLHT prior to when the chairman decided to consider the PO, the appellant clearly showed that the dispute on the suit land was between him and the respondent. There was also an attempt to settle the matter out of court before local leaders of the area, but the efforts were futile.

It is also conspicuously shown in the record of the WT that, in his statement of defence (dated 13th May, 2020) the said Augustino neither claimed that the land belonged to him nor to his late father. He was expressly clear that, he was not concerned with that dispute on the land.

The dispute was between the respondent (Gidion) and the appellant (Victor). The two were owning lands which were adjacent to each other. He was in fact, surprised to be involved in the dispute because he had never made any follow up of that land. He also denied to have witnesses any sale of the land as claimed by the respondent (Gidioni).

On the other side, in the subsequent suit, the appellant (Victory) was claiming before the DLHT for the recovery of his own land from the respondent (Gidion). According to the record before the DLHT, his cause of action is that, the land was given to him by his late father during his life time, but the respondent has unjustifiably interfered it. He has also refused to vacate from it despite various efforts made by him (appellant).

Now, from the above narrated contents of the record, it cannot be argued that the parties in the former suit are the same as in the subsequent suit or that the appellant (Victory) was claiming (in the subsequent case) under the same title with the said Gidioni (his brother) who was involved in the former suit. This is because, as shown above, the said Gidion did not claim anything from the respondent (Gidion), but it was the respondent (Gidion) who had complained against him (Augustino) for his denunciation of the fact that he was witness to the sale of the land. Furthermore, the said Augustino was open before the WT that, the land did not belong to him and he was not concerned with that dispute, but it was his brother (Victory) who was making a follow up of the same.

Indeed, apart from the fact that Augustino did not claim any ownership of the land before WT, the respondent (Gidion) himself, confessed in his statement of the claim that it was the brother of the said

Augustino who had approached him and stopped him from cultivating the land. It is now surprising that he took action against the said Augustino in the former case instead of doing so against the appellant (Victory) who had indicated to him that he had rights in the land.

Owning to the above reasons, it cannot be said that the element/condition of res judicata discussed above was met in the subsequent suit. It follows thus, that, since I observed earlier that the elements of res judicata must be met cumulatively for it to apply in a case, and since I have just held that one element discussed above was not met in the subsequent case, I agree with the appellant that, under the circumstances of the case under consideration, it cannot be argued that the chairman of the DLHT was justified in holding through the impugned ruling that the subsequent case was res judicata.

Due to the reasons listed above, I distinguish the precedents cited by the learned counsel for the respondent. I consequently answer the issue posed above negatively that, the chairman of the DLHT was not justified in holding that the subsequent case was res judicata. He would have thus, proceeded to hear the case on merits and give the appellant the opportunity to be heard in providing proof of his claim (if any). I therefore, uphold the first and second grounds of appeal.

Regarding the second ground of appeal, I am of the view that, thought the appellant did not argued it, the learned counsel for the respondent did so. He was of the view that, the chairman was justified to hold that the appellant had to file objection proceedings instead of instituting the subsequent case vide Order XXI rule 57(1) of the CPC and

the **Katibu Mkuu case** (supra)**.** The major issue regarding the second ground of appeal is therefore this; *whether the chairman of the DLHT was justified in the impugned ruling to hold that it was the appellant's duty to institute objection proceedings instead of instituting the subsequent case as a fresh suit.* In my settled opinion, this contention does not have any legal support on the following reasons: Though the provisions just cited above provide for the option of lodging objection proceedings to a non-party to a suit whose property is attached in execution of a decree, the same do not guide that such proceedings are the only legal remedy available to such non-party. The provisions do not thus, bar such non-party from instituting a fresh suit against the decree holder if he (non-party) wishes. Neither, the **Katibu Mkuu case** (supra) held so.

In fact, though the **Katibu Mkuu case** (supra) was decided by the CAT whose decision are binding to this court by virtue of the doctrine of stare *decisis*, the same is distinguishable from this case for the following grounds: in that precedent, the CAT decided the appeal basing on the rules of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar which were not *in pari materia* with the above cited provisions of our CPC. Furthermore, the issues before the CAT were essentially two; the first was whether an order arising from objection proceeding was appealable. The second issue was whether the judge of the High Court of Zanzibar had actually investigated the matter brought before him by way of objection proceedings as required by the law. That precedent was not therefore, in support to the respondent's contention in the matter at hand that the

appellant was duty bound to lodge objection proceedings instead of filing the subsequent case.

On the other hand, the position of the law in our jurisdiction supports the course taken by the appellant in the matter at hand in filing the subsequent case (as a fresh suit). It is more so because, the subsequent case was not res judicata as I held earlier. It was for instance, held by this court (Munyera, J. as he then was) in the case of **Omoke Oloo v. Werema Magira [1983] TLR 144** (at page 145) that, the law does not provide that the only way open to a party objecting to an attachment is through the objection proceedings. A party can decide to bypass objection proceedings and resort to a suit to recover his wrongly seized property. Furthermore, in the case of **Kangaulu Mussa v. Mpunghati Mchodo [1984] TLR 348**, this same court (Lugakingira J. as he then was) also held that, as a matter of practice, a person may bring a fresh suit where he could also have proceeded by way of objection and the court has discretion to entertain or not to entertain a suit which could be brought by way of objection depending on the circumstances of each case.

Owing to the above reasons, the holding in the impugned ruling that the appellant was compelled to file objection proceedings instead of filing the subsequent case, which said holding was supported by the respondent's counsel was based on a misconception of the law. I consequently answer the issue raised above negatively that, the chairman of the DLHT was not justified in the impugned ruling to hold that it was the appellant's duty to institute objection proceedings instead of instituting the subsequent case. I accordingly, allow the second ground of appeal.

By virtue of the the above findings, I allow the appeal and grant the reliefs sought by the appellant as follows: the impugned ruling and orders of the DLHT are hereby quashed and set aside. Its proceedings (from the date when it started to take the evidence of the appellant (i.e. on 29th July, 2021) to when it delivered the impugned ruling (i.e. on the 5th November, 2021) are also nullified and quashed. The subsequent case (the Application No. 67 of 2021) shall thus, be heard afresh in determining it afresh on merits from when the saved proceedings end (i.e. on 29th July, 2021). Each party shall however, bear his own costs since the chairman of the DLHT was also instrumental in committing the irregularities discussed above which have led to the allowing of the appeal. It is so ordered.

J. H. K. UTAMWA
JUDGE
10/05/2022.

10/05/2022.
CORAM; J. H. K. Utamwa, Judge.
Appellant: present in person.
For Respondent: present in person and Mr. Hafidhi Mbinyika, advocate.
BC; Ms. Gloria. M.

Court: Judgment delivered in the presence of the appellant in person, the respondent in person and Mr. Hafidhi Mbinyika, learned counsel for the respondent, in court, this 10th May, 2022.

J. H. K. UTAMWA
JUDGE
10/05/2022.