

IN THE HIGH COURT OF TANZANIA
SHINYANGA DISTRICT REGISTRY
AT SHINYANGA

LAND APPEAL NO. 39 OF 2021

ESITA IDEBE.....APPELLANT

VERSUS

JILALA SENYELE.....1st RESPONDENT

SAMWEL MASALA.....2ND RESPONDENT

[Appeal from the decision of the District Land and Housing Tribunal of
Maswa]

(Hon. J.T. Kaare, Chairman)

dated the 15th day of July, 2021

in

Land Application No. 82 of 2020

JUDGMENT

29th March & 13th May, 2022.

S.M. KULITA, J.

This is an appeal from the District Land and Housing Tribunal of Maswa. In a nut shell the story behind this appeal is that, the Appellant sued the Respondents at the District Land and Housing Tribunal over nine acres of unsurveyed land situated at Mwambalange Village in Bariadi District, within Simiyu Region. In reply to the claim, the 1st Respondent

raised a preliminary objection on point of law to the effect that, the Appellant's application is *Res Judicata*. Upon the same being heard on the 15th day of June, 2021 the trial Chairman sustained the preliminary objection, the Appellant's application was thus dismissed.

The said decision aggrieved the Appellant, hence this appeal in which he relied on two grounds as follows; **one**, the trial Chairman erred by holding that the application is *Res Judicata* relying on the Land Appeal No. 02 of 2018 District Land and Housing Tribunal of Maswa, in which the Appellant had never been a party, and the lands in disputes are different, **two**, the trial Chairman erred in holding that the 2nd Respondent represented the Appellant's interest in the Land Appeal No. 02 of 2018 while this current case is over a different subject matter.

In this Appeal, Mr. Emmanuel Paul Butamo, Advocate represented the Appellant, whereas Mr. Daud Masunga, Advocate represented the 1st Respondent. The 2nd Respondent was unrepresented. On 29th November, 2021, the matter was scheduled for hearing through written submissions. Only the Appellant and the 1st Respondent complied with.

Submitting in support of the appeal, specifically on ground number one, Mr. Butamo stated that the Appellant's application at the trial tribunal was not *Res Judicata*. He gave the reason being, the Appellant has never

been a party to the Land Appeal No. 2/2018. He added that, in Land Appeal No. 2/2018 which arises from Itubukilo Ward Tribunal in the Land Application No. 2/2017, the land in dispute was 1 acre while in the Appellant's application No. 82/2020 from which this appeal arises, the disputed land is different. It measures 9 acres. Mr. Butamo cited the case of **George Shambwe v. Tanzania Italian Petroleum Company Ltd [1995] TLR 21** and section 9 of the Civil Procedure Code, to bolster his argument that, for the doctrine of *Res Judicata* to stand it must be proved that the parties and the subject matter in dispute in the subsequent suit should be the same to the previous one.

Concerning the second ground of appeal Mr. Butamo stated that, in the said Land Appeal No. 2/2018 there was no representation of the of the Appellant's interests by the 2nd Respondent. He submitted that in her application No. 82/2020 in the District Land and Housing Tribunal, Maswa, the Appellant claims against both Respondents for entering into a contract over a matrimonial property without her consent.

In reply Mr. Masunga submitted that, the Appellant's application at the tribunal (Land Application No. 82/2020) was *Res Judicata*. He said that the land in dispute over the Appellant's application is the same with that litigated in the Land Application No. 2/2017 (Itubukilo Ward Tribunal)

which was appealed at the District Land and Housing Tribunal of Maswa, in the Land Appeal No. 2/2018. He added that, it is not in dispute that, the previous two cases (Application No. 2/2017 Itubukilo Ward Tribunal and its appeal No. 2/2018 District Tribunal Maswa) were instituted by the 2nd Respondent who is the husband of the Appellant. Further, Mr. Masunga stated that, the 9 acres involved in the Appellant's application No. 82/2020 are the same ones involved in the previous suits.

Concerning the second ground of appeal, Mr. Masunga was of the views that the same lacks merits. He contended that, the interests of the Appellant in the previous cases were represented by the 2nd Respondent who is her husband. He cited the case of **Ester Ignas Luambano v. Adriano Gedam Kipalile, Civil Appeal No. 91/2014, CAT at Zanzibar** to bolster his assertion that in such a scenario the trial court was right to regard the Land Application No. 82 of 2020 of the District Land and Housing Tribunal for Maswa, *Res Judicata*.

In rejoinder Mr. Butamo reiterated his submission in chief and added that, the 1st Respondent's preliminary objection on *Res Judicata* should have not been regarded for it being on matters of facts, not of law as per **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (969) E.A. 696**. He then distinguished the case of **Ester Ignas**

Luambano (supra). On the issue of the interests of the Appellant being represented by the 2nd Respondent, Mr. Butamo stated that there is nowhere the Appellant signified to that much.

I have earnestly gone through both parties' submissions, authorities supplied and the available records. As well, I have taken into consideration the rival issues. The issue to be determined here is whether the Appellant's application No. 82/2020 lodged at the District Land and Housing Tribunal of Maswa, is *Res Judicata*.

As submitted by the Appellant's counsel that, the doctrine of *Res Judicata* is governed by section 9 of the Civil Procedure Code [Cap 33 RE 2019] of which I hereunder quote it for easy of 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 subsequently raised and has been heard and finally decided by such court".

In accordance with the above quoted provision of the law, the Court of Appeal stated thus in **Peniel Lotta V. Gabriel Tanaki and two others [2003] TLR 312;**

"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 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 heard and finally decided in the former suit.*

According to the dictates of the above quotes, the question is, in our case at hand, do all the enlisted conditions for the principle of *Res Judicata* to apply, cumulatively exist?

I had an opportunity of going through the records of the tribunals. The decision of the Itubukilo Ward Tribunal No. 2 of 2017 which was between Samwel Masala versus Jilala Senyele, the Respondents herein, at its first typed page, shows that, the parties' dispute was over a one-acre area.

Further, the records show that, Samwel Masala appealed at the District Land and Housing Tribunal of Maswa through Land Appeal No. 2 of 2018. In its decision specifically at page 11 the said appellate tribunal stated clearly that, the dispute among the Respondents herein is over one-acre sized area.

Again, in the same case file, Land Appeal No. 2 of 2018, Maswa, I found a contract of sale of land between the Respondents herein. The said contract which is dated 11th April, 2004, concerns one-acre piece of land. However, in all the above records referred, the boundaries of the disputed one acre of land, have not been stated.

In the current case, the records show that, the Appellant through Land Application No. 82 of 2020 approached the District Land and Housing Tribunal of Maswa claiming for un-surveyed piece of land sized nine (9) acres. The boundaries of the same have been stated.

On that account, it thus goes without saying that, the Appellant claims either over eight (8) or all nine (9) acres, which is a different subject matter as compared to that litigated in the previous suit No. 2 of 2017 Itubukilo Ward Tribunal and appealed at the District Tribunal of Maswa in Land Appeal No. 2 of 2018 in which the claim involved one-acre piece of land. It was therefore not proper to hold the whole of the Appellant's application No. 82 of 2018, *Res Judicata*. This is because the conditions that were required to exist cumulatively for the *Res Judicata* principle to apply, the first one has not been proved to exist. Had the trial Chairman keenly gone through the records, he would not have held as what he did.

Without much ado, I find it a merit in this appeal, hence I accordingly allow. The District Land and Housing Tribunal erred on this. In the event its judgment is hereby quashed and set aside. I thus order that the Land Application No. 82 of 2018 be remitted back to the District Land and Housing Tribunal of Maswa for being heard on merit. It is to be reassigned to another Chairman who will entertain it with new set of assessors. It is further ordered that the determination should only base on the subject matter that does not fall within the one-acre subject matter

which had already been decided in the Land Application No. 2 of 2017 at Itubukilo Ward Tribunal, whether it is within the currently disputed 9-acres or not.

Respondent to bear the costs.

It is so ordered.


S.M. KULITA
JUDGE
13/05/2022

DATED at Shinyanga this 13th day of May, 2022.




S.M. KULITA
JUDGE
13/05/2022

