IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TABORA)

AT TABORA

LAND APPEAL NO. 4 OF 2021

(Arising from Land Application No. 47/2018 in the District Land and Housing Tribunal for Nzega)

1. ESHELI SHIJA ELIUS
2. CHARLES M. ESHELI
3. MABULA MATHIAS ..... **APPELLANTS**
4. SIMON PETRO

VERSUS

YOANA BANYA ESHELI..... RESPONDENT

JUDGMENT

Date: 15/6/2022& 12/8/2022

BAHATI SALEMA, J.:

The appellants herein **Esheli Shija and 3 others** being aggrieved and dissatisfied with the whole decision in Land Application No.47/2018 of the District Land and Housing Tribunal for Nzega before Hon.Lingwetu V.A delivered on 30/12/2021 sought to challenge the decision on the following grounds;

1. *That, the trial tribunal erred in law and in fact to substitute the name of the applicant without due process of the law.*
2. *That, the trial tribunal erred in law and in fact to substitute the name of the applicant without due process of the law.*
3. *That, the trial tribunal erred in law and in fact to rely on the decision of Nyasa Primary court which had no jurisdiction to entertain land Appeal.*
4. *That, while there was a judgment of IJANIJA ward tribunal which was in favour of the appellants and which was not appealed the trial tribunal erred in law and in fact to entertain the matter which was res- judicata.*
5. *That, the trial tribunal erred in law and fact in failing to evaluate the evidence before it thus misdirecting itself in consideration thereof consequently arriving in a wrong judgment.*
6. *That, the appellate court erred in law and in fact to declare the respondent as the winner without considering the contradictory evidence adduced by the respondent and her witness at the trial.*

Brief facts of the case can be summarized as follows; the respondent Yoana who is an administrator of the estate of the late Esheli Shija Mabula acquired the suit land measuring approximately 9 acres which in the year 1916 was cleared from a virgin forest. The deceased commenced cultivating the suit land from 1916 until 1980 when he died. After which the land remained in possession of the deceased

family whereby one Tito Kanoni was appointed as the guardian of the same by the family of the deceased.

In 2004 the guardian of the suit came to learn that the 1st respondent, Esheli Shija Elius sold the same to the 2nd, 3rd and 4th respondents without the same being involved as a guardian of the disputed land. That immediately after the guardian of the suit land came to know that the suit land was sold to the 2nd, 3rd and 4th respondents, he lodged a land complaint at Ijanija Ward Tribunal whereby the decision was delivered in favour of the 1st respondent. He then appealed to Nyasa Primary Court where the judgment of the Ward Tribunal was nullified and ordered the said Land Application to be filed afresh by involving the buyers. Consequently, Land Application 47/2018 was instituted at Nzega which is now the subject of this appeal.

The appellants were represented by Mr. E. Musyani and whereas the respondent was represented by Mr. Edward Marando and wwhen the matter at hand was scheduled for hearing, with leave of the court it was ordered to be disposed of by way of written submissions and schedule for the same was ordered, whereby submissions in chief by the appellants was filled, replying submissions by the respondent and a rejoinder by the appellants was duly complied with by the parties. I undertake not to reproduce their submissions on record in full save to the extent necessary for the determination of the appeal. I commend

the learned counsels for their industry and lucid presentations. They have enriched my mind a great deal.

The appellant's counsel in his submissions dropped the 2 and 3 grounds of appeal and remained with only, the 1st, 4th, 5th and 6th grounds of appeal.

Submitting on the first and fourth grounds of appeal which touch on the jurisdiction of the court. As we know, the matter of **jurisdiction** can be raised at any stage of the proceedings by the court itself *suo-motto* or by parties to the case and is of the firm view that those two grounds may suffice to dispose of the entire appeal.

He submitted that the trial Tribunal erred in law and in fact to entertain the application which was time-barred considering the time Esheli Shija Mabula died intestate in 1980 and left the disputed land. Mr. Musyani submitted that it is undisputed that the disputed land was being used by the 1st appellant's mother from 1967 to 1996 when she died and the mother of the 1st appellant has been in possession and use of the disputed land for more than 29 years and after the death of his mother in 1996 the 1st appellant (Esheli Shija) legally sold the same to the 2nd appellant (Charles Esheli) and 4th appellant (Simon Petro) in between 1996 to 2000.Also on page 30 of the proceedings, the 2nd respondent admitted having known that the disputed land was sold between

2003/2004 and it has been in use by the 2nd, 3rd and 4th appellants since then until to date.

He stated further that leave alone 29 years which the disputed land was used by the appellants' mother but taking simple calculation from 2003 when the respondent was aware that the disputed land has been sold to the 2nd, 3rd and 4th appellants to 2018 when the case was registered it is almost 14 years, so the case was filed out of time contrary to the law.

He asserted that Section 5 of the Law of Limitation Act, Cap. 89 [R. E. 2019], the accrual of the right of action starts on the date on which the cause of action arises and the provisions of paragraph 22 of Part 1 to the Schedule of the Law of Limitation Act (supra) provide that the period of limitation for recovery of land is twelve (12) years.

He submitted that the respondent instituted this suit on 26th November, 2018 counting from the year 2003 when the cause of action arose to 2018 when the respondent filed his case it was fourteen (14) years. To bolster his stance he cited the case of **Yussuf Same and Another Vs Hadija Yussuf (1996)** TLR 347.

He asserted that, if the respondent had any legal right or interest over the suit property he should have either himself or his relative claimed the same prior to the expiration of twelve (12) years. As such, since there were no claims or complaints lodged before 2003 and since the

2nd, 3rd and 4th appellants have been in the disputed land from the year 2002 to date, the respondent is precluded from claiming for the same.

As to the 4th ground of appeal, he contended that while there was a judgment of Ijanija Ward tribunal which was in favour of the 1st appellant and which was not appealed against, the trial tribunal erred in law and in fact to entertain the matter which was ***res- judicata*** and he cited section 9 of the Civil Procedure Code, Cap. 33 [R. E. 2019].

He submitted that the judgment of the trial tribunal of Ijanija ward tribunal was in favour of the 1st appellant and which was not appealed against and the parties litigating in the subsequent suit are the same parties that litigated under the previous suit and under the same title.

He submitted that the doctrine of *res-judicata* acts as an estoppel to such parties to re-litigate those same matters in any subsequent suit because the doctrine, apart from binding the parties as to the matter decided, also puts to an end the particular cause of action on which former litigation between the parties was founded.

As to the 6th ground of the appeal on the contradictory evidence, he submitted that the evidence of the respondent and his witness in the trial tribunal was very contradictory and quoted DW1, DW2, DW3 on pages 28, 29, 30 and 31. He prayed to this court that the appeal be allowed and the trial tribunal's judgment be quashed and set aside with costs.

Responding, the respondent's counsel submitted on the first ground of appeal, the respondent insisted that the trial tribunal was correct in entertaining the matter as the appellants were both aware of the nature of ownership and interests over the land they trespassed.

He submitted that it is vividly in the testimony of both parties, that, the appellants were confronted by the family of the respondent led by the late Antony Maganga who was then the administrator of the estate of the late Esheli Shija Mabuka. After that confrontation there followed a series of dispute resolutions through local government leaders until the matter went into the hands of the trial tribunal. Therefore, there was a continuous disturbance from the occupiers of the land while the appellants were using the suit land.

He submitted that the said Bibiana Mapondela, daughter of the late Mzee Esheli Shija Mabula and the 1st appellant's mother used the suit land in the lifetime of the late Mzee Esheli Shija Mabula as *usufruct rights* and never handed the suit land to own and have absolute and exclusive rights over the same. That is why even in 1987 when the family meeting was convened following the death of Mzee Esheli Shija Mabula she never claimed ownership of the said land since she knew that the same is the family land.

The respondent agreed that the time limit for claiming recovery of land is 12 years but it is in law, that, for a person to acquire rights under

adverse possession over land, several conditions must cumulatively be met as was stated in the case of **The Registered Trustees of the Holy Spirit Sisters Tanzania Vs January Kamili Shayo and 136 Others**, Civil Appeal No. 193 of 2016 Court of Appeal at Arusha (Unreported).

In so far as the case above is concerned, the appellants can never claim adverse possession as they were continually disturbed/ interrupted by the family of the respondent over the same land.

As for the 4th ground, the respondent submitted that the matter on trial could never operate as *res judicata* since there is no suit in the clear description of the subject matter was heard and decided between the same parties by a competent court. The judgment of the Ijanija Ward Tribunal does not anywhere state the location of the suit land, the value of the same, the borders of the suit land and even the size of the same to convince any court that the subject matter discussed and adjudged therein is the same as what is being discussed herein and before the trial tribunal.

Therefore in the eyes of the law, not in the eyes of the parties no one can say that there is a previous judgment over the suit land between the parties.

He further asserted that even the parties in the suit on trial in the District Land and Housing Tribunal are different from those in the claimed Ijanija ward Tribunal's decision. It is the position of the

respondent that the said judgment does not in any way reflect the suit land and cannot be attached to it in their legal perspective.

On the 6th ground of appeal, he submitted that there were discussions on several separate sizes of land on trial, that is to say, the total size of the family land, the size of the lands sold by the 1st appellant to his co appellants and the total size of the suit land in its entirety as against all appellants. The case of **Mathias Timothy Vs. Republic (1987) TLR 86 and Mohamed Said Matula Vs Republic** (1995) TLR 3 are not material used here as the same two cases are criminal cases where even the standard of proof is different from the standard in this case.

He submitted that the same standard can not apply in the case at hand as it will change the whole principle of proof in this case. The respondent insists that there was no material discrepancy that shook the evidence of the respondent on trial to the level of discredit. The judgment of the trial tribunal is correct and right and should be upheld.

Having considered the competing submissions from both camps, the issue before this court is whether the appeal is meritorious.

To begin with the first ground of appeal, the court had ample time to go through the submissions laid down by both parties in respect of time-barred.

It is a well-settled principle of law that the Law of Limitation Act, Cap. 89 [R.E 2019] provides the accrual of the right of action starts on the date on which the cause of action arises and the provisions of paragraph 22 of Part 1 of the Schedule to the Law of Limitation Act (supra) provide that the period of limitation for recovery of land is twelve (12) years.

As gathered from the evidence of both parties, the appellants have been in possession and use of the disputed land for more than 29 years and after the death of his mother in 1996, the appellants sold the same between 1996 and 2000. As correctly submitted by the appellants' counsel that the disputed land was sold in 2003 when the respondent was aware that the disputed land has been sold to the 2nd, 3rd and 4th appellants in 2003/2004 and it has been in use.

Also in the matter at hand, the respondent conceded that the time limit for claiming recovery of land is 12 years, in my considered view, if the respondent had any right or serious interest in he disputed land he could not have sat on her haunches for all that time without taking any action after knowing that the first appellant has sold their land in 2003/2004 to his fellow appellants. In support of this argument, he cited the Court of Appeal of Tanzania in the case of **Loswaki Village Council and another Vs. Shibesh Abebe Civil Application No. 23 of 1997 Arusha Registry** (unreported) where it was held that:-

"Those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within period prescribed by law or where no such period is prescribed within reasonable time."

Similarly, section 5 of the Law of Limitation Act, Cap. 89 [R.E. 2019] provides that the right of action in respect of any proceedings shall accrue on the date on which the cause of action arises. The cause of action, in this case, arose soon after the respondent became aware of the alleged sale committed by the first appellant. The respondent was late by 14 years. Under the Law of Limitation Act, a suit for recovery of land must be filed within 12 years and where the suit is instituted after the period of limitation prescribed, it shall be dismissed. Therefore the first ground has merit.

As to the 4th ground of appeal in respect of *res – judicata*, according to section 9 of the Civil Procedure Code, Cap. 33[R. E 2019] which provides that:-

"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 to litigate under the same title in a court competent to try a such subsequent suit or the suit

in which such issue has been heard and finally decided by such court".

In deciding whether the matter is *res judicata* the following points must be proved by the party alleging *res judicata;*

1. The matter was directly and substantially in issue in the former suit.
2. The issues are between the same parties or between parties under whom or any of them claim to litigate.
3. The parties have litigated under the same title.
4. The former suit was determined by the court with competent jurisdiction.
5. There are two suits, the former suit, and the subsequent suit.
6. The issue has been determined conclusively.

This requirement prohibits the plaintiff to relinquish and reinstitute another case in which the subject matter was directly and substantially in issue in the subsequent suit and has been heard and finally decided in the former suit.

In his submission, Mr. Musyani contended that there was a judgment of Ijanija ward tribunal which was in favour of the 1st appellant and which was not appealed and the parties litigating in the subsequent suit are the same parties that litigated under the previous suit and the same title.

The respondent quoted...

> *"Mgogoro huu umejitokeza 2003/2004 baada ya kuvamiwa na wadaiwa. Tulijua baada ya kaka yangu Antony Maganga (marehemu) kuwa eneo limevamiwa na kuuzwa, tukaamua kushtaki na kesi ilifunguliwa na Titus Kanoni kwenye Baraza la ardhi la kijiji cha Ijanija, ambapo maamuzi Esheli Akashinda (See page 24 of the typed proceeding).*

Further at page 29 the respondent had this to say "... *Hakuridhika na maamuzi ya Baraza la Kata ndio maana akafungua kesi kudai mali za marehemu baba yake".*

At page 32 of the proceeding DW2 has this to say... *tulipeleka kwenye mabaraza ya chini ya kijiji cha Ijanija, tuliamriwa kuwa "Esheli Kashinda".*

DW2 at page 34 when he was cross-examined informed the court that ... "*Kesi hio alishinda Esheli...*" DW2 went further to inform the court that "*... Baraza la Kata lilisikiliza kesi mara ya pili na Esheli Shija Elias (the 1st appellant) akashinda.*"

DW2, further informed the court that the case in respect of disputed land was not yet completed she had this to say *"kesi haikuisha inaendelea hadi leo ipo"* see page 34 of the typed proceeding.

DW3 informed the court that and I quote at page 35 "... Titus Kanoni *akafika na kufungua kesi kwenye Baraza la kata ya Ijanija dhidi ya Eshel Shija Kesi hiyo Esheli akashinda."*

At page 40 *"kwenye kata ulishinda wewe, "... iliamuliwa kesi ianze upya kwenye kata na ukashinda wewe"* see page 40 of the typed proceeding. Instead of appealing the respondent decided to re-open the case while the ward tribunal decision was never challenged the remedy was not to commence fresh proceedings on the same subject matter.

Opposing Mr. Malando stated that, the matter on trial could never operate as *res judicata* since there is no suit in the clear description of the subject matter was heard and decided between the same parties by a competent court. The judgment of the Ijanija Ward Tribunal does not anywhere state the location of the suit land, the value of the same, the borders of the suit land and even the size of the same to convince any court that the subject matter discussed and adjudged therein is the same as what is being discussed herein and before the trial tribunal.

Having traversed through those arguments, for this court to come to a proper decision as to whether the matter at hand is *res- judicata* or not I find it necessary to trace the record of the litigation at hand and the history of the alleged previous litigation.

As it can be discerned from the proceedings of the trial tribunal and courts records I also subscribe to the appellants' submissions that this matter is a res judicata from the records of the court since it has been adjudicated and was never appealed. I am aware of the guiding doctrine of *res- judicata* which is based on three maxims, **no man should be punished twice for the same cause,** it is *in the interest of the state that there should be an end to litigation and* **a judicial decision must be accepted as correct.** I find this ground also has merit.

As these grounds dispose of the matter at hand, I won't dwell much on other grounds of appeal. I hereby allow the appeal and quash the decision of the trial tribunal. Following the circumstance of this matter, no order as to costs.

Order accordingly.

A. BAHATI SALEMA

JUDGE

12/8/2022

Judgement delivered under my hand and seal of the court in the Chamber, this 12th day of August, 2022 in the presence of the Christina John hold in brief of Edward Malando and the Respondent.

A. BAHATI SALEMA

JUDGE

12/8/2022

Right to appeal is hereby explained.

A. BAHATI SALEMA

JUDGE

12/8/2022