

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

LAND CASE NO. 8 OF 2022

**RAMADHANI MOHAMED KIHAGO (An Administrator
of the estate of the late HAWA MOHAMED**

JABIR.....PLAINTIFF

VERSUS

AHMED JUMBE KIHAGO1ST DEFENDANT

ENEZAELI WILBERT MAWALLA.....2ND DEFENDANT

RULING OF THE COURT

12/05/2022 & 10/08/2022

GWAE, J

This ruling is an outcome of a preliminary objection canvassed by Mr. Fridolin Bwemelo, the learned counsel for both defendants herein on the competence of this suit instituted by the plaintiff, Ramadhani Mohamed Kihago who is suing in the capacity of an administrator of the estate of the late Hawa Mohamed Jabir against the defendants, Ahmed Jumbe Kihago and Enezaeli Wilberforce Mawalla (hereinafter to be referred to as the 1st and 2nd defendant respectively).

It is through his plaint duly filed on 14th February 2022; the plaintiff is asserting to have been granted letters of administration of the estate of the late Hawa Mohamed Jabir through Probate Cause No. 99 of 1998 however the same was subsequently revoked till on the 10th February 2022 when it was regranted to him. The plaintiff also avers that the 1st defendant unlawfully sold the estate of the deceased which is on Plot No. 4 Block 22 Kaloleni-Arusha City to the 2nd defendant.

The plaintiff is now before the court, seeking among other things, a declaration that the 1st defendant trespassed into the suit property of the late Hawa and that the sale of the suit property between the 1st and 2nd defendant is null and void. Upon service of the copies of the plaint, the defendants raised a preliminary objection through their written statement of the defence which is to the effect that;

"That, the matter is Res judicata as the dispute has already been resolved through Civil Case No. 16 of 1995 in the High Court of the United Republic of Tanzania at Arusha and Civil Appeal No. 16 of 1996 of the Court of Appeal of Tanzania at Arusha".

Resisting this suit to be barred by the doctrine of res judicata, the defendants vigorously stated that, the suit property is not the lawful property

of the said late Hawa Mohamed Jabir and therefore not subject of Probate Cause No. 99 of 1998 as the same property had already been declared to be the lawful property of the 1st defendant by the High Court through its judgment in Civil Case No. 16 of 1995 which was confirmed by the Court of Appeal vide Civil Appeal No. 16 of 1996.

On the 4th April 2022 when this matter was called on for hearing of the defendants' preliminary objection known by its acronym "PO", Mr. M. Nyirembe and Mr. Muhalila appeared in court representing the plaintiff and defendants respectively. It was ordered that; the defendants' preliminary objection be argued by way of written submission. Subsequent to the order, the parties' advocates filed their written submissions in conformity with the filing order.

According to the counsel for the defendants, this suit is barred from being heard and determined by this court under section 9 of the Civil Procedure Code, Cap 33, Revised Edition, 2019 since it was formerly heard and finally determined by this court (**Munuo, J** as she then was) through Civil Case No.16 of 1995. He further argued that the plaintiff being a grandson to the late Hawa and the son to one Mohamed Kihago who was

the plaintiff in the said former civil suit is thus barred from instituting these subsequent proceedings over the same suit property.

To reinforce his arguments, the learned advocate for the defendants cited the following courts' decisions; **Ester Ignass Luambano vs. Adriano Gedam Kipatlile**, Civil Appeal No. 91 of 2014 (unreported-CAT), **Karata Ernest and others vs. The Attorney General**, Civil Revision No. 10 of 2010 (unreported), **NIC Bank Tanzania Limited vs. Hirji Abdallah Kapiluka**, Civil Application No. 561/16 of 2018 and in **Peniel Lotta vs. Gabriel Tanaki and others** (2003) TLR 312 where the Court of Appeal set five conditions precedent in applying the doctrine of res judicata by holding that;

"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) Court which decided the former suit must have been competent to try the subsequent suit; and

- (v) the matter in issue must have been heard and finally decided in the former suit

Having submitted as herein above, the defendants asked this court to sustain the preliminary objection and consequently dismiss this suit with costs.

Arguing against the defendants' preliminary objection, the plaintiff's counsel stated that, the objection raised is not on a purely point of law since it requires proof and or ascertainment of certain facts. He supported his argument by citing the famous case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (1969) EA 696, **Mount Meru Flowers Limited vs. Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018 (unreported) and a foreign jurisprudence of Supreme Court of India in **SMT. V. Rajeshwari vs T.C. Saravanabava**, Civil Appeal No. 7653 of 1997.

Admitting the existence of the said former matter yet the counsel for the plaintiff in his style stated that, the former and the later suit are two different suits with different issues. He then expounded his arguments by stating that, in the former suit that Civil Case No. 16 of 1995, the issues framed were

1. Whether the property in Plot No. 4 Black 22 Kaloleni-Arusha was granted to Kihago Jumbe and 4 others
2. Whether Mohamed Kihago and 3 others did apply to the Regional Land Officer to have their names struck out
3. Whether the late Kihago Jumbe transferred the property to the defendant for consideration of Tshs.40,000/=
4. Reliefs

Whereas in the instant suit, the possible issues, according to the plaintiff's counsel are; **firstly**, whether the 1st defendant and 2nd defendant trespassed the suit property of the late Hawa Mohamed Jabir, **secondly**, whether the 1st defendant had the capacity to sell the disputed land to the 2nd defendant and other issues as to be framed by the court with consultation with the parties.

In his rejoinder, the counsel for the defendants, stated that all judicial precedents cited by the plaintiff's counsel support his PO since the same is on the purely point of law which has been pleaded or which arises by clear implication out of the pleadings. He reiteratedly stated that the 1st defendant had finally been declared the lawful owner, therefore, he had locus to sell the suit property adding that the said late Hawa Mohamed Jabir was the wife

of the said Kihago Jumbe whose son, Mohamed Kihago was the plaintiff and the appellant before this court and Court of Appeal of Tanzania respectively. Therefore, the plaintiff is a privy to the former or previous proceedings, he is thus barred from instituting a subsequent suit by virtue of being the son and grandson to the late Mohamed Kihago and late Hawa Mohamed Jabir respectively.

Having briefly summarized the parties' written submission, it is now for determination of the defendants' preliminary objection which can be split into two issues namely; **firstly**, whether the defendant's PO is a purely point of law capable of disposing the matter without requiring ascertainment of other facts and if the 1st issue is answered in affirmative the **2nd issue** is on whether the plaintiff's institution of this suit is barred by the doctrine of res judicata.

As to the 1st issue, according to the courts' interpretations of the word 'preliminary objection' including but limited the famous case of Mukisa (Supra) and others, a meaningful and legal preliminary objection must be on a purely point of law such as issue of jurisdiction of the court, limitation of time or res-judicata as rightly argued by the counsel for the plaintiff. The point of law must be pleaded or by necessary implication founded from the

parties' pleadings. In the foreign case decided by the Supreme Court of India in **SMT. V. Rajeshwari vs T.C. Saravanabava** (supra) whose judgment was delivered on the 16th December 2003, it was stated;

"The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal..... However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had throughout been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged".

Basing on the numerous decisions of our courts including the above persuasive authority, it is my considered view that, in order to be certain as to whether the defendants' plea of res-judicata constitutes a preliminary

objection in the eye of the law, a court of law has to look carefully at the parties' pleadings which include a plaint, written statement of defence (WSD) and reply to the WSD thereof as well as annextures appended therein. **In Oilcom Tanzania LTD vs. Christopher Letson Mgaila**, Land Case No. 29 of 2015, (unreported) where this court (Utamwa, J) stated;

"It is my thinking however in construing pleadings, the court should also consider annextures attached to them (If any) so as to understand the actual dispute between the parties for the purpose of resolving it effectively. The view is based on the fact that annextures form part of the pleading since they assist in elaborating the material facts pleaded in the pleadings. The broader meaning of the pleadings for the purpose of promoting the right of fair trial to parties therefore, should be that annextures are part and parcel of pleadings".

In our instant case, the plaintiff's plaint duly filed in court on the 14th February 2022 tends not to disclose the relationship between the parties nor does it state if there was a previous case between the 1st defendant and the said late Mohamed Kihago Jumbe save to the written submission against the PO. However, it is clear from the defendants' joint written statement of defence filed on the 23rd March 2022 at paragraph 6 that, the 1st defendant was declared the lawful owner of the suit property by the competent court

vide Civil Case No. 16 of 1995 by appending the judgment of the Court of Appeal confirming the decision of this Court through Civil Appeal No. 16 of 1996.

More so, the said late Hawa Mohamed Jabir is said to have been present when the family meeting was held on the 28th August 1985 following the demise of Kihago Jumbe which occurred 19th day of September 1984 as exhibited by m/sheet (See Para. 9 and its annexure). Therefore, I am of the considered view that, if some of paragraphs in the WSD were false or fabricated, the plaintiff ought to have filed his reply to the defendants' joint written statement of defence which is not the case here. Failure to counter some of serious contention by an adverse party designates admissions of those facts.

Nevertheless, I have looked at the plaintiff's annexures in his plaint especially caveat filed by the plaintiff with the Assistant Registrar of Title. The caveat so filed is indicative of naming beneficiaries of the estate or that, the suit property is the belonging of the following people; Kihago Jumbe, Mohamed Kihago, Jumbe Kihago, Hamza Kihago and one Abasi Kihago. The names of the said owners of the suit property are equally mentioned in the judgment of the Court of Appeal, these are the persons who led this court's

framing of the issue on whether, the property on Plot No. 4 Block 22-Kaloleni-Arusha Municipality was granted to them (persons mentioned in the caveat).

In the light of that observation, it follows therefore the assertion by the counsel for plaintiff that the issues in this case and those of the previous case are quite different is, in my view, nothing but misleading of the court since the words, whether the suit property was granted to the said siblings signifies the question of ownership to the property in dispute. And the term "trespass" said to be contentious issue in our instant matter as wrongly asserted by him as the same is no more than the issue of ownership over same subject matter. The term ownership and trespass over a property are therefore interrelated.

In the strength of the above findings, I am therefore of the established opinion that the preliminary objection canvassed by the defendants is on the point of law capable of disposing of the suit out of the parties' pleadings. The 1st issue is thus answered in affirmative.

In the 2nd issue, the plea of res judicata refers to "a final judgment on the merit issued by a competent court on a claim, demand or cause of action between the parties which constitutes an absolute bar to an institution of a

subsequent lawsuit on the same claim between the same parties or privies. The former proceedings must have the effects of final pronouncement of judgement. In essence, this principle prevents parties from endless litigation on the same issue (s). It is thus pertinent to have it been raised at the earliest possible stage in order to avoid unnecessary litigation.

As earlier explained, the plaintiff is related to the deceased persons that is his late father Mohamed Kihago Jumbe and his late grandmother, Hawa Mohamed Jabir (the wife of the late Kihago Jumbe) as exhibited in the judgment and annexure (M/sheet of family meeting held on the 28th August 1985.

It also goes without saying that there was an institution of a civil case (Civil Case No. 16 of 1995) in this court by the late Mohamed Kihago who sued his young brother, Ahmed Jumbe Kihago now the 1st defendant. The said late Mohamed Kihago was aggrieved by the decision of this court, he unsuccessfully appealed to the Court of Appeal. As facts of this suit are not far from the authority in **Piniel Loth v. Gabriel and 4 others** (2003) TLR 312 when the Court of Appeal of Tanzania faced similar situation regarding applicability of the doctrine of res judicata to a relative or privy to the party

in previous case as provided for under section 9 of the Code where plaintiff was privy or aware of the former proceedings and it was held;

“Though the **appellant was not formally** joined in the former suit, for the purposes of section 9 of the Civil Procedure Code he **must be deemed to have claimed under his mother in that suit**; explanation (vi) to section 9 is not confined to representative suits (Emphasis added”.

In our instant matter, it is certainly clear that the plaintiff is claiming over the same property whose dispute was conclusively resolved in the previous proceedings. Despite the fact that the plaintiff's plaint does not describe the suit land as required under provisions of Order VII Rule 3 of the Code however the caveat so appended in the plaint indicates that, the suit land is on Plot No.4 Block 22 Kaloleni whereas the suit land in the former case instituted by his father, the late Mohamed Kihago was on the same Plot No. 4 Block 22 Kaloleni-Arusha Municipality. Like in the former civil case which was certainly based on the ownership between the plaintiff's late father and 1st defendant over the same subject matter (Plot No. 4 Block 22-Kaloleni.

Guided by the authority cited above and section 9, explanation (iv) of the Code as well as the court's findings above, I am therefore justified to


conveniently hold that, the plaintiff who is now suing in the capacity of the administrator of the late Hawa Mohamed must be deemed to have claimed through his late father, Mohamed Kihago Jumbe who could have also claimed on the behalf of his late mother, Hawa Mohamed Jabir who passed away in the year 1988, before the institution of the former case in this court. It follows therefore that, the matters raised in this suit are deemed to have been the matter, directly and substantially, in issue in the previous case and principle for res-judicata therefore applies forthwith (See court's authority in **Umoja Garage vs NBC Holding Corporation** (2003) TLR 339).

Therefore, I find that, there is a clear preclusion of the plaintiff from re-instituting this suit involving the same parties (plaintiff being privy to the former case and the 1st defendant who was the defendant in the previous case), the same issue under the same title, the matter which was previously heard and conclusively determined by the competent courts of law by declaring the 1st defendant to be the rightful owner of the suit property on Plot No. 4 Block 22 located at Kaloleni in Arusha Municipality. Consequently, the act of the plaintiff of instituting a subsequent civil case against the 1st defendant who emerged a decree holder over the same subject matter against his late father is nothing but absolutely abuse of court process.

In the upshot, the defendants' preliminary objection is hereby sustained. The plaintiff's suit is consequently dismissed with costs.


It is so ordered.

Dated and delivered at Arusha this 10th August 2022


M. R. GWAE
JUDGE
10/08/2022

Court: Right of Appeal fully explained




M. R. GWAE
JUDGE
10/08/2022